



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 670 OF 2006

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

JOHN MBITHI NGEA.....DEFENDANT

JUDGMENT

[1] The Plaintiff, **Total Kenya Limited**, filed this suit on **6 December 2006** against the Defendant, **John Mbithi Ngea**, seeking Judgment in its favour for **Kshs. 3,875,612.19** together with interest from **7 October 2004** and costs. The claim is based on a Marketing Licence Agreement dated **1 February 2004** made between them, by which the Plaintiff granted the Defendant a licence to sell products and conduct business at the Plaintiff's petrol station known as **Thika Road Total Service Station** along Thika Road, Nairobi (hereinafter the Station).

[2] It was the Plaintiff's case that to assist the Defendant in the conduct of the business aforementioned, it granted the Defendant, at the Defendant's request, a product loan in the sum of **Kshs. 9,000,000** which the Defendant agreed to repay in monthly instalments of **Kshs. 125,000**; and that the Defendant paid only one instalment of **Kshs. 125,000** and thereafter defaulted. Consequently, on or about **7 October 2004**, the Plaintiff terminated the Marketing Licence Agreement in accordance with the terms and conditions thereof; and accordingly retook possession of the Station on **8 October 2004**. The Plaintiff also filed this suit to recover the balance of the Product Loan in the sum of **Kshs. 3,875,612.19**, after taking into account the instalment paid as well as products and stock that were on site at the time of the handing over.

[3] The Defendant denied the claim contending that the Marketing License Agreement was signed upon incorrect and inaccurate data on the Station's sales, profits, staff salaries, product losses, credit card charges, insurance and rent, among other expenses; and that the agreement and the entire arrangement was a deliberate, willful and fraudulent misrepresentation on the part of the Plaintiff, with the intention of removing the Defendant from his gainful employment with the Plaintiff. It was the case of the Defendant that his decision to accept the alternative offer from the Plaintiff was based on the projected profit and loss schedule held out to the him by the Plaintiff; which turned out to be false. Thus the Defendant contended that he has consequently suffered damage for which he counterclaimed general damages.

[4] With regard to the Product Loan of **Kshs. 9,000,000**, the Defendant denied that he requested for the same as alleged. His version was that he was then in the employ of the Plaintiff, when the Plaintiff offered him an alternative employment of running its **Thika Road Service Station**. He further contended that in so doing, the Plaintiff fraudulently misrepresented to him that the alternative employment would provide

him with better earnings than he was receiving from the Plaintiff as a Logistics Manager.

[5] The Defendant further contended that he was never granted the alleged loan of **Kshs. 9,000,000** by the Plaintiff; and that the said amount was in fact a credit entry in the Station's books of account which were kept under the exclusive control of, and by the Plaintiff. Hence, even the first instalment of **Kshs. 125,000** was never paid directly by him, but was debited by the bank from the Station's account without any reference to him. He added that in respect of the Product Loan, the Plaintiff deliberately failed and or refused to correct a variance in respect thereof between the book value and the actual stock value to the tune of **Kshs. 780,000**.

[6] With regard to the termination of the contract, the Defendant denied that it was terminated in accordance with the terms and conditions set in the said Agreement. According to him, the Plaintiff simply moved in and took over the Station at a time when the parties had scheduled a meeting to discuss the stock variance and the inflated rent of **Kshs. 630,975.04** per month; which rent turned out to be higher than the Station's monthly profit. He further contended that during the takeover, the Plaintiff's agents and/or servants refused to take back some items on the ground that they were damaged when in fact they had been handed over to him in the same state.

[7] In view of his posturing herein, the Defendant made a Counterclaim against the Plaintiff, on the basis that he has suffered and continues to suffer damage due to the termination of his employment by the Plaintiff through misrepresentation, as well as loss of the prospects of earning **Kshs. 365,971** for 3 years and 8 months up to the mandatory retirement age of 55 years, totaling **Kshs. 16,102,724**; thus, the Defendant counterclaimed a total of **Kshs. 16,463,639** being the financial loss arising from the Plaintiff's misrepresentations and termination of his employment. In the alternative, he claimed lost income for the period between **1 February 2004** and **8 October 2004** amounting to **Kshs. 3,096,774** at the monthly rate of **Kshs. 375,000**. Accordingly, the Defendant prayed that the Plaintiff's suit be dismissed and that judgment be entered for him against the Plaintiff for:

[a] Special damages of Kshs. 19,560,413.19

[b] General damages for loss and suffering

[c] Costs of this suit

[d] Interest on [a], [b], and [c] above at court rates.

[8] The Plaintiff joined issues with the Defendant vide its Reply to Defence and Defence to Counterclaim, which was filed herein on **5 June 2007**. It denied having provided the Defendant with incorrect and inaccurate data or that it deliberately, willfully or fraudulently misrepresented facts to the Defendant as alleged. It was the contention of the Plaintiff that the Defendant had the opportunity to verify all information prior to entering into the Marketing License Agreement; and that his early retirement package had no connection with the Marketing Licence Agreement.

[9] It was further the Plaintiff's contention that the Profit and Loss Schedule was projected based on historical estimates and the trend of the Station; which the Defendant was at liberty to verify. The Plaintiff therefore denied having made any misrepresentations to the Defendant; or that the Marketing License Agreement was entered into as an alternative to employment or in consideration for the Defendant's retirement. It posited that the Defendant retired voluntarily from the its employment and received a lucrative retirement package that included a waiver of 50% of all of the Defendant's loans with the Plaintiff, having regard to the notice period and the duration of employment, in accordance with the Plaintiff's Staff Policies. Thus, the Plaintiff prayed for the dismissal of the Defendant's Counterclaim; and for the entry of judgment in its favour as per the Plaintiff.

[10] The Plaintiff called two witnesses in support of its case, namely: its Distribution Manager, **Caleb Geoffrey Apungu (PW1)**, and the Territory Manager for Nairobi Area, **Stella Kashenu (PW2)**. In his written witness statement, which he adopted as his evidence herein, **PW1** stated that, in **2003**, he was the

acting Network Sales Manager responsible for the management of the Plaintiff's retail sales segment through its service stations; and that on or about **November 2003**, he was advised by the Plaintiff's management to discuss a dealership arrangement with the Defendant, who was then employed by the Plaintiff as the Logistics Manager. The dealership was in respect of the **Thika Road Service Station**, for which the Plaintiff had set aside a working capital in the form of a loan of **Kshs. 9,000,000**, repayable in equal monthly instalments of **Kshs. 125,000**.

[11] It was the evidence of **PW1** that upon conclusion of discussions, he wrote a Letter of Offer dated **3 December 2003** on behalf of the Plaintiff to the Defendant, offering the Defendant the dealership of the Station; and that the offer was accepted by the Defendant on **5 December 2003**. Thereafter, a Marketing License Agreement dated **1 February 2004** (the Agreement) was made between the Plaintiff as the Licensor and the Defendant as the Licensee; whereby the Plaintiff granted the Defendant the license to sell its products and conduct business at the Station on terms and conditions that were detailed in the Agreement (a copy whereof is at **page 3** of the Plaintiff's Bundle of Documents).

[12] **PW1** further testified that, in accordance with the terms of the Agreement, the Plaintiff granted the Defendant, at the Defendant's request, a Product Loan in the sum of **Kshs. 9,000,000** which the Defendant agreed to pay by monthly instalments of **Kshs. 125,000**. A copy of the Letter of Offer in that regard is exhibited at **page 1** of the Plaintiff's Bundle of Documents). He added that, in breach of the terms of the said Letter of Offer and Agreement, the Defendant failed to repay the Product Loan and was therefore indebted to the Plaintiff in the sum of **Kshs. 3,875,612.19** as at the time of the institution of this suit. In support of the claim, **PW1** relied on the Statement of Account at **page 73** of the Plaintiff's Bundle of Documents. **PW1** therefore concluded his evidence by urging the Court to enter judgment for the Plaintiff against the Defendant for the aforesaid sum of **Kshs. 3,875,612.19** together with costs and interest from **7 October, 2004** as prayed for in the Plea.

[13] **PW2** augmented the evidence of **PW1** by reiterating that by a Marketing License Agreement dated **1 February 2004** made between the Plaintiff and the Defendant, the Plaintiff granted the Defendant a license to sell products and conduct business at the **Thika Road Total Service Station** on terms and conditions set out in the Agreement; and that to assist the Defendant to conduct the business, the Plaintiff granted him, at his request, a Product Loan in the sum of **Kshs. 9,000,000**, which the Defendant agreed to repay by monthly instalments of **Kshs. 125,000**. It was further the evidence of **PW2** that the Defendant paid only one instalment and thereafter defaulted in payment. Thus, the Defendant, in breach of the terms of the Agreement and the Letter of Offer in respect of the Product Loan, failed to repay the loan; whereupon, she wrote a letter on behalf of the Plaintiff to the Defendant dated **16 June 2004** (at **page 28** of the Plaintiff's Bundle of Documents) reminding him that he had not honoured his agreement with the Plaintiff.

[14] It was further the evidence of **PW2** that, in purported part payments of the said amount, the Defendant delivered to the Plaintiff **Cheque No. 000033** dated **7 October 2004** for **Kshs. 900,000/=** drawn on the account of **Trocas Company Limited** with the Standard Chartered Limited at Koinange Street Branch in favour of the Plaintiff; and **Cheque No. 000381** dated **7 October, 2007** for **Kshs. 1,100,000** drawn on the Plaintiff's Account with Barclays Bank of Kenya Limited, Queensway House Branch in favour of the Plaintiff; but that the cheques were dishonoured on presentation and returned with remarks "cheque stopped". Copies of the cheques were exhibited at **pages 61 and 62** of the Plaintiff's Bundle of Documents. In further proof of the stoppage, the Plaintiff exhibited a copy of the advice from their bankers, **Citibank** at **pages 64 and 65** of the Plaintiff's Bundle of Documents. **PW2** similarly urged the Court to enter judgment in the Plaintiff's favour against the Defendant in the sum of **Kshs. 3,875,612.10** together with interest and costs from **7 October 2004** as prayed in the Plea.

[15] The Defendant gave a detailed Witness Statement dated **14 March 2012** on which he relied. He stated that he was in a contract of employment with the Defendant, holding the position of a Logistics Manager between **1 November 1994** and **December 2003**. His salary as at **December 2003** was **Kshs. 365,971** per month. It was his evidence that in the month of **October, 2003**, he was scheduled to attend a training on safety, quality and operations in France, but before he could go for the said training, the Plaintiff's Managing Director, **Mr. Lamine Kane**, confidentially made a proposal to him in the form of

alternative employment, namely the running of the Plaintiff's **Thika Road Total Service Station**. He added that this was because he had remained in the same job grade and position for 9 years; and that although he was performing well, there was no room for growth for him. According to the Plaintiff, one of the assurances he was given was that he would maintain his employment stability with an income of **Kshs. 375,000**; an amount that was slightly higher than his monthly salary at the time.

[16] It was therefore his evidence that, on the strength of the information provided by the Plaintiff's Managing Director, he accepted the offer, and signed the Letter of Offer dated **3 December 2003** on **5 December 2003** (see **pages 20 and 21** of the Defendant's Bundle of Documents). He was accordingly served with a Termination Letter dated **30 December 2003** as he was to take over the running of the Station with effect from **1 January 2004**; but that within a short time of taking over that station, he realized that the representations made by the Plaintiff were not correct. For instance, he noted that the Station's rent and sales figures in the Letter of Offer and the Marketing License Agreement were derived from the **October 2003** Profit & Loss Account; and that the expenses were understated and the sales figures overstated relative to the actual trends. His conclusion was that this was done to accommodate the high rent payable to the Plaintiff and the unrealistic dealer's income.

[17] It was further the Defendant's evidence that when he undertook a physical stock check at the Station, he noted several anomalies including expired stock, which he brought to the attention of the Plaintiff for rectification, but no corrective action was taken. He drew the Court's attention to the follow-up letters he wrote to the Plaintiff about the situation at the Station. The said letters are at **pages 100, 102 and 312** of the Defendant's Bundle of Documents. It was thus his contention that the claimed sum of **Kshs. 3,875,612.23** was an overstatement. He added that, since the Marketing License Agreement was based on a false foundation, he requested the Plaintiff for a revision of the **October 2003** Profit & Loss Schedule to cater for the anomalies noted; but that, although the Plaintiff collected the necessary data from the Station, no action was taken. Instead, he received a letter from the Plaintiff on **16 June 2004** (at **page 296** of the Defendant's Bundle of Documents), demanding immediate payment of the product loan instalments that were overdue.

[18] The Defendant testified that, as he endeavoured to arrange for a meeting with the management of the Plaintiff, he was served with a letter by the Network Sales Manager terminating his dealership (at **page 310** of the Defendant's Bundle of Documents) and instructing him to clear the outstanding product loan of **Kshs. 8,875,000** within two weeks. The letter was followed by a physical stock-taking exercise, which is what provoked his letter **18 October 2004** (see **page 312** of the Defendant's Supplementary Bundle of Documents). In conclusion the Defendant stated that the amount of **Kshs. 3,875,612.23** being claimed by the Plaintiff was not a loan to him, but an erroneous debit balance in the Statement of the Plaintiff's Trading Account for the Station, after deducting the Product Loan from the account.

[19] I have carefully perused the record of pleadings and proceedings, and considered the written submissions filed herein by Learned Counsel; and it is evident therefrom that quite a number of the facts relied on herein are not in controversy. Those facts are that the Defendant was an employee of the Plaintiff, and served as the Plaintiff's Operations Manager between **6 July 1994** and **31 December 2003** when his services were terminated upon mutual understanding pursuant to a negotiated retirement package that would see him take over the running of the Plaintiff's **Thika Road Total Service Station**, Nairobi. The Defendant was put in occupation of the Station and, after training and a handing over process, he commenced operations at the Station on **1 February 2004**; having signed both the Letter of Offer and the Marketing License Agreement, which set out the terms of engagement between the parties.

[20] It is further not in dispute that the Plaintiff thereafter terminated the Marketing License Agreement on **7 October 2004** and took back the Station from the Defendant on **8 October 2004**, contending that the Defendant had breached the terms of their Agreement. In the same vein, the Defendant was required to repay the outstanding Product Loan of **Kshs. 8,875,000** within two weeks; which sum was thereafter reduced to **Kshs. 3,9756,12.19**; and is the amount that is the subject of the Plaintiff herein. Accordingly, although the Plaintiff listed a total of 11 issues for the Court's determination vide the List of Issues filed herein on **27 May 2011**, the same can be collapsed to the following five issues:

[a] Whether the Plaintiff made any misrepresentations to the Defendant in the Letter of Offer and the Marketing License Agreement; and whether the Defendant is entitled to General Damages for fraudulent misrepresentation.

[b] Whether the Plaintiff granted the Defendant a Product Loan of Kshs. 9,000,000; and if so, whether the sum claimed of Kshs. 3,875,612.19 is rightfully due to the Plaintiff on account of that loan;

[c] Whether the Marketing License Agreement was terminated by the Plaintiff in accordance with the terms and condition thereof; and if not, whether the Defendant is entitled to the sum of Kshs. 19,560,413.19 that is claimed for in the Counterclaim.

[d] Who is to bear the costs of this suit.

[21] Before delving into a consideration of the aforesaid issues, there is need to consider upfront a preliminary jurisdictional issue that was raised by the Defendant in his Written Submissions, namely, that in filing this case, the Plaintiff breached **Article IX - Part iv** of the Marketing License Agreement, which provided that any dispute arising out of the contract was to be referred to Arbitration; and that the Arbitral Award arising therefrom would be final and conclusive as to the rights of the parties. It is indeed that case that in Article IX(iv) of the Marketing Licence Agreement, the parties committed themselves to arbitration as their preferred dispute resolution mechanism. That Clause states as follows:

"If at an time during the continuance of this Agreement any dispute difference or question relating to the construction meaning or effect of this Agreement or of any clause herein shall arise between the parties, then the aggrieved or affected party shall give written notice of no less than 21 days to the other party herein. Each party shall within fourteen days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall thereafter be referred to the two arbitrators...The award of the arbitrator(s) shall be conclusive as to the rights of the parties and no recourse shall be had to a court of law save on a matter of legal interpretation..."

[22] Accordingly, it was the submission of the Defendant that, in the premises, the Court's role would be limited to enforcement of an Arbitral Award and no more. In support of this argument, the case of **Paul Chemunda Nalyanya vs. I. Messina Kenya Limited [2015] eKLR** was relied on, in which it was held that:

"The Court can only be asked to intervene by the Parties in aiding the process of arbitration; in enforcement of the arbitral award; or in the rarest of cases, in setting aside such an award. Parties cannot ignore a valid arbitration clause in their contract, and rush to Court seeking adjudication, in a dispute which is clearly subject to arbitration."

[22] Whereas I fully agree with the foregoing exposition of the law, it is instructive that Section **6(1) of the Arbitration, Chapter 49 of the Laws of Kenya**, also enjoins a Defendant who is desirous of invoking the Arbitration Clause to do without delay. That provision reads:

"A court before which proceedings are brought in a matter which is the subject of an arbitration shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay of proceedings and refer the parties to Arbitration unless it finds-

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

[23] There is no indication in the Defence that the Defendant was desirous of invoking their Arbitration Clause; but more importantly, he ought to have applied, at the time of entering appearance herein for the matter to be referred to arbitration, which he did not do. Instead, he unequivocally submitted to the jurisdiction of the Court as can be seen from paragraph 27 of his Defence and Counterclaim. Accordingly, I would be of the same finding as did the **Court in Agip (K) Limited vs Kibutu [1981] eKLR** in which the Court of Appeal expressed itself thus:

"...such an application must be made "before delivering any pleadings or taking any other steps in the proceedings". To make the existence of an arbitration agreement a ground of defence is, as was said by Sir Newham Worley Ag P in *Purshottam v Keshavlal* (21 EACA) 111 "selfdestructive", because it involves the delivery of a pleading before the application for a stay is heard. The only way in which an application for stay to enforce an arbitration clause in an agreement can be made is by notice of motion supported by affidavit; it cannot be disguised as a point of law contained in a pleading. As the application must be made before any step is taken in the suit, it cannot be incorporated in a pleading, delivery of which constitutes a step in the proceedings. In the instant case, not only was a defence delivered, but it included a counterclaim, which is a cross-suit, and which invokes the court's jurisdiction to deal with the dispute. Furthermore, there is no affidavit by the defendant on record to the effect that he is, and was at the commencement of the proceedings, ready and willing to do everything necessary for the proper conduct of the arbitration..."

[24] And as was observed in **Marge Enterprises Ltd vs Kenya Alliance Insurance Company Ltd [2006] eKLR**:

"Section 6 of the Arbitration Act does not render a suit filed in the existence of arbitration agreement frivolous or an abuse of the process of court ... but gives an opposing party a right to have those proceedings stayed and if found appropriate by the Court, to have the matter in dispute referred to arbitration."

The foregoing being my view of the matter, it is my finding that the arguments by the Defendant in respect of the Arbitration Clause are untenable, not only because it has been raised far too late, but also because he expressly submitted to the jurisdiction of the Court when he filed his Defence and Counterclaim.

[a] Whether the Plaintiff made any misrepresentations to the Defendant in the Letter of Offer and the Marketing License Agreement; and Whether the Defendant is entitled to General Damages for fraudulent misrepresentation.

[25] The Letter of Offer issue the document dated **3 December 2003** and is exhibited at **page 1** of the Plaintiff's Bundle of Documents. The salient features thereof is the offer by the Plaintiff to the Defendant of a Dealership to operate its **Thika Road Service Station**; together with a product loan of **Kshs. 9 million** to cater for the working capital. Other terms of the dealership were sales targets, royalty fees and diversification charges, at rates which were specified in the Letter of Offer. The Defendant was to consider those terms and take a decision whether or not to go by those terms. He signed the document on **5 December 2003** stating that:

"I JOHN MBITHI NGEA do hereby agree to fulfill the above conditions."

In his evidence before the Court, the Defendant confirmed that he read the Letter of Offer through before signing it.

[26] The Letter of Offer has to be understood alongside the employer-employee relationship that then existed between the Plaintiff and the Defendant; which was to be brought to a close, to pave way for the dealership agreement. The Defendant exhibited at **page 22** of his Bundle of Documents the letter dated **30 December 2003** by which that relationship was terminated. Some of the agreed terms, in addition to taking over the running of the Station aforementioned were:

[a] Payment of one a half months' basic pay in lieu of notice and fixed mileage.

[b] Payment of one and a half months' salary for every year worked;

[c] 50% write off of the Defendant's house loan

[27] The Defendant conceded that his services were accordingly terminated and that he was paid in line with aforesaid terms; and although in his evidence he alleged that others were paid off at the rate of 2 months' salary; and that his employment contract provided for 3 months pay in lieu of notice, this was a negotiated exit and the Defendant was afforded the opportunity of considering the terms carefully before acceptance. In any event, no proof was offered by the Defendant to the effect that others were paid at the rate of 2 months or that those others exited the employ of the Plaintiff at the same time or on similar terms. More importantly, the Defendant did not find it necessary to exhibit his Letter of Appointment in proof of his allegation that he was entitled to 3 months salary in lieu of notice. Thus, on that score, it cannot be said that the Defendant was misled in any way by the Plaintiff, either with regard to his terms for early retirement or the Letter of Offer for which the negotiated early exit was made. Similarly, the arguments by the Defendant that the dealership entitled him to a salary that was to be paid for by the Plaintiff are unfounded from the standpoint of the termination letter of **30 December 2003**.

[28] The Marketing License Agreement on the other hand was not signed until **1 February 2004** and provides for the finer details of the Dealership. It is exhibited at **pages 3 to 22** of the Plaintiff's Bundle of Documents. Both **PW1** and **PW2** confirmed that the terms of the Agreement were discussed and negotiated beforehand; and that it was clear that the **Kshs. 9 million** was to be availed in the form of products and equipment, some of which were already at the Station. It was therefore the contention of the Plaintiff that the Defendant, being an insider, had every opportunity of verifying for himself all aspects of the proposed agreement; and to check the performance of the station before appending his signature to the Marketing Licence Agreement.

[29] According to the Defendant, when he was approached in confidence by the Plaintiff's Managing Director, he was assured that he would maintain his employment stability as he was going to earn a monthly income of **Kshs. 375,000**; and that he would be advanced a product loan of **Kshs. 9,000,000** to ensure the Station had adequate working capital; which loan would be repayable in 6 years. So all these details were put down in writing in the form the Forecasted Operating Account(exhibited at **page 19** of the Defendant's Bundle of Documents) along with other documents, including the Profit and Loss Accounts, which the Plaintiff gave the Defendant to go and study for one week before making up his mind. It was the Defendant's evidence that it was on the basis of the projections and assurances he received from the Plaintiff's Managing Director that he took a decision to accept the Plaintiff's offer.

[30] The Defendant relied on the case of **Republic vs Registrar of Societies ex parte Justus Nyangaya & 3 Other [205] eKLR** and **Moses Gakuru Thuo & Another vs Kenya National Assurance Co. (2001) Ltd & Another [2011] eKLR** that damages are recoverable for fraudulent misrepresentation. The Defendant presented the argument that the Defendant is therefore entitled to **Kshs. 16,102,724**, which is what he would have earned for three years and 8 months, had he remained in the employ of the Plaintiff as its Logistics Manager, plus a sum of **Kshs. 3,096,774.19** being payment of his salaries as the Manager of the Station, making a total of **Kshs. 19,560,413.19**.

[31] There appears to be no dispute that the Defendant took over the running of the Station as a going concern from an entity known as **Netico**; which was then running a number of the Plaintiff's service stations on its behalf, especially in situations where individual dealers contracts come to an end or are terminated by the Plaintiff for breach of contract or otherwise. The Plaintiff's contention was that the **Thika Road Service Station** was healthy in every sense when it was handed over to the Plaintiff. There being no evidence to the contrary, I am not satisfied that the Defendant was in any way misled. Indeed, projections are simply that; an estimate or forecast of a future situation or trends based on the Station's performance; and therefore cannot amount to misinformation in the absence of facts to the contrary about the Station's performance vis-a-viz the projections.

[32] The Court has not lost sight of the Defendant's contention that after taking over the Station and undertaking a stock-taking exercise, he noted that the Profit and Loss Analysis figures had understatements with regard to the insurance premium, cash in transit, salaries and wages and product losses; and that the disclosed data entirely omitted the mandatory cost of annual internal audit, commission for sales, credit card charges on the Plaintiff's Bon Voyage fuel cards and provision for credit card fraud losses. It was further the contention of the Defendant that the Profit and Loss Analysis figures had understatements with regard to the insurance premium, cash in transit, salaries and wages and product losses; and that the disclosed data entirely omitted the mandatory cost of annual internal audit, commission for sales, credit card charges on the Plaintiff's Bon Voyage fuel cards and provision for credit card fraud losses.

[33] It is noteworthy however that the alleged omissions and suppression did not involve huge sums of money as to create a fundamental flaw in the projections provided by the Plaintiff. For instance, the Defendant alleged that the cost of travelling to the Plaintiff's head office to reconcile statements, of **Kshs. 2,000** was omitted; as well as the provision for credit card fraud of **Kshs. 8,000**. He also complained that the cost of annual audit of **Kshs. 100,000** among other such expenses were not factored in the Profit and Loss Account that he was shown. In the absence of a demonstration that these alleged variances would fundamentally alter the picture painted by the Plaintiff in the projections aforementioned, the Court is not in a position to find that there was any misrepresentation.

[34] More importantly, the Defendant expressly stated that the Plaintiff's Managing Director gave him the Profit and Loss Analysis on **31 October, 2003** to go and study for a week; and that when he noted that there was no allowance for annual audit fees, credit account management expenses, and computer expenses, he raised queries and sought clarifications and was informed that they had been grouped together under "**other general charges.**" It is clear then that these are matters that the Defendant signed the agreement with the full knowledge of, and cannot therefore claim that he was misled about. Accordingly, in respect of the first issue, it is my finding that there is no evidence herein that the Plaintiff made any misrepresentations to the Defendant in the Letter of Offer dated **3 December 2003** or the Marketing License Agreement dated **1 February 2004**. Consequently, it is my finding that the Defendant is not entitled to any award of general damages for misrepresentation.

[b] Whether the Plaintiff granted the Defendant a Product Loan of Kshs. 9,000,000; and if so, whether the sum claimed of Kshs. 3,875,612.19 is rightfully due to the Plaintiff on account of that loan;

[35] The Plaintiff's suit is premised on the contention that it gave a Product Loan of **Kshs. 9,000,000** to the Defendant on the basis of the Letter of Offer dated **3 December 2003** (at page 1 of the Plaintiff's Bundle of Documents) and the Marketing License Agreement dated **1 February 2004**. Both **PW1** and **PW2** was emphatic that the Product Loan was to be in the form of products to enable the Defendant continue operations; and indeed the Defendant conceded that it was an entry in the books of account. However, it was the contention of the Defendant that, upon taking over the Station and undertaking a stock-taking exercise, he noted the following discrepancies:

[a] That the figure of **Kshs. 1,410,000** for the value of the shop stock that was handed over to him on **1 February 2004** and posted in the Station's statement on **March 2004** was wrong, and that the actual physical stock value was **Kshs. 630,963.29**. Consequently, this mistake introduced into the Station's stocks and working capital a loss of **Kshs. 779,036.71** which had a direct impact on the Product Loan of **Kshs. 9,000,000**.

[b] In addition to the foregoing, the Defendant contended that the stock-taking procedure adopted on **31 January 2004** did not require the checking of expiry dates of the various products, and so it turned out that, of the total shop stock valued at **Kshs. 630,963.29**, items worth **Kshs. 73,952** comprising 12% of the total value were either damaged or had expired. Particulars thereof were set out at **pages 67-68, 70-73 and 102** of the Defendant's Bundle of Documents.

[36] The Defendant's evidence in the foregoing respects remains unassailed. Indeed he adduced credible

evidence to show that he promptly brought the foregoing anomalies to the attention of the Plaintiff and kept following up by way of reminders, but received no response from the Plaintiff. The Defendant relied on his letters dated **3 June 2004, 21 June 2004, 21 July 2004** and **31 August 2004**. The only response that the Defendant received was the Plaintiff's letter dated **7 October 2004**, by which the dealership was terminated on the grounds that the same was not profitable for the parties and was being operated in contravention of the Marketing License Agreement. With regard to the Product Loan, the Plaintiff stated thus:

"You need to furnish the company with a written plan within two weeks from the date of this letter on how you intend to settle the outstanding loan balance of Kshs. 8,875,000/="

[37] Whereas the tone of the letter dated **7 October 2004** was repeated in the Plaintiff's letter dated **9 November 2004**, the suit herein is not for **Kshs. 8,875,000** but **Kshs. 3,875,612.19** only. There appears to be no explanation in the evidence of either **PW1** or **PW2** as to how the aforesaid sum was worked out; save that the of the initial Product Loan of **Kshs. 9,000,000**, the Defendant is acknowledged to have paid one instalment of **Kshs. 125,000**. And in the Plaintiff it was stated that credit was given for the products and stocks that were handed over by the Defendant, worth **Kshs. 3,804,576.51** as well as a sum of **Kshs. 1,191,811.30** which appears unexplained by the Plaintiff's witnesses.

[38] Granted that the Defendant was not given **Kshs. 9,000,000** loan in cash at the commencement of the dealership but in the form of products and stock, the Plaintiff was under duty to demonstrate how the sum claimed was arrived at, and in so doing give satisfactory explanation about the expired stock and allegations of suppressions raised by the Defendant. This having not been done, I find no reason to disagree with the Defendant's assertion that the amount of **Kshs. 3,875,612.19** that is being claimed by the Plaintiff herein is not the remainder of the Product Loan, but could very well be attributable to an erroneous debit balance in the trading account records for the Station, which records were being maintained exclusively by the Plaintiff.

[39] It is noteworthy that the Plaintiff produced two cheques at pages 61 of 62 of its Bundle of Documents together with documents from its bankers (see pages 64-65), to demonstrate that the Defendant issued the same in acknowledgement of the outstanding debt. The Defendant's response was that the cheques were for the purchase of products for seven days as there was a long holiday in between; and that he stopped them because of the termination of the dealership by the Plaintiff; and the fact that he had suppliers to pay before the handing over exercise on 8 October 2004. That explanation was not refuted; and it is instructive that both cheques are were dated **7 October 2004**. Accordingly, on the evidence available it is my finding that the Defendant is not liable to pay the aforesaid sum of **Kshs. 3,875,612.19** to the Plaintiff.

[c] Whether the Marketing License Agreement was terminated by the Plaintiff in accordance with the terms and condition thereof; and if not, whether the Defendant is entitled to the sum of Kshs. 19,560,413.19 that is claimed for in the Counterclaim.

[39] By its letter dated **7 October 2004**, the Plaintiff brought to an end the dealership agreement with the Defendant of **1 February 2004**. That letter reads as follows in part:

"...After a detailed analysis of the business trends before and after your takeover of dealership at the said station, we have noted a serious decline in several business areas, a situation that is not profitable for both the company and yourself and contrary to the Marketing License in particular to provisions of Appendix IV...It is further noted that you have not been able to service the product loan of Kshs. 9 million advanced to you by the company at the commencement of your dealership. Given the foregoing, the company has decided to terminate your dealership at the above station ...to avoid further loss for both you and us, and you are therefore required to hand-over the station back to the company immediately..."

[40] Accordingly, the Agreement was terminated for two main reasons: namely failure by the Defendant

to meet the agreed sales targets; and failure by the Defendant to repay the Product Loan. The Defendant cited Article VIII(i), of the Marketing License Agreement to support his argument that he was entitled to one month's termination notice and relied on the case of **Hassan Zubeidi vs Patrick Mwangangi Kibaiya & Another [2014] eKLR** and urged the Court to uphold the principle that a party should not be allowed to benefit from his own breach of contract.

[41] Whereas under **Article VIII(i)** of the Marketing License Agreement it was stipulated that either party could terminate the Agreement without giving any reason by simply issuing one month's prior notice of such intention to terminate; **Article VIII(ii)** of the same Agreement recognizes that:

Licensor may at its absolute discretion terminate this License forthwith if the Licensee neglects or fails to perform or observe any of the provisions of this License or commits any breach of his obligations herein without limiting the foregoing, in any of the following events:

...

(j) If the Licensee's sales of petroleum products in any continuous period of three months fail to reach the minimum monthly litres stipulated in Article IV(ii) of this License."

[42] As has been observed herein, the Defendant signed both the Letter of Offer and the Marketing License Agreement in which the agreed targets were set out. It is further not in dispute that the Defendant failed to meet those targets. He conceded in his evidence herein, conceded that he indeed failed to meet the agreed targets; contending that the same were unreasonable, and that he had written a letter dated **21 July 2004** to the Plaintiff concerning the decline in sales and asking for intervention. In the premises, it is manifest that the Plaintiff was entitled to terminate the Agreement as it deed; and made it clear in the letter of termination dated **7 October 2004** that the said termination was pursuant to the aforesaid Article. Having so found, there would be no basis for awarding the Defendant the sum of **Kshs. 19,560,413.19** that he has claimed for in the Counterclaim.

[d] Who is to bear the costs of this suit.

[43] Granted my findings herein above that the Plaintiff has failed to demonstrate that the Defendant is under duty to pay the sum claimed of **Kshs. 3,875,612.19**; and that the Defendant has equally failed to establish his entitlement to the sums he counterclaimed herein, I would direct that each party bears own costs of this suit.

[44] Thus, in the result, it is my finding that the Plaintiff's suit lacks merit and is hereby dismissed; and that the Defendant's Counterclaim similarly fails and is accordingly dismissed. Each party to bear own costs.

Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE