



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.29 OF 2016

MAXAM LIMITED..... PLAINTIFF

VERSUS

HEINEKEN EAST AFRICA

IMPORT COMPANY LIMITED.....1ST DEFENDANT

HEINEKEN INTERNATIONAL B.V.....2ND DEFENDANT

JUDGMENT

1. The plaintiff through Re-amended plaint dated 18th December 2017 filed on the even date seeks the following reliefs:-

i. A Permanent Injunction restraining the Defendants, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting on their instructions in any manner whatsoever from;

a) Terminating the distribution agreement dated 21st May 2013 between the Plaintiff and the 1st Defendant relating to the distribution of the Heineken larger beer brand in Kenya.

b) Appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya.

ii. A declaration that the Notice of Termination dated 27th January 2016 from the 2nd Defendant to the Plaintiff is unlawful, irregular, unprocedural and therefore null and void *ab initio*.

iii. A declaration that the Kenyan Distribution Agreement dated 21st May 2013 between the Plaintiff and the 1st Defendant is in full force and effect as per the terms and conditions set out therein.

iv. A declaration that the Defendants' actions and breaches aforesaid have infringed on the Plaintiff's rights as protected by Article 19 of the Constitution.

v. A declaration that the Defendants' conduct of offering lower market prices to other distributors of the Heineken Larger Beer, approving higher market prices to the Plaintiff on the same products and arbitrarily reducing the Plaintiff's approved margins is discriminatory and offends the provisions of Article 27(2) of the Constitution.

vi. A declaration that the pricing models imposed on the Plaintiff by the Defendants without the Plaintiff's prior consultation and/or express consent and which models were issued subsequent to the Court Order of 28th August 2017 are exploitative, oppressive, unfair, null and void.

vii. Special damages for loss of business as more specifically tabulated in paragraph 12 above being; Kshs. 1,799,978,868.00 for the Plaintiff.

viii. An Order of this Court directing the taking of accounts in respect of loss of profits occasioned to the Plaintiff by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the hearing and final determination of this suit.

ix. Special damages for loss of profits as to be tabulated in prayer (viii) hereinabove.

x. General damages.

xi. Costs of the suit.

2. The plaintiff in support of the claim filed a Bundle of documents dated 5th February 2016, Supplementary Bundle of Documents dated 6th May 2016; witness statement of Ngugi Kiuno dated 5th February 2016; further witness statement dated 27th May 2018; statement of Daniel Kaburu dated 27th May 2016.

3. The Defendants on their part filed a Re-Amended statement of Defence dated 26th March 2018 and witness statement of Uche Unigwe dated 7th May 2017, with bundle of documents filed on 11th May 2017 and witness statement of Kevin Santry filed on 19th July 2017.

4. The matter subsequently proceed to hearing, when parties presented their respective cases, adopted their aforesaid pleadings, witnesses statements and parties gave evidence in chief, cross examined and re-examine. Parties were therefore directed to file and exchange their submissions.

Plaintiff's Case

5. It is plaintiff's contention that on 21st May 2013 the plaintiff and 1st defendant executed an Agreement for the distribute of Heineken larger beer brand in Kenya which came into force on effective date being 1st May 2013 to remain in force and effective until the end of third anniversary of that effective date and was to automatically be extended for a period of one year and subsequent one year periods unless terminated by either party by giving the other written Notice of Termination within three (3) months of the third anniversary of the effective date or one year extension as the case may be.

6. The plaintiff contend that the parties agreed further as follows:-

a) That in the event that the 1st Defendant wishes to terminate the agreement before the end of the term, then the defendants discuss and agree with the Plaintiff on a fair and reasonable monetary amount for compensation taking into account the length of time taken by the Plaintiff in the distribution of Heineken larger beer brand in Kenya and the profitability of its business under the agreement.

b) That the agreement and all subsequent distribution of Heineken larger beer brand in Kenya was to be governed by and construed in accordance with the laws of Kenya.

c) That in the event of a dispute, the parties were to proceed to perform their obligations in accordance with the agreement and with due diligence, pending the resolution of the dispute.

d) That nothing in the agreement was to preclude either party from obtaining relief from a Court of law and that parties recognize that monetary damages alone would not adequately compensate in the event of breach of parties of the agreement and is therefore mutually agreed that in addition to all other remedies available at law or in equity the parties shall be entitled to injunctive relief in addition to other remedies available in law and in equity.

7. Following the appointment the Plaintiff embarked on setting up massive and elaborate infrastructure so as to fulfill and/or discharge its obligations as appointed and/or contracted as set. The financial investments for the Plaintiff involved but was not limited to:-

a) Procuring an irrevocable and unconditional, and payable on demand, a bank guarantee of 250,000.00 Euros issued by a reputable Kenyan bank and the format acceptable to the 1st Defendant.

b) Acquiring, operating and maintaining numerous warehousing units in the respective territories in accordance with the 1st Defendant's conditions and standard of the environment including installing and utilizing temperature records in the storage areas and keeping records of such temperatures readings for a minimum of twelve (12) months.

c) Establishing an existing set of delivery routes using a route planning system and acquiring and maintaining numerous lorries and other vehicles in line with the distribution business.

d) Developing an operational plan in conjunction with the Defendants planning processes and focus on execution of the Defendants marketing strategies.

e) Ensuring that any debts are recoverable and the liability ratio is at least positive in the ratio of two (2) or higher.

8. It is plaintiff contention that as a result of the Plaintiff's engagement and commitments as set out herein above the market for the Heineken product in **Kenya**, has expanded and grown significantly during the Plaintiff's term leading to profitability of the business for both the Defendants and the Plaintiff.

9. The Plaintiff further avers that in order to fully discharge its obligations and enhance volume and revenue growth of the Heineken portfolio within the Kenyan market the Plaintiff contracted other third parties including landlords in respect of warehouses, sub-distributors

for the product but with approval of the 1st and 2nd Defendants, hiring of lorries for the delivery and transport of the product among others. As such, any purported termination of the respective contracts without any valid, genuine and viable reason and/or ground exposes the Plaintiffs to substantial loss and damage in their own accord and to the third parties and has serious legal and financial ramifications and consequences to be borne by the Plaintiffs as regards their liability to the third parties. In addition thereto, and in view of the intended termination of the Plaintiff's engagement and commitments as set out herein above, the value of the Heineken Distribution business in has expanded and grown and the Plaintiff's current valuation of its business is currently as tabulated hereunder;

	Maxam Limited
i) PE Multiple Method	Kshs.1,196,384,485.00
ii) Discounted Future Earnings Method	Kshs.1,117,418,051.00
iii) Dividend Discount Method	Kshs.1,117,418,051.00
iv) Free Cash Flow Valuation	Kshs.2,486,677,028.00
Average Valuation	Kshs.1,799,978,868.00

10. It is plaintiff contention that it stands to lose the above value of its business if the Kenyan Distribution Agreement is allowed to terminate without compensation.

11. The plaintiff avers that on 27th January 2016, without any justification whatsoever, the 2nd defendant illegally and unprocedurally issued a termination notice of the Kenyan agreements contrary to law and equity. In any event the purported termination notice dated 27th January 2016 to the Plaintiffs in respect of its respective contracts is invalid and therefore null and void for the following reasons:-

a) The Notice is issued on a "without prejudice" basis meaning therefore that it has got no legal implications whatsoever as regards Clause 17 of the Kenyan Distribution Agreement between the Plaintiff and the 1st Defendant.

b) There is no privity of contract between the Plaintiff and the 2nd Defendant who has issued the purported Termination Notice since the Kenyan Distribution Contract was exclusively between the Plaintiff and the 1st Defendant.

c) In light of the above, the three (3) months Termination Notice under the Kenyan Distribution Agreement is now not available to the 1st Defendant or any of the 2nd Defendants since no legally binding notice has been issued as required by law and the subject agreement.

12. It is plaintiff's contention that the Defendants have not given any reasons whatsoever for the termination of the Kenyan agreement.

13. The plaintiff contend on the other hand, upon filing this suit in Court, the Honourable Mr. Justice Eric Ogola issued interim orders herein on 26th April 2016, prohibiting and restraining the Defendants from *inter-alia* terminating either by themselves, their agents, servants and/or or any other person acting on their instructions; the distribution Agreement dated 21st May 2013 between the Plaintiff and the 1st Defendant relating to the distribution of Heineken Beer brand lager in Kenya, pending the hearing and determination of this suit.

14. The plaintiff aver that thereafter on 31st July 2017, this Honourable Court on its own motion vacated the said interim orders and immediately thereafter, the Defendants proceeded to appoint one of the Plaintiff's sub-distributors as their own distributors, being Jeyfine Wines Company Limited and thereby entirely circumventing the Plaintiff's exclusive distributorship role under the Kenyan Agreement. The appointment of this distributor altered the whole subsisting relationship that the Plaintiff had zealously moved to Court to protect.

15. It is plaintiff's further contention by a Ruling delivered herein on 28th August 2017, the Honourable Mr. Justice J. L. Onguto issued an Order reinstating and extending the interim orders of injunction earlier issued on 21st April 2016 by the Honourable Mr. Justice Ogola save that the limb on the Plaintiff's exclusivity was vacated in view of the appointment by the Defendants herein of Jeyfine Wines Company Limited as a distributor.

16. The plaintiff further averred that pursuant to the said Order, the only limit to the Plaintiff's exclusivity as distributors under the new arrangement was therefore solely in respect of the appointment of Jeyfine Wines Company Limited only.

17. The plaintiff further avers that however, the Defendants have blatantly gone ahead and similarly acquired the following of the Plaintiff's key accounts customers as sub distributors contrary to the Court order of 28th August 2017;

ITEM NO.	Key Account Name	Country Located
1.	Mega Wines and Spirit	Kenya

2.	Chandarana Supermarkets Ltd	Kenya
3.	Majid Al Futtain Hypermarkets Ltd	Kenya
4.	Inscor (K) Ltd	Kenya
5.	Quick Mart Ltd	Kenya
6.	TOTS Liquor store Ltd	Kenya
7.	Montys Kenya Ltd	Kenya
8.	Karen Provision Stores	Kenya
9.	JDs Ltd	Kenya

18. The plaintiffs case is that the court order had contemplated that the Plaintiff's Distribution arrangement would exist side by side and on equal footing with Jeyfine Wines Company Limited and not any other parties. However, this has been frustrated by the Defendants' actions of appointing the Plaintiff's very own customers as distributors and the Plaintiff has credible information that the Defendants have to date appointed many other new distributors alongside Jeyfine Wines Company Limited, thereby greatly reducing the margins and supply of product to the Plaintiff.

19. The plaintiff avers that consequently, the volume of sales by the Plaintiff has been affected, thereby effectively occasioning the Plaintiff substantial loss on profits.

20. It is further contended the defendant further to the foregoing and in blatant disregard to the interim orders in place in favour of the Plaintiff as well as in breach of the Plaintiff's Agreement, the Defendants and particularly the 1st Defendant herein are now personally selling and distributing Heineken Larger Beer Brand directly to the market and at lower prices than those allowed to the Plaintiff which is in itself a scheme to circumvent the Court Orders in place in favour of the Plaintiff and to stifle the Plaintiff's businesses to the Plaintiff's detriment.

21. It is plaintiff's further contention that the business model previously in place before the order of 28th August 2017 was to the effect that the Plaintiff sold to resellers who in turn sold to consumer outlets. However, the approach now adopted by the Defendants is to route the consumer outlets through new and illegally appointed distributors and all the business has eventually been taken away from the Plaintiff who no longer has the pricing mechanism that enabled it to sell to the resellers.

22. The plaintiff argues that indeed, as aforementioned, the Plaintiff's cost prices are now at par with the prices available to their reseller customers, which was not the case before the order of 28th August 2017 and the Defendants' actions are thus in direct contravention of the Court Order.

23. The plaintiff case is further that all in all the Plaintiff has been subjected to substantial loss on profits even on the reduced volumes of sale as particularized in the plaint.

24. The plaintiff aver the defendants furthermore, the Defendants through their sales consultants and/or representatives are now misinforming some of the Plaintiff's customers that the Plaintiff is no longer a distributor of Heineken Larger Beer brand and are even cautioning the said customers from purchasing the said product from the Plaintiff due to a lack of stock, which coincidentally has been occasioned by the Defendants' refusal to supply the Plaintiff with the product in blatant breach of the existing interim Orders as aforesaid. This has similarly occasioned substantial financial loss on the Plaintiff's businesses hence loss of profits.

25. The plaintiff contends the defendants' actions and breaches aforesaid have further infringed on the Plaintiff's Constitutional rights and in particular Article 19 of the Constitution which is the bedrock upon which persons enjoy various rights decreed in the Constitution.

26. Further, the Defendants' conduct of offering lower market prices to other distributors of the Heineken Larger Beer, issuing higher market prices to the Plaintiff on the same products and arbitrarily reducing the Plaintiff's approved margins is obviously discriminatory and offends the provisions of Article 27(2) of the Constitution as there is no rationale in this disparate treatment of persons and businesses in the same category and situation.

27. It is the plaintiff's case that the defendants' conducts as set out hereinabove are oppressive, unreasonable and indeed the Defendants are not acting *bona fide*. The Constitutional requirement to act in good faith as well as the contractual underpinning of their arrangement with the Plaintiff precludes the Defendants from being distributors by themselves, drastically and dramatically reducing the Plaintiff's stocks and selling Heineken Larger products to other distributors at lower market prices than those approved for the Plaintiff thereby knowingly and discriminately driving the Plaintiff out of business and subjecting it to unjustifiable losses

Defendants' Case

28. The defendants contend that an agreement was signed between the plaintiff and 1st defendant with key terms of Kenya distribution agreement being clause 1, 17, 21(c), 26, 28 and 32. It is defendants' contention that through a letter dated 28th February 2013 (Uganda confirmation letter), the 3rd Defendant and holding company of 1st Defendant's acting on behalf of 1st defendant, confirmed appointment of the plaintiff as the distributor of Heineken larger in Uganda. The letter was issued following a request from the plaintiff's director, to enable the plaintiff to clear Heineken products imported into Uganda, which letter the defendants aver is a standard letter issued as a matter of routine to various distributions of Heineken products in Africa to assist in clearing imported products. The Defendants urge some of the key clauses for the Uganda confirmation letter are:-

a) The Plaintiff was confirmed as the distributor of Heineken larger in Uganda as of 1st February 2012 and will remain so until the 3rd Defendant notifies the Plaintiff otherwise.

b) Either party may terminate the appointment letter on giving three months' notice in writing.

c) No compensation is payable by the 3rd Defendant to the Plaintiff on termination.

The Ugandan letter was duly accepted and signed by the General Manager of the plaintiff, on behalf of the plaintiff.

29. The defendants deny the plaintiff has heavily and substantially invested on warehouse, delivery and transport equipment including lorries and other vehicles.

30. The defendants state that the letter dated 11th August 2014 (Tanzania confirmation letters, the 2nd defendant confirmed the appointment of the 3rd plaintiff as the importer and distributor of Heineken larger beer in Tanzania, which was issued upon request by 3rd plaintiff director, to reduce the delay in getting the goods cleared by Tanzania Revenue Authority, and which letter the defendants urge is a standard letter issued as a matter of routine to various distributors of Heineken products in Africa to assist in clearing imported products. The key terms of Tanzania confirmation letter are:-

a) The importer shall not sell or distribute the product in a region or country outside the territory without the prior written consent of Heineken (2nd Defendant).

b) The importer will distribute the product throughout the whole territory (Tanzania). In case the importer should use sub-distributors to ensure the distribution of the product in areas outside of its current distribution area, the choice and appointment of sub-distributor must be formally approved by Heineken (2nd Defendant).

c) Marketing activities/advertising, POS material and activation in retail outlets) will be managed and financed exclusively by Heineken.

31. The Defendants contend that a similar letter with corresponding date of 11/8/2014 (second Uganda confirmation letter) was also served to the 2nd plaintiff confirming it was the correct importer of Heineken in Uganda by **HBBV**, with similar terms as the letter to the 3rd plaintiff; which was sent upon request by 2nd plaintiff's director to reduce the delay in getting the goods cleared by the Uganda Revenue Authority. The defendants aver that the confirmation letter issued to 2nd and 3rd plaintiff do not provide for a formal agreement and/or contract to be drafted and executed between the parties.

32. The defendant's contend that the huge margins enjoyed by plaintiff's arising from the Kenya distribution agreement, adequately cover the plaintiffs investments over the term of the agreement and as such no compensation urged to be accorded to the plaintiff at the end of the three year term, when the defendants' terminate the agreement. The defendants contend that the growth of defendants' product within the markets of the three East Africa countries is as a result of the Defendants managing the sub-distributors of its product in Tanzania.

33. The Defendants aver that though aware of contract entered into between the plaintiff and third parties, any liability on the plaintiffs as a result of contract with third parties cannot be extended to the Defendants or claimed against the defendants.

34. The Defendants aver that on 27th January 2013, the 3rd Defendant in compliance with:-

- a) Clauses 17, 28 and 32 of the Kenya distribution agreement dated 21st May 2013 between HEAIC and 1st Plaintiff;
- b) Terms of the letter dated 26th July 2012 to the 1st Plaintiff;
- c) Terms of the Uganda confirmation letter and second Uganda confirmation letter to the 2nd Plaintiff; and
- d) Terms of the letter Tanzania confirmation letter to the 3rd Plaintiff.

Issued a notice of termination of the above-mentioned distribution agreements and letters of confirmation, to take effect on 21/5/2016. The defendants contend it was under no obligation to give any reasons for termination of the agreement as confirmation letters.

35. The defendants further aver the plaintiff acted in breach of clause 26 of the Kenya distribution agreement, by failing to engage the representatives of the defendants in consultation in case a dispute arises following the issuance of the notice of termination by moving to court, which is the last resort. The defendants contend the plaintiff moved to court prematurely and in breach of dispute resolution mechanism under distribution agreement.

Plaintiff's Evidence

36. The plaintiff in support of his claim called two (2) witnesses, **PW1** Ngugi Kiuno, Managing Director of the 1st plaintiff company, who relied on his witness statement (*Exhibit P-1*) dated 5th February 2016 and further witness statement dated 21st May 2016 (*Exhibit P-2*); Bundle of documents dated 5th February 2016 (*Exhibit P-3*) and Supplementary Bundle of documents (*Exhibit P-4*).

37. **PW2** Daniel Kabiru, an auditor with UHY Kenya, who testified that he had worked for plaintiff since 2012, who testified that he had received instructions in 2016 to do evaluation of Maxam Limited business and Modern Lane Limited and Olepasu Tanzania Limited, which was to be based on distribution of Heineken product. **PW2** prepared the valuation and delivered it to the plaintiff; appearing in the plaintiffs Bundle of document (*Exhibit P-4*). He testified that he also made witness statement dated 27/5/2016 (*Exhibit P-5*) which he relied upon as his evidence in chief.

Defendants Evidence

38. The defendants in support of their defence called two witnesses, **DW1**, Uche Uningwe, a former General Manager of the 1st defendant, who relied on his witness statement filed on 7th May 2017, and adopted the same as his evidence in chief (*Exhibit D-1*) annexed to his defence bundle of documents (*Exhibit D-2*).

39. **DW2**, Kevn Jonnes Santry, a Legal Director on Legal Affairs in charge of Defence Africa and Middle East Region, relied on his witness statement (*Exhibit D-3*), which he adopted as his evidence in chief.

Analysis and Determination

40. I have very carefully considered the pleadings, the witnesses statements; witnesses oral evidence, the rival submissions by the Advocates, and from the above, the issues arising from consideration can be summed up as follows:-

- a) Whether the Distribution Agreement is admissible for want of Stamp Duty?
- b) Whether there was breach of legitimate expectation?
- c) Whether the termination notice was valid?
- d) Whether the plaintiffs are entitled to any remedy?

A. Whether the Distribution Agreement is admissible for want of Stamp Duty?

41. In the instant suit, **PW1** Ngugi Kiuno, the Managing Director of the plaintiff gave evidence, and testified the issue in dispute is the Distribution Agreement entered into between the plaintiff and the defendants on 21st March 2013, in which he was signatory to the agreement and the same had to last for three (3) years. That the agreement had an extension clause. **PW1** further testified he was called to a meeting of 27/1/2016 where he was informed the purpose of the meeting was to terminate the agreement. That no reason was given for intended termination of the agreement. That later while at his office he received an e-mail terminating the agreement followed by hand copy dated 27/1/2016. He urged the notice had no reasons and no money was offered for compensation. During cross examination **PW1**, confirmed the Agreement between the 1st plaintiff and 1st defendant is found on page 1 of (*Exhibit P-3*) and that it was not registered and do not have stamp duty.

42. The defendants contend that failure to register and have the agreement stamped, is contrary to the provisions of Stamp Duty Act, which is provided under schedule (1) and (3) of section 5 of the Stamp Duty Act. That Distribution Agreement should have been stamped. That in event of default, section 19(1) of the Stamp Duty Act provides that:-

"No instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except:-

(a) In criminal proceedings;

(b) In civil proceedings by a collector to recover stamp duty unless it is duly stamped."

43. The plaintiff contention is that the Agreement's failure to bear a stamp duty stamp is of no legal consequences as all parties have sought to rely on the same.

44. In **Weetabix Limited vs Healthy U (2006) eKLR**, the plaintiff therein produced, as an exhibit, an assignment that had not been stamped. Hon. Justice Anzangalala, as he then was, citing the provision of section 19(1) of the Stamp Duty Act proceeded to expunge the assignment as an exhibit.

45. The defendants are urging this court to concur with that previous decision on the issue of inadmissibility of the distribution as an exhibit and find failure to have the same duly stamped renders the entire suit fatally defective. The court is further urged to find that in absence of the Agreement being admitted as an exhibit, the entire claim is unsustainable as the plaintiff has failed to discharge the burden of proof mandated by the Evidence Act under section 107.

46. For the court to consider the effect of failure to have the document in question stamp duty stamped as required under section 19(1) of the Stamp Duty Act, has to consider the purpose of having a document stamped. The section provides that:-

"No instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever except ..."

My understanding of the section is to ensure any document for which stamp duty is required to be paid for, should have stamp duty paid first before it can be received. Failure to pay stamp duty do not in my mind mean the document is invalid or fatally defective but stamp duty that is required to be paid has not been paid; first before admission of the document as there is no bar in paying the stamp duty due thereafter or upon an order of the court to that effect.

47. In the instant suit the plaintiff and defendants had the agreement admitted as an exhibit without having any objection by any of the parties. Both parties are relying on the distribution agreement executed between the plaintiff and 1st defendant. I find that to declare the said document at this stage invalid would be acting contrary to Article 159(2) (d) of the Constitution of Kenya 2010 which provides in exercise of judicial authority, the courts shall administer justice without undue regard to procedural technicalities. The court is further enjoined by the constitution to do substantive justice and overlook procedural technicalities. In my view declaring the parties agreement invalid simply because the document is not duly stamped is a procedural technicality which if allowed could be a source of injustice and would not result to achieving substantive justice. I further decline to follow the authority relied upon by the defendants as it was made before coming into force of the New Constitution of Kenya 2010, which does away with procedural technicalities. Secondly the decision relied upon is a decision of High Court which is persuasive to this court and not binding. I am not in that regard persuaded to follow the same decision for reasons stated herein above.

48. The Court of Appeal has considered similar issues regarding non-payment of the stamp duty. In **Abok James Odera t/a A.L. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** in a judgment delivered on the 11th October, 2013 considered the effect of sections 19(3)(a), (b) and (c), 20 and 21 on stamping of agreements in the Stamp Duty Act. The Court ordered that the *"respondent be and is hereby directed to submit the agreement of 4th March, 1996 to the stamp duty collector for assessment of the duty payable, which should be paid in the normal manner"* page 9 of the eKLR report the Court said:-

"...We are in agreement that the agreement of 4th March, 1996 though subject to the stamp duty act (supra) and that duty is payable on it, it does not fully comply with the above provision, but such noncompliance is not however to the enforcement of the agreement..... the court is enjoined under section 19(3) (a)(b) and (c) not to reject such an agreement in totality, but to receive and either assess the stamp duty itself and direct that it be paid.alternatively the court can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment. There is also provision for payment for waiver penalties on late payment of duty as the stamp duty collector may direct at discretion. The stamp duty collector also has a discretion to extend time with which the stamp duty assessed should be paid where he is satisfied that the omission or neglect to pay stamp duty was not form intention to evade payment of stamp duty or otherwise to defraud the Authority concerned. The stamp duty collector also has a discretion to charge additional stamp duty on top of what may have been assessed as stamp duty payable on the such agreement. There also a safety value vide which the defaulter has a right of appeal to the relevant minister against the collection directive on the payment of the stamp duty assessed additional stamp duty assessed and penalties imposed.... What the learned trial Judge should have done and which we are also mandated to do a first appellate court, is simply to impound the said agreement, either assessed duty ourselves, collect it, and then forward the duty collected to the stamp duty collector for purposes of assessment and payment of the resulting duty payable."

49. In **Mwanahamisi Omar Mzee Also Known as Fatuma Mohamed Ali Omar Chengo Kahindi Birya & another [2018] eKLR (Mombasa High Court Civil Appeal No.107 of 2016)** Honourable Mr. Justice Majanja confronted an objection to receiving an agreement in evidence because it was not stamped. At paragraphs 10 and 20 and 21 of his judgment he said:-

"19...The purpose of the Stamp Duty Act is to ensure collection of revenue and not necessarily to deprive the party of a cause of action. I hold that such an objection should be raised at the earliest opportunity to enable the party relying on the document comply with the provisions.

20. *This same issue was dealt with by the Court of Appeal in Stallion Insurance Company Limited vs Ignazio Messina & C.S.A [2007] eKLR where the court approved its previous decision in Diamond Trust Bank Kenya Limited vs Jaswinder Singh Enterprises NRB CA Civil Appeal No.285 of 1998 [1999] eKLR where Owuor JA, with whom Gicheru and Tunoi JJA, agreed, states as follows:*

The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (Cap. 480). In view of my above finding, it suffices to state that:-

Section 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of **Suderji Nanji Ltd vs Bhaloo (1958) EA 762** at page 763 where Law J., (as he then was) quoted with approval the holding in **Bagahat Ram vs Raven Chond (2) 1930 A.I.R Lah 854** that:

"Before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty....."

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity.

Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant's counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19(3) of the Stamp Duty Act.

21. The decision I have cited accords with the provisions of Article 159(2d) of the Constitution which requires the court to do substantive justice without undue regard to technicalities. The Constitution underpins the overriding objective in sections 1A and 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which imposes on the parties and their advocates to assist the court in ensuring substantive justice is achieved. The respondents ought not be permitted to defend their case by ambush where full discovery has been made and opportunity given to the parties, at the pre-trial conference, to raise all objections concerning admissibility of documents and other evidence in advance of the hearing. At the end of the day, the appellant proved that she incurred expenses for treatment following her admission at Mewa and Tenwek Hospitals. These documents were admitted without objection..."

50. In **James Maina Muriithi vs My Beauty Transporters Limited & others [2018] eKLR (Nairobi Milimani High Court Civil Suit No.262 of 2014)** Honourable Mr. Justice Richard Mwongo faced an objection to some receipts that were not stamped under the Stamp Duty Act in final written submissions. The Judge analysed the law; cited **Suderji Nanji Ltd vs Bhaloo (1958) EA 762** and **Bagahat Ram vs Raven Choud (2) 1930 A.I.R Lah 854** and followed Majanja J in **Mwanahamisi Omar Mzee Also known as Fatuma Mohamed Ali Omar vs Chengo Kahindi Birya & another [2018] eKLR** noting thus:-

"I agree with the plaintiff's counsel that the defendant ought to have raised the issue well before final written submissions were filed. However, the law is also clear that under sections 19(3) and 20 of the Stamp Duty Act, there is a statutory right availed for unstamped documents to be stamped out of time, for payment of requisite penalties, and thereafter for them to be relied upon. I am prepared to go this route."

The learned Judge went that route and at paragraph 56 of his judgment he ordered-

"56. Applying the above provision, I will order that subject to the plaintiff effecting the payment of stamp duty on the unstamped receipts, evidence of which shall be produced to the Registrar of the High Court within forty five days from the date of this judgment, the amount of Kshs.283, 834.00 is hereby awarded as special damages. As indicated, this special damages is conditional on payment of requisite stamp duty as assessed by and paid to the collector of stamp duties."

51. I note in this suit the issue under Stamp Duty Act had not been raised during the hearing of the suit but during the hearing of submissions. The law the defendants seek to rely on to thwart the plaintiffs' case is clear and has been explained severally by Court of Appeal since 1958. Failure to have document stamped is not fatal to the plaintiffs case as has severally been held by court. In the case of **Abok James Odera t/a Odera & Associates vs John Patrick Machira t/a Machira & Co. Associates (supra)** upon consideration of the effects of sections 19(3) (a)(b) & (c), 20 and 21 on the Stamp Duty Act on stamping of agreements in the Stamp Duty Agreement; it was ordered the Respondent be and is hereby directed to submit the agreement of 4th March 1996 to stamp duty collection for assessment of duty payable which should be paid in the normal measure.

52. I find that the defendants counsel ought to have raised the issue before hearing and submissions were filed. However I find the law clearly under section 19(3) and 20 of Stamp Duty Act, there exists a statutory right availed for unstamped documents to be stamped out of time, for payment of requisite penalties and therefore for them to be relied upon. I find this reasonable and fair to all parties. The court is enjoined under section 19(3) (a) (b) and (c) of the Stamp Duty Act not to reject such an agreement in totality; but to receive it and either assess the stamp duty itself and direct that it be paid or alternatively the court can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment. There is also provision for payment of duty payable or waiver of penalties on late payment of duty as the stamp duty collector may direct at his discretion.

B. Whether there was breach of legitimate expectation?

53. The plaintiff aver that given the magnitude of the investments that the plaintiff had been required by the 1st defendant to put in place in order to fulfil its obligations under the Agreement, there infact existed a legitimate expectation, which it urged, was further reinforced by clause 17 of the Agreement to the effect that the plaintiff could effect automatic renewals of the agreement after the initial three (3) years period.

54. **PW1** averred that any reasonable person would have been reluctant to invest so heavily in a commercial relationship for a mere three (3)

year period, without adequate and sufficient consideration on offer.

55. On the other hand the defendants submit that the doctrine of legitimate expectations has limited use on contracts between private entities and it is invoked only in circumstances where public body or official makes promises to a person who then acts on that representation. The defendants relies on the case of **Communications Commission of Kenya & 5 others vs Royal Media Services Ltd & 5 others (2015) eKLR** in which it set the conditions that must be met in order for an Applicant to successfully invoke the principle of legitimate expectation thus:-

- a) *There must be an express, clear and unambiguous promise given by a public authority;*
- b) *The expectation itself must be reasonable;*
- c) *The representation must be one which it was competent and lawful for the decision maker to make;*
- d) *There cannot be a legitimate expectation against clear provisions of the law or the constitution.*

56. The **Public Service Commission Act** defines "a public body" as follows:-

- a) *any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;*
- b) *a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;*
- c) *statutory public bodies; or*
- d) *any public body under the jurisdiction of the Commission by an act of parliament for a specified function to the performance of that function.*

57. It should be noted from the Supreme Court decision herein above, the learned Judges quoted the principles outlined above but the same cannot be said to be exhaustive; as the learned Judges used the word "may" and the list give just some possibilities. The Supreme Court just gave guidelines. The cases below given a wide evaluation on how the courts have held and determined in respect to the doctrine of legitimate expectation.

58. In the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR** the Court held that:-

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

59. In **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601** it was held that:-

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

60. In the **Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6thEdn. Sweet & Maxwell page 609** it is stated that:-

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

61. It is clearly demonstrated from the above-mentioned authorities and the law, that the doctrine of legitimate expectation is founded on fairness, in which one party makes a promise which is relied upon by the other party. In order to adjudicate the issue there is need to weigh the relative strength of expectation the plaintiff had in respect to the contract with the defendants. The rationale for this doctrine was restated in **Republic vs Devon County Council ex parte P Baker (1955) 1 ALLER** where it was stated:-

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one

that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.”

62. During the hearing of this suit, **DW1** admitted that the commercial relationship between the 1st defendant and the plaintiff existed before the Agreement in issue and the plaintiff had prior to the agreement been supplying in Kenya, Heineken production for a number of years under the flexible requirements than those in the agreement of 21st May 2013. **DW1** testified the good working relationship was the reason that a formal offer was made to the plaintiff to become distributor of Heineken beer larger in Kenya under the agreement of 21st May 2013. The formal Agreement required the plaintiff to set up substantial infrastructures and investments, thereby implying that the commercial relationship being undertaken by the plaintiff and as such the plaintiff's operations defendant was expected to be operational for a significant period of time than the previous commercial dealings between the two.

63. **PW1** testified that the prior good relationship as well as the previous uninterrupted commercial relationship created the legitimate expectation, that the plaintiff could expect "automatic" extensions on the Agreement, so long as it continued to perform its obligations satisfactorily as had been the case even in the past and which it did perform since 2013. I find the promise and arrangement of automatic extensions served as motivation for the plaintiff to keep performing in accordance with the assigned obligations resulting to investing heavily in the business. In considering the Plaintiff's contractual legitimate expectation, I am guided by the findings of Lord Diplock in **Council of Civil Service Unions vs Minister For Civil Service (1985) AC 375** cited in **Coastal Bottlers Limited V Commissioner Of Domestic Taxes [2008] eKLR** where the learned Judge correctly held that:-

“Legitimate expectation may arise either from an express promise given or from the existence of a regular practice which the claimant can reasonably expect to continue.”

64. I find in this suit as regards expectation created under clause 17 of the Agreement, Hon. Justice Ogola, dealing with this matter, aptly captured the same in his ruling dated 26th April 2016 where under paragraph 30 the learned Judge stated:-

“In the present case the Agreement has been running smoothly without any hitches, and the need to terminate it is not due to any stated shortcomings of the Plaintiffs. If that is the case, as it seems to me to be, then it is important to determine the context in which the word “automatic” was used in clause 17. It states that the Agreement would be automatically renewed. Now, to my mind, when one has an Agreement which has run its course smoothly, one would expect that the same would be automatically renewed as per that clause. However, the confusion suffices enough to uphold, for the time being, that the Plaintiffs/Applicants have established a case for the continuation of the Agreement for at least another year from the effective Date of Termination, pursuant to the said word “automatic”, subject, of course, to a contrary interpretation in a full hearing of the evidence to be brought by the parties. ”

65. I do not agree with defendants' contention that the plaintiff cannot rely on the doctrine of legitimate expectation by virtue of the provisions of the agreement. I also do agree by relying on the provisions of the agreement and the plaintiff relying on doctrine of legitimate expectation is introducing new issues as the same can only be found in the parties agreement.

66. I note the findings of facts by Hon. Justice Ogola relating to this dispute has never been challenged on Appeal or Review and are therefore binding in so far as this dispute is concerned. The Judge held the Agreement had been automatically renewed for one (1) year after expiring of 3 years period and that the termination notice that was issued on "without prejudice" basis has no legal effect and that the plaintiff expectations were that the Agreement was to be renewed automatically after every one (1) year in view of the fact that the business was profitable.

C. Whether the termination notice was valid?

67. The plaintiff contention is that the 3rd defendant illegally and un procedurally issued a termination notice contrary to law and equity. That plaintiff aver that the termination notice involving a multi-billion Kenya shillings Agreement ought to have been concise and leave no room for ambiguity or doubts. The plaintiff further contends that there is no privity of contract between the plaintiff and the 3rd defendant who issued the purported termination notice. It is further contended, that issuance of binding Termination Notice on "without prejudice" basis and without giving any reason whatsoever for termination as required under clause 18 of the Agreement completely invalidated the same and such a notice was void ab-initio and is without any legal basis whatsoever.

68. The defendants contend, that even if the court were to find the Termination Notice was valid both in form and contract, it was issued by an affiliate of party privy to the contract and that mere marking of document as "without prejudice" did not vitiate the import of the Termination Notice as explained by **DW2**. It is further urged the 1st defendant nor its appointed affiliates were under obligation to provide reasons for such termination. The defendant urge under clause 32 of the Agreement it was unequivocal that:-

"...Heineken shall be entitled to appoint any affiliated company to perform this agreement or any part thereof..."

That the privity of contract according to the defendants and by virtue of clause 32 of the Agreement cannot be imported into this suit as the 1st defendant urges as principal it had authorized the 2nd defendant to issue Termination Notice on its behalf; urging the plaintiffs are asking the court to rewrite the contract for the parties (see **Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited (2017) eKLR**).

The defendants further urge the Agreement expressly allows the appointment of affiliated company to perform any part of the Agreement but the 2nd defendant, in issuing termination letter also stated that it was acting on behalf of the 1st defendant. In considering the 2nd defendant's right to issue the Termination Notice, I am guided by the Ruling of the Court of Appeal in **Aineah Liluyani Njirah vs Aga Khan Health**

Services (2013 eKLR) where the Court of Appeal held:-

"....A third party should be able to enforce a term of the contract where the contract expressly states that a third party has the right of enforcement..."

69. Upon considering the facts of this case and considering the appointment of the plaintiff was by the defendants agent I find that the doctrine privity to contract did not apply in this case and hold that the 2nd defendant acted within the provisions of the law by issuing termination notice. However the notice was not issued in accordance of clause 18 of the Agreement as no reason was given for termination of the agreement. In the Ruling of Hon. Justice Ogola of 26th April 2016 at paragraph 39 and 40 he noted ambiguity created by purported Termination Notice of 27th January 2016. It is noted that the termination notice was headed "*without prejudice*" contrary to submissions by the defendants that "*without prejudice*" as a legal concept solely governs admissibility of documents to evidence, I find that the defendants had no intention to have the notice bear any binding legal obligation whatever. I find the defendants unlawfully and unfairly purported to unilaterally terminate the agreement. The defendants in their action were giving and hold back at the same time. I find as in giving and holding nothing changes hands. The purported Termination Notice did not in my few result in termination of the subsisting Agreement of 21st May 2013 or at all (see the holding in the Ruling of Hon. Justice Ogola) which has not been appealed against nor challenged.

70. In this suit, **PW1** averred that the 1st defendant opted not to supply any products to the plaintiff at all. **DW1** conceded to the same. In view of defendants refusal to supply to the plaintiff with their products, notwithstanding subsistence of the Agreement, the defendants breached clause 26 of the agreement which specifically required that:-

"In the event of a dispute, the parties will proceed to perform their obligations in accordance with the Agreement and with due diligence pending resolution of the dispute'. The Plaintiff is therefore entitled to damages as prayed in the Re-amended Plaintiff in view of the breach on the part of the 1st Defendant."

In view of the above I find the plaintiff has demonstrated that the defendants cited in breach of the contract. The defendants constructively terminated the Agreement by deliberate actions of proceeding in appointing numerous other distributors even after the reinstatement of interim orders by this court on 28th August 2017 without the issuance of any fresh legally binding Termination Notice, which though had been overtaken by event in view of clause 17 and 26 of the Agreement.

D. Whether the plaintiffs are entitled to any remedy?

71. In this suit, I have already come to a finding that the subject Agreement was constructively terminated by the defendants in appointing numerous other distributors after the reinstatement of interim orders by the court on 28th August 2017, without even issuing fresh legally binding Termination Notice. **PW1** testified of the defendants having appointed numerous distributors a fact which **DW1** did not deny.

72. The plaintiffs in the re-amended plaintiff under paragraph 12 claim special damages as tabulated under the said paragraph 12 on account of loss of its business occasioned by the 1st defendant's breach of its obligations under the Agreement to supply products to the plaintiff for onward sale to resellers as well as illegal termination of the Distribution Agreement.

73. The primary purpose of damages in a contract is to place the injured party in the position he would have been in had the contract been performed. The plaintiff is under duty to mitigate losses and take reasonable steps to reduce its losses; for plaintiff to succeed in a claim where specific damages are sought, the same must be specifically pleaded and strictly proved. In the case of **Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd [2015] EKLJ J. Majanja** observed:

"....As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the latin phrase *restitutio in integrum* such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved..."

74. **PW2**, testified he was engaged by the plaintiff, for the purpose of valuation of its Heineken business, from **UHY Kenya (an audit firm)**. He prepared the Valuation Report and arrived at the final valuation. He stated his qualifications and confirmed he was a graduate with Bachelors of Commerce (Accounting option and a member of **CPA** in good standing and a registered member of chartered certified Accountants (**ACCA**)). I therefore find **PW2** was qualified to prepare the Valuation Report. I note that the extracts of profit and loss Accounts and audited financial statements of the plaintiff company, contrary to defendants submissions, were factored in the valuation and the same are duly highlighted as part of the working papers in the report. The report is clear, that it only related to the plaintiff's Heineken sales and not any other. **PW2** further explained why valuation is done with terminal year (*year 5*) and pointed out that is the general practice of valuation and not peculiar to the subject valuation. The defendants did not controvert **PW2**'s evidence nor provided alternative professional counter-argument from a qualified accountant. In this case the base year was given as 31st March 2016 and terminal year would have been 1021. **PW2** was categorical he had not acted for any of the plaintiff's associated company, hence there was no conflict of interest.

75. On issue of whether **PW2** had perused the plaintiff's profit and loss statement for the year 2016 when preparing the Valuation Report, **PW2** testified that the 2016 audit had not been performed at the time of valuation and therefore relied on the management accounts prepared by the plaintiff. He further testified that the figure as has been the practice does not change in any material way with final audited financial statements, urging that his valuation was accurate in all aspects.

76. It submitted by the defendants, that there are no corresponding entries of profit of the tax figures, contrary to the standard acceding practice of reflecting profit after tax on the balance sheet. Upon perusal of the balance sheet and considering **PW2** evidence, it is revealed that the balance sheets have revenue reserve which is an accumulation of the profit or loss from prior periods. Secondly it should be noted the base year used was 2016 hence the balance sheet for year 2015 was not necessary. I find therefore that is the standard acceding practice.

Further it should be noted the objective of any business is to endeavour to keep the inventories as minimum as possible simply because it ties down funds, hence projecting inventories is allowed. The plaintiff contends the defendants have mixed up issues pointing out that **PE** ratio is not the same as market share. **PW2** explained **PE** ratio = market value per share/earning per share. He explained that auditors get **PE** ratio from listed companies and not private companies because the information is not in public domain. **PW2** further explained he used **EABL** since it is a major importer of spirits and also a distributor beside being a manufacturer, he further explained that he discounted the **PE** ratio by 50% since **EABL** is a more established company compared with the plaintiff.

77. Upon considering the evidence of **PW2** on valuation of business lost by the plaintiff specifically at Heineken beer business and considering the defendant's did call any expert witness to controvert any tabulations and/or methodologies purported by **PW2**; I find and hold the valuation of the lost business in total sum of Kshs.1, 799,978,868 remains uncontroverted by the defendants.

78. In assessing the plaintiff's prayer for special damages what should be of consideration is whether the same has specifically been pleaded and strictly proved. Looking at the plaint the plaintiff has adequately satisfied the requirement under law and proven the special damages. The same is duly pleaded in paragraph 12, 24 and 31 of the plaint. The plaintiff is in fact lost its Heineken business as a result of actions of defendants by blatantly breaching various clauses of the Agreement this clause 17, 18, 20 and 26. In the case of **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269**, the court stated:-

“Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”

79. In this suit considering the nature of the claim and facts of the case, I find that the circumstances of the breach under which the special damages arose have been successfully demonstrated before this court and I find there is no dispute that the plaintiff has now completely been driven out of the business and lost their entire Heineken beer distribution business and for that reason, special damages would be the only award that would compel itself to this Honourable court.

80. On revisiting the parties Agreement and considering the facts of the case I find the plaintiff is entitled to special damages for the reasons, that under clause 26 the 1st defendant was required to continue performing its obligations according to the terms and conditions of the Agreement, pending the resolution of the dispute herein but the 1st defendant acted contrary and completely cut the supply, leading to immediate collapse and extinguishing of plaintiff's business and investment. Clause 26 of the Agreement did not provide for the 1st defendant to appoint other additional distributors. This resulted to collapse of the plaintiff's business. The 1st defendant is liable to compensate the plaintiff for its breach of the clause No. 26 of the Agreement.

81. In a ruling by Hon. Justice Erick K. Ogola, dated 21st April 2016, the court held that the Termination Notice of 27th January 2016 had no legal effect, it therefore follows that the agreement has always been renewed automatically after every year since 27th May 2016 and the same is still in full force and effective. In view of the above I find the 1st defendant had no basis at all to appoint additional distributors and deprive the plaintiff supplies of Heineken Larger Beer products.

82. Upon considering the evidence of the **PW1**, **PW2** and **DW1**, I find **DW2**, an expert witness, who produced Valuation Report, proved the special claim of damages of Kshs.1, 799,978,868.00. The same was not challenged nor controverted by any expert witness of equal measure on part of the defendants and as such an admission on part of the defendants. The special damages has been pleaded in the Re-amended plaint and was strictly proved by **PW1** and **PW2** as per their witnesses statement' and the Valuation Report dated 4th May 2016.

83. The upshot is that the plaintiff suit is meritorious. I proceed to make the following orders:-

1) The plaintiff is hereby directed to submit his Distributorship agreement dated 21st March 2013 to the Stamp Duty Collector for assessment of the duty payable, upon which the plaintiff should pay the amount in the normal manner within 7 days from the date of this judgment and copy of the stamped document bearing stamp duty collector's stamp and court stamp be submitted to the Deputy Registrar within 4 days from such stamping by court for record purposes.

2) An injunction order be is HEREBY issued restraining the defendants, their agents, servants, employees and/or any other person whomsoever and/or howsoever acting in themselves in any manner whatsoever from;

a) Terminating the distribution agreement dated 21st May 2013 between the Plaintiff and the 1st Defendant relating to the distribution of the Heineken larger beer brand in Kenya contrary to the terms of the agreement.

b) Appointing any other distributor for the distribution of the Heineken larger beer brand in Kenya contrary to the terms and conditions of the agreement.

c) A declaration be and is HEREBY issued that the Notice of Termination dated 27th January 2016 from the 2nd Defendant to the Plaintiff is unlawful, irregular, unprocedural and therefore null and void *ab initio*.

d) A declaration be and is HEREBY issued that the Kenyan Distribution Agreement dated 21st May 2013 between the Plaintiff and the 1st Defendant is in full force and effect as per the terms and conditions set out therein.

e) A declaration be and is HEREBY issued that the Defendants' actions and breaches aforesaid have infringed on the Plaintiff's rights as protected by Article 19 of the Constitution.

f) A declaration be and is **HEREBY** issued that the Defendants' conduct of offering lower market prices to other distributors of the Heineken Larger Beer, approving higher market prices to the Plaintiff on the same products and arbitrarily reducing the Plaintiff's approved margins is discriminatory and offends the provisions of Article 27(2) of the Constitution.

g) A declaration be and is **HEREBY** issued that the pricing models imposed on the Plaintiff by the Defendants without the Plaintiff's prior consultation and/or express consent and which models were issued subsequent to the Court Order of 28th August 2017 are exploitative, oppressive, unfair, null and void.

h) Special damages for loss of business as more specifically tabulated in paragraph 12 in the plaint of Kshs. 1,799,978,868.00 is awarded to the Plaintiff.

i) An Order be and is **HEREBY** issued directing the taking of accounts in respect of loss of profits occasioned to the Plaintiff by reason of reduced volumes of sales as well as reduced profit margins from September 2017 until the date of this judgment.

j) Special damages for loss of profits as to be tabulated in prayer (i) hereinabove.

k) General damages (Nil).

l) Costs of the suit to the plaintiff.

Dated, signed and delivered at Nairobi this 29th day of July 2019.

.....

J .A. MAKAU

JUDGE