REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 622 OF 2010

KEN ALUMINIUM PRODUCTS LIMITED.....PLAINTIFF

VERSUS

HIGH-TECH AIR CONDITIONING &

REFRIGERATION LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Ken Aluminium Products Limited**, filed this suit on **16 September 2010** against the Defendant, **High-Tech Air Conditioning & Refrigeration Limited,** contending that on or about the month of **August, 2008,** it entered into an oral agreement with the Defendant for the purchase of a Water Chilling Machine. The Plaintiff averred that, although it was made clear to the Defendant that the machine was required for a specific purpose and with specific expectations at the Plaintiff's plant, the Defendant failed to make the delivery and installation within three weeks of the agreement as was expected, and notwithstanding that the Plaintiff had made a deposit of **Kshs.900,000/=** towards the purchase.

[2] It was further the contention of the Plaintiff that no sooner had the Defendant installed the Water Chiller Machine than it developed technical problems which the Defendant kept on rectifying in vain. It was thus the averment of the Plaintiff that the machine supplied did not correspond with the descriptions or fit the purpose for which it was acquired. In particular, the Plaintiff averred that:

> **[a** The Water Chiller's design contradicted the descriptions and was not fit for the purpose it was meant for;
>
> **[b]** the machine was poorly constructed and was of unmerchantable quality;
>
> **[c]** the Defendant failed to effectively rectify the defects as agreed;
>
> **[d]** The Defendant made misrepresentations as to the quality and fitness of the machine.

[3] It was thus averred by the Plaintiff that, by reason of the said misrepresentations and breaches of the contract, it suffered loss and damage, and is therefore entitled to reject the Water Chiller, repudiate the contract and demand a refund of the total amount paid to the Defendant together with interest and costs. In terms of Special Damages therefore, the Plaintiff claimed:

[a] A refund in the sum of **Kshs. 2,088,000/=;**

[b] Loss of business at **Kshs. 500,000/=** per month

[c] The costs of repairs and other incidentals as tabulated.

Thus, the Plaintiff now claims Special Damages, General Damages for breach of Contract, Costs of this suit and compound interest as well as a declaration that it is not liable to make any further payment to the Defendant under the contract; and any other or further relief that the Court may deem fit and just to grant.

[4] The Defendant denied the Plaintiff's allegations and averred, in its Defence filed herein on **22 October 2010**, that it had been servicing the Plaintiff's equipment for about 3 years; and that the Plaintiff had persistent and perennial problems with its machine; and that after consultation with the Plaintiff, it was agreed that the Defendant would install and commission a new Water Chilling Machine for which Quotation No. 945 was issued, setting out the specifications of the machine to be commissioned as well as the terms of payment. The Defendant therefore denied that the Plaintiff made it known to it that he required the machine for a specific purpose with specific expectations.

[5] It was further the contention of the Defendant that it supplied and delivered to the Plaintiff the machine as per its Quotation; and that it was agreed that the Plaintiff would take, along with the machine, two condensing units at a price of **Kshs. 2,088,000/=,** to avoid total breakdown of the Plant. Thus, the Defendant averred that the Plaintiff, being in total agreement with the proposal by the Defendant, released an initial down payment of **Kshs. 900,000/=;** whereupon the installation was commenced by early **December 2008**. According to the Defendant, the bigger of the two condensing units was ready for testing by **22 December 2008** but the Plaintiff did not provide electrical power until **5 January 2009** when the said unit was commissioned and tested to the satisfaction of the Plaintiff.

[6] The Defendant conceded that the second condensing unit was supplied and delivered on **18 February 2009** and was installed within two days of the delivery. It was thereafter tested and upon being satisfied that it was working perfectly, the Plaintiff released the second instalment of **Kshs. 688,000** on the understanding that the balance would be paid after a further test run; and that the final payment was ultimately made on **30 March 2009**. Thus, the Defendant denied that it was in breach of any condition or term or the contract; or that the machine did not correspond with the description; or that it was not fit for the purpose, adding that the first unit was operational for about three months before the second unit was installed; and that the final payment was made about one and a half months after the installation of the second unit. That it was therefore misleading for the Plaintiff to say that the machine instantly developed problems upon installation.

[7] The Defendant further asserted that, pursuant to its quotation to the Plaintiff, it installed the machine at the Plaintiff's premises as agreed and that the said machine was in merchantable order, in perfect condition and fit for the purpose for which it was required; and that it was the duty of the Plaintiff to notify it at once of any malfunction, failure or defect; none of which was communicated for over six months after installation. According to the Defendant, it was an implied condition as per the trade usage of such machines, that it could only give a six months' warranty on any fault or defect; and that in the absence of any such complaints, the Plaintiff was estopped from making any such allegations herein.

[8] The Defendant averred that on **18 October 2009**, over 9 months after the installation and commissioning of the machine, it was called in to assess a fault with the machine and it was discovered that water had seeped into the electrical compressor through a leak in the copper pipe inside the tank; and that the said leak causing the damage could not be attributed to a defect in the machine or poor workmanship as alleged, but was due to deliberate tampering. In the Defendant's perspective, had there been a gas leak, the machine would have cut out the compressor by the safety pressure switch supplied by the manufacturer; and that the fact that this did not occur is indicative that the pressure gauge had been tampered with. The Defendant further contended that it undertook to repair the machine, not under a warranty, but at the invitation and cost of the Plaintiff; and that the repair costs, amounting to **Kshs. 371,200/=** was inclusive of materials and labour. Accordingly the Defendant counterclaimed for the

aforesaid sum of **Kshs. 371,200/=** together with interest at commercial rates and costs of the suit along with interest thereon.

[9] The Plaintiff joined issues with the Defendant on the matters raised in the Defence and Counterclaim vide its Reply to Defence and Defence to Counterclaim filed herein on **3 November 2010**. It reiterated its stance that the machine which the Defendant supplied, delivered and commissioned was not the one agreed or specified in Quotation No. 945; and further that the Defendant was specifically required to supply a new Water Chiller similar to the one it had been servicing, but opted to supply a different machine. Thus, according to the Plaintiff, it had nothing to do with the two condensing units; adding that the second condensing unit was supplied free of charge at the discretion of the Defendant, as it was not part of the specifications or descriptions set out in the Quotation.

[10] In respect of the payment of the second instalment of **Ksh.688,000/=,** it was the contention of the Plaintiff that it was not made on account of satisfactory performance on the part of the Defendant, but was made following coercion and threats by the Defendant which would jeopardize the Plaintiff's production process and consequently business. The Plaintiff reiterated that the Defendant had always been informed of the imperfect performance of the machine and added that the allegations of tampering with the machine were not only false but also unwarranted. According to the Plaintiff, if there was any tampering then it was by the Defendant or its agents as it was its responsibility to service the machine. Accordingly, the Plaintiff denied the Defendant's Counterclaim and further denied that the Defendant is entitled to **Kshs. 371,200/=** as the repairs were part of the Defendant's duty and responsibility, with a view of ensuring that the machine worked as expected.

[11] In support of the Plaintiff's case, evidence was adduced by its Production Manager, **Mr. Anil Kumar Shah (PW1),** in line with the Witness Statement filed herein on **3 March 2017** and the Lists and Bundles of Documents filed on the Plaintiff's behalf on **16 May 2011** and **10 October 2014,** (marked **PExh. 1A and 1B,** respectively). He confirmed that the Plaintiff did enter into a contract with the Defendant on or about **August 2008** for the supply, delivery and installation of a Water Chiller Machine. It was the evidence of **PW1** that in the course of negotiations, the Plaintiff made it known to the Defendant that it required the machine for a specific purpose and with specific expectations at its plant, but that those expectations were never to be met. According to **PW1**, the Defendant had agreed to supply the machine within 3 weeks from the date of agreement, but ended up taking five months to supply and install the same. He added that soon after installation, the copper tubes in the water tank developed leaks, which caused the gas system to let in water into the compressor. As a result, the machine developed mechanical problems which the Defendant's engineers severally attempted to rectify without success. Consequently, the Plaintiff's operations were brought to a complete stop, hence this suit for recovery of the monies paid under the contract, being **Kshs. 2,088,000/=,** loss of business at **Kshs. 500,000/=** per month, general damages for breach of contract, costs, a declaration that the Plaintiff is not liable to make any further payment to the Defendant under the contract, and any other or further relief that the Court may deem fit and just to grant.

[12] The Defendant, on the other hand, called its Managing Director, **Mr. Tariq Farook Alam (DW1)** as its witness. **DW1** also relied on his Witness Statement dated **17 June 2016** and testified that, prior to the subject contract, the Defendant had been servicing the Plaintiff's water chilling machine from the year **2006**; and that since the Plaintiff suffered perennial breakdowns of its said machine, it (the Defendant) suggested to the Plaintiff that a lasting solution would be the procurement of a new machine by the Plaintiff, for which it issued the Plaintiff with Quotations No. 943 and 945 dated **12 August 2008** and **13 August 2008**, respectively. **DW1** added that the parties thereafter agreed on the supply and installation of the new Water Chiller Machine on the terms specified in the Quotations aforementioned; and that the Plaintiff further agreed to take two and not one condensing unit at the price of **Kshs. 2,088,000/=,** whose purpose was nothing more than to offer the Plaintiff the option of flexibility.

[13] DW1 further testified that, being satisfied with the proposal, the Plaintiff released an initial down payment of **Kshs. 900,000/=;** and that thereafter, the installation of the Water Chiller Machine commenced by early **December 2008**, such that by **22 December 2008**, the bigger one of the two condensing units had been fully installed and was ready for testing; but that the Plaintiff did not provide

electrical power until **5 January 2009,** when the said unit was commissioned and tested to the Plaintiff's satisfaction. According to **DW1**, the second unit was supplied and delivered by **18 February 2009** and installed within two days. It was also tested and found to be working perfectly. He added that the Plaintiff was satisfied with the work and therefore paid the 2nd instalment of **Kshs. 688,000/=,** and thereafter the final balance on **30 March 2009**.

[14] Thus, it was the testimony of **DW1** that it was apparent that the damage to the machine, which occurred 9 months after installation, was as a result of some tampering with the machine; and that the Defendant undertook to repair the machine on instructions of the Plaintiff for which it was entitled to **Kshs. 371,200/=** in terms of labour and for the expenses incurred in purchasing materials for repairs; which sum the Plaintiff had failed, refused and/or neglected to pay. **DW1** relied on the Defendant's List and Bundle of Documents filed herein on **1 July 2016** (marked **Defendant's Exhibit No. 1**) and accordingly prayed for judgment in the Defendant's favour in the sum of **Kshs. 371,200/=** together with interest at commercial rates and costs of the Counterclaim; while urging for the dismissal of the Plaintiff's suit with costs.

[15] Having taken the foregoing summary of the evidence into account in the light of the pleadings and the written submissions filed herein by Learned Counsel for the parties, there is no dispute that the parties hereto had a longstanding business relationship, and that prior to **August 2008**, the Defendant had been providing repair and maintenance services to the Plaintiff in respect of its plant and equipment, particularly its Water Chiller. The contention by the Defendant that the Plaintiff's Water Chiller suffered perennial breakdowns appears not to have been disputed, it being apparent that this is what necessitated the procurement of a brand new Water Chilling Machine from the Defendant. Indeed, at Paragraph 2(1) of the Reply to Defence and Defence to Counterclaim, the Plaintiff acknowledged this fact by stating that the machine, which the Defendant alleged to have been servicing for three years, was not in issue and was different from the one in issue herein.

[16] There is further no disputation that, sometime in **August 2008**, the parties held discussions and came to an oral agreement whereby the Plaintiff agreed to purchase and the Defendant agreed to sell to the Plaintiff a new Water Chilling Machine. A Quotation was accordingly prepared by the Defendant, being Quotation No. 945 dated **13 August 2008**, at page 13 of the Plaintiff's Bundle of Documents marked **PExh. 1)** and page 11 of the Defendant's Bundle **(DExh.1).** That Quotation confirms that what was to be supplied was one condensing unit together with a galvanized insulated tank with its accessories including cut-outs. The purchase price, inclusive of labour and transport, in the sum of **Kshs. 2,482,968.40,** was to be paid in three instalments of 60% as down payment, 20% on delivery and 20% on immediate completion of installation. There is therefore no doubt that there was mutual understanding and oral agreement between the Plaintiff and the Defendant for the sale by the Defendant to the Plaintiff of a new Water Chiller; or that the Water Chiller was intended for a specific purpose at the Plaintiff's plastic manufacturing plant.

[17] The parties are further in agreement that the Plaintiff made a down payment of **Kshs. 900,000/=** for which an Electronic Tax Receipt (ETR) **No. 00693** was issued, dated **9 October 2008** (at page 3 of **PExh.2)**. Thereafter, the machine was installed in **December 2008** and commissioned in **January 2009**; whereupon, the Plaintiff paid a further sum of **Kshs. 688,000/=,** being the second instalment. The remaining balance was cleared by the Plaintiff on **30 March 2009,** as confirmed by the **Invoice No. 2448** dated **30 March 2009** and the **ETR No. 000834.** Thus, there is no dispute that the Plaintiff fully paid the purchase price and attendant installation costs for the machine and that the same was supplied, installed and commissioned by the Defendant as agreed; and, although the agreement between the parties appears to have been that the new machine was to be delivered within 3 weeks, the Plaintiff appears not to have taken exception to the late delivery of 5 months so as to make it a cause of action. This is evident in the emails at pages 20 and 22 of **DExh.1.**

[18] Those emails, which were written on behalf of the Plaintiff by **Prakash Mehta,** are in fact indicative of a waiver of the Plaintiff's right to complain about the delayed supply and installation of the Water Chiller. In the email dated **25 November 2009**, (at page 20 of DExh. 1) **Mr. Mehta** wrote to the Defendant thus:

"...First, the delivery time of 3 weeks extended to over 5 months (and all you were required to do was copy a proven equipment already working with us) Despite the fact that we were losing production ... we very patiently waited for you to deliver and commission the chiller..."

And in the email dated **4 December 2009** (at page 22 of DExh.1) **Mr. Mehta** stated thus:

"...I am kicking myself for taking the decision to place the order with them. I should have seen it coming the way the order was handled ... and we should have cancelled it way back in October 2008, when the equipment was already delayed..."

[19] Moreover, there is no evidence on the record that the Plaintiff protested the late delivery, noting that it was not itself free from blame for the delay; firstly in not promptly making the down payment, and secondly in not availing electricity supply in good time. The down payment was evidently not made until **9 October 2008;** and, according to the Defendant's uncontroverted evidence, the machine could not be installed until **5 January 2009** because of lack of electricity supply; which was undoubtedly the responsibility of the Plaintiff as evinced in Quotation No. 945 (at page 13 of **PExh. 1**). In any case, if time was of the essence in connection with the delivery and commissioning of the machine, it would have been explicitly provided for in either Quotation No. 943 or Quotation No. 945. There appears to be no such stipulation. (see **Sagoo vs. Dourado [1983] KLR; Bir Singh vs. Parmar [1972] EA 211 and Aida Nunes vs. J.M.N Njonjo & C. Kigwe [1962] EA 89**.

[20] Although it was the contention of the Plaintiff that the machine developed problems immediately, there is credible evidence herein to show that this was not the case. The Job Card at page 11 of the Plaintiff's Bundle of Documents and the Invoice dated **4 October 2008** (at page 12 of **PExh.1**) are evidently for repairs undertaken on **30 September 2008**, before the new Water Chiller was installed. There is no evidence of any repairs and that were effected on the new machine before **19 October 2009** when the Quotation No. 1071 was issued in connection with the breakdown of the compressor. Thus, having given attention to the List of Issues proposed by the Plaintiff and filed herein on **16 May 2011,** it is my considered view that the only issues remaining in contest are:

[a] Whether the Defendant acted in breach of the terms and conditions of the Sale Agreement entered into between the parties herein; and if so, whether the Plaintiff is entitled to Special and General Damages for that breach, and in what quantum;

[b] Whether the Plaintiff is indebted to the Defendant in the sum of **Kshs. 371,200/=** as claimed in the Counterclaim;

[c] What order should be made as to costs?

[a] Whether the Defendant acted in breach of the Terms of the Sale Agreement and whether damages are payable

[21] It was the case of the Plaintiff that, whereas the Defendant supplied and installed the Water Chilling Machine as agreed, the machine did not correspond with the specifications given by the Plaintiff; and therefore that it was not only of unmerchantable quality but also did not reasonably fit the purpose for which it was required. In this regard, Counsel for the Plaintiff relied on **Section 16** of the **Sale of Goods Act, Chapter 31** of the **Laws of Kenya**, and the cases of **Kenital (K) Limited vs Charles Mutua Mulu & 4 Others [2006] eKLR**, **Dickson Maina Kibira vs. David Ngari Makunya [2015] eKLR,** and **Gragan (K) Limited vs. General Motors (K) Limited & Another [2016] eKLR,** to support the argument that there was an implied warranty in the agreement between the parties that the Water Chiller would be of merchantable quality and therefore fit for the purpose for which it was procured. The Plaintiff urged the Court to consider that the parties had a business relationship prior to the subject agreement and that the Defendant was, on own admission, a dealer of no less than 20 years' standing in connection with refrigeration products and services.

[22] The Defendant countered the Plaintiff's arguments by relying on the doctrine of Caveat Emptor, and

urged the Court to find that it was the duty of the Plaintiff to ensure that the machine was suitable for the purpose for which it bought it, and that it was not its duty as the seller to disclose every defect in the machine in the absence of an inquiry from the Plaintiff. Counsel for the Defendant relied on the case of **Abdulla Ali Nathoo vs. Walji Hirji [1957] 1 EA 207,** in which the Court held that there was no implied warranty and that the doctrine of Caveat Emptor was applicable, since the appellant had an opportunity of inspecting the goods before taking delivery. In the submission of Counsel for the Defendant, **Section 16** of the **Sale of Goods Act** was irrelevant to this particular transaction; and that the Plaintiff had accepted the machine within the meaning of **Section 36** of the **Sale of Goods Act**. The Defendant also relied on the **Dickson Maina Kibira Case** (supra) but for the holding that the installation of the machine was intimation enough that the Plaintiff had accepted the product.

[23] Having perused the exhibits presented before the Court in this matter, there appears to be no express warranty that was issued by the Defendant in respect of the subject Water Chiller. Hence, while the Court was invited by the Defendant to imply such a warranty by dint of **Section 16** of the **Sale of Goods Act**, the Defendant was of the posturing that since ordinary business usage would require a 6 months warranty, the Court should find that had there been any such warranty, it would have lapsed by **October 2009** when the breakdown occurred; and that in any event, the risk in the goods had passed so that **Section 16** of the **Sale of Goods Act** was no longer applicable to the transaction. **Section 16** of **the Sale of Goods Act** provides as follows:

"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:

provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed."

[24] It was the uncontroverted evidence of the Plaintiff that the Defendant was one of their long-term suppliers and service providers. **DW1** expressly conceded this in his evidence, adding that he had been a contractor in air conditioning and ventilation profession of over 30 years. It is also significant that, by its own admission, the Defendant had been servicing the Plaintiff's old water chiller machine from 2006 and that it was on account of its perennial breakdowns and problems that the Defendant recommended to the Plaintiff the purchase of a new Water Chiller of the description set out in **Quotation No. 945**. In the premises, the Defendant was acutely aware of the particular purpose for which the machine was required, and that the Plaintiff relied on the Defendant's skill or judgment in the acquisition of a Water Chiller that would, once and for all, solve the Plaintiff's perennial maintenance problems. There is further no gainsaying that the Water Chiller was an item which was in the course of the Defendant's business to supply. Accordingly, and notwithstanding whether or not the Defendant was the manufacturer of the machine, there was an implied condition that it would be reasonably fit for the purpose for which it was purchased.

[25] Moreover, there is every indication that the machine was bought by description from a seller who ordinarily deals in goods of that description. **DW1** explicitly admitted that he knew what the Water

Chiller was going to be used for by the Plaintiff. Thus, there was an implied condition that the goods would be of merchantable quality. It matters not therefore that the machine was inspected and installed to the satisfaction of the Plaintiff; granted that the Plaintiff was no expert in that particular field, and the defect was not such as would be easily detected. This must be why the Defendant was called in to assess the fault, a fact adverted to, not only in the Defence, but also in the evidence of **DW1**, and specifically at paragraph 14 of **DW1's** Witness Statement. The particulars of the needed repairs were thereafter set out by the Defendant for the Plaintiff's benefit in its **Quotation No. 1087**. Paragraph 20(v) of the Defence, for instance, states as follows:

"On 18th October 2009 over nine (9) months after the installation and commissioning of the machine the Defendant was called in to assess a fault with the machine and it was discovered that water entered into the electrical compressor through a leak in the copper pipe inside the tank."

[26] Thus, since it was the contention of the Defendant that the machine was otherwise in a merchantable state and fit for the intended purpose; and that it must have been tampered with, it was incumbent upon it to demonstrate by clear and cogent evidence that the machine was indeed tampered with and that the malfunction was not due to a defect in the machine or attributable to poor workmanship. At paragraph 20(vi) of the Defence, the Defendant set out the Particulars of Tampering that it proposed to prove at the hearing, namely:

[a] The problem occurred nine (9) months after installation and that if it was a factory defect, it would have been detected immediately upon installation and testing;

[b] With the gas leak, the machine should have cut out the compressor by the safety pressure switch supplied by the manufacturer;

[c] The pressure switch did not cut out and this evidently shows that the pressure gauge was tampered with;

[d] In the event there was a warranty claim (which was denied) any tampering with an electrical product would render a warranty claim null and void.

[27] While the Court is satisfied that the breakdown occurred in **October 2009**, when the Defendant was called in to assess and repair the damage, there was no tangible evidence adduced by the Defendant to demonstrate that the machine was indeed tampered with. As experts in the subject field, it was the duty of the Defendant to convince the Court not only of the likelihood that the copper pipes inside the tank were exposed to such tampering, but also the fact that the tampering took place as a matter of fact, as well as the manner in which it occurred. The evidence of **DW1** is simply to the effect that **"...It was apparent that the damage caused to the machine was as a result of tampering with the machine..."** It was not demonstrated that the tampering indeed occurred; and neither did the Defendant present the Court with facts from which to base the conclusion that the tampering was manifest. In the premises the Defendant failed to discharge the burden of proving its case as is required by the law, namely, **Section 109 of the Evidence Act, Chapter 80 of the Laws of Kenya,** which it is stipulated that:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[28] The Defence Counsel, in a bid to discredit the Plaintiff's evidence, urged the Court, in the Written Submissions filed herein on **30 May 2017,** to disregard the evidence of **PW1** contending that it was hearsay evidence, given **PW1's** concession that he was not in the employ of the Plaintiff as of **2009/2009** when the cause of action arose. Reliance was placed on **Section 63** of the **Evidence Act** and the cases of **Abiero vs. Thabiti Finance Company Ltd & Another [2001] eKLR; Kinyatti vs. Republic [1984] eKLR; Bukenya & Others vs. Uganda [1972] EA 549** and **Kenya Commercial Bank Ltd vs. Thomas Wandera Oyalo [2005] eKLR** in support of the Defendant's submission that the Plaintiff, having relied wholly on hearsay evidence of **PW1**, had fallen short of proving its case on a balance of probabilities.

[29] Indeed, **PW1** admitted in cross-examination that he was not an employee of the Plaintiff when the contract was made or when the Chiller Machine was delivered. He was not an employee of the Plaintiff by **October 2009** when the machine broke down. He conceded that, as of **8 March 2017** when he gave his testimony, he had worked for the Plaintiff or only 6 years; and therefore must have been employed in the year **2011.** He also admitted that what he told the Court was largely based on information he heard and the story told by the documents kept by the Plaintiff. Thus, in **Halsbury's Laws of England, 3rd Edition, Vol. 15** at page 266 the opinion is expressed that:

"A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in the case where the uttering of a slander has to be proved), the latter is not...A statement is hearsay if tendered to prove the truth of the facts asserted; it is sometimes called original evidence if its relevance depends on the fact that it was made, and not on the fact that it was true..."

[30] Similarly, in **Kinyatti vs. Republic** (supra), the Court of Appeal made the following expression:

"The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact...Evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made."

[31] In the light of the foregoing, it would follow that, to the extent that **PW1** was not a first-hand witness to the pertinent issues herein, such as the installation and subsequent breakdown of his evidence would amount to inadmissible hearsay evidence. However, from the preceding review of the evidence adduced herein, there is no gainsaying that the critical facts relied on by the Plaintiff are not in controversy. As has been pointed out, it was not in dispute that the Defendant recommended the purchase of a new Water Chiller to the Plaintiff, or that it issued the Plaintiff with **Quotation No. 945**. It was not disputed that the machine that broke down, and which is the subject of this suit, was supplied, installed and commissioned by the Defendant; and neither is the breakdown in contestation. The documents that were relied on by the Plaintiff are the very documents that the Defendant has supplied in proof of its case; such that what remains in contest, as has been pointed out hereinabove, is the Defendant's contention that the machine was tampered with, in respect of which the incidence of the burden of proof shifted to the Defendant, which burden the Defendant has failed to discharge. For the same reasons, it is similarly inconsequential that the Plaintiff did not call its Managing Director, **Mr. Mehta,** in the light of the provisions of the aforestated provisions of **Section 109** of the **Evidence Act**.

[32] Consequently, I would find and hold that the fact of the breakdown of the machine, and in particular the leakage in the copper pipes, was due, not to tampering as was alleged by the Defendant, but due to the fact that the same was not of merchantable quality within the ambit of **Section 16** of the **Sale of Goods Act;** and therefore, the Defendant acted in breach of contract in supplying the machine in that condition. Having known of the Plaintiff's perennial problem with its water chilling machine, and having prescribed the solution for the perennial problem, it was by necessary implication, the obligation of the Defendant to supply a machine that would provide the Plaintiff with a lasting solution to its problem and not one that would break down in a few months. This was therefore not a situation in which the doctrine of Caveat Emptor or **Sections 35** of the **Sale of Goods Act** would apply; and indeed this was confirmed not only by the graduated payment arrangement of 60:20:20 but also by an admission by **DW1** that the last payment was only made after an extended test-run period.

[33] It is notable that the Defendant did make reference to trade usage and urged the Court to find that, any implied warranty could only have been valid for the first 6 months, during which the machine suffered no breakdown; and therefore that the risk therein had effectively passed to the Plaintiff as of

October 2009 when the breakdown happened. It is however trite that trade usage, where it is alleged to exist, must be sufficiently proved to the satisfaction of the Court. In **Harilal & Co. & Another vs. The Standard Bank Ltd [1967] EA 512**, for instance, it was held that:

"A trade usage may be described as a particular course of dealing between parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must have been presumed to have intended to adopt that course of dealing and to have incorporated it into their contractual relationship unless by agreement it is so expressly or impliedly excluded. Before a course of dealing can acquire a character of a trade usage it must, first, be so well known to the persons who would be affected by it that any such person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it; secondly, be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other party; thirdly, be reasonable, that is, that the course of dealing is such that reasonable men would adopt it in the circumstances of the case; and finally, be such as is not contrary to legislation or to some fundamental principle of law. A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well-known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefitted from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety judicial notice may be taken of it under section 60 of the Evidence Act. Where a trade usage is proved to exist then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it."

[34] There was no concrete evidence adduced herein to demonstrate the existence of a trade usage between the parties in connection with the alleged 6 months warranty period, nor was it suggested that it was a matter of general or local notoriety in respect of which the Court ought to take judicial notice. Thus, having failed to prove the existence of a trade usage, or exhibit a copy of the warranty that was alleged by **DW1** to have been issued by the manufacturer, I would agree with the Plaintiff that, in the circumstances hereof, the breakdown of the Water Chiller occurred so soon after the delivery that the Defendant was under obligation to effectually rectify the defect, and that this is what it attempted to do but failed at. Accordingly, it is my finding that the Defendant is liable to the Plaintiff for breach of contract for supplying a product that failed to meet the purpose for which it was procured.

[35] It is now trite that the purpose of damages for breach of contract is for the claimant 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 was enunciated in **Hudley Baxendale [1854] 9 Exch. 341** thus:

"where two parties have made a contract which one of them had broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either naturally that it is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

[36] The same principle was applied in the case of **Gedion Mutiso Mutua vs Mega Wealth International Limited [2012] eKLR**, thus:

"The principal guiding the award of general damages for breach of contract was restated in Provincial Insurance Company of East Africa Ltd vs. Mordekai Mwanga Nandwa [1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things form such a breach of contract itself, or such

as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. the plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract..."

[37] With the above principle in mind, I have given due consideration to the evidence and the respective submission made by the parties and note that there is no contestation that the Plaintiff spent **Kshs. 2,088,000/=** on the Water Chiller. The documents comprised in the Plaintiff's Bundle of Documents and those exhibited at pages 10, 11, 13 and 15 of the Defendant's Bundle of Documents confirm this. Accordingly, the Plaintiff would be entitled to a refund of the said amount. However, there is no proof of loss of business at the rate of **Kshs. 500,000/=** per month. No attempt was made by the Plaintiff to show what volume of business it was undertaking or even its earnings before the breakdown; or how the same was affected by the breakdown of the Water Chiller. It is trite that any claim in the nature of special damages must be specifically proved. There being no such proof, there is no basis for the Court to award Special Damages to the Plaintiff for loss of business. In any case, it was not specified the period during which the amount was claimable, noting that every litigant is under obligation to mitigate its losses. It is over 7 years since the breakdown and no explanation was supplied as to why the Plaintiff would continue to lose business when it could have taken appropriate intervening measures. In the premises, I find no basis for awarding the Plaintiff any additional sum apart from the **Kshs. 2,088,000/=** aforementioned.

[b]<u>Whether the Plaintiff is indebted to the Defendant in the sum of Kshs. 371,200/= as claimed in the Counterclaim</u>;

[38] The contention of the Defendant was that it did a good job and satisfactorily performed its obligations under the subject contract; and that the damage to the machine, which occurred 9 months after installation, was as a result of some tampering with the machine. It was further the contention of the Defendant that it undertook to repair the machine on instructions of the Plaintiff for which it was entitled to **Kshs. 371,200/=** in terms of labour and for the expenses incurred in purchasing materials for repairs; which sum the Plaintiff had failed, refused and/or neglected to pay. The Defendant relied on its List and Bundle of Documents filed herein on **1 July 2016** (marked **Defendant's Exhibit No. 1**) and accordingly prayed for judgment in the Defendant's favour in the sum of **Kshs. 371,200/=** together with interest at commercial rates and costs of the Counterclaim.

[39] That bill was the subject of protracted correspondence, as evinced in the emails at pages 19 to 22 of the **Defendant's Exhibit No. 1**. Whereas ordinarily, the Defendant would have been entitled to payment for the repair works undertaken, indeed there is ample proof that he would be paid by the Plaintiff in similar circumstances going by the documents annexed at pages 1 to 9 of the **Defendant's Exhibit No. 1**, this was no ordinary situation. The Plaintiff had recently bought a new Water Chiller from the Defendant on the Defendant's advice. I have analyzed the evidence adduced herein and found that the Defendant is liable to the Plaintiff for supplying a machine that was not fit for the purpose for which it was intended. Accordingly, any attempts by the Defendant to rectify the defects, which is what the post-installation repairs amount to, cannot be legitimately charged to the Plaintiff's account. For this reason, it is my finding that the Defendant's Counterclaim is untenable and is accordingly dismissed with costs thereof.

[40] Thus, in the result, Judgment is hereby entered for the Plaintiff in the sum of **Kshs. 2,088,000/=** together with interest thereon at Court Rates from **October 2009** until payment in full and costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2018

OLGA SEWE

JUDGE