REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 137 OF 2012

LIVINGSTONE JOEL WECHE

t/a WECHE TRANSPORTERS…….……PLAINTIFF

VERSUS

PZ/CUSSONS EAST AFRICA LIMITED…….DEFENDANT

JUDGMENT

1. By a plaint dated 24th February 2012 and filed in court on 21st March 2012 and subsequently amended on 17th June 2015 with leave of this court, the plaintiff, **Mr Wellington Joel Weche T/A Weche Transporters** instituted suit against the defendant **PZ Cussons East Africa Limited** seeking for damages for breach of contract, costs of the suit, interest on damages and any other relief that the court deems fit to grant.
2. The defendant entered an appearance on 12th April 2012 but never filed any statement of defence. Consequently, the plaintiff applied for interlocutory judgment which was duly entered on 11th May 2012 by the Deputy Registrar.
3. This matter therefore proceeded for formal proof after the defendant's efforts to set aside the exparte interlocutory judgment were thwarted by the ruling of Honourable Odunga J made on 5th November 2012 dismissing the defendant's application dated 27th September 2012 with costs.
4. The suit was heard on 21st April 2015 with the plaintiff being represented by Miss Omwakwe advocate whereas the defendant was represented by Miss Nasser.
5. The plaintiff testified as PW1 and stated on oath that he wholly relied on his witness statement dated 24th February 2012 which statement was adopted as his evidence in chief. According to the plaintiff, he entered into an agreement of transportation with the defendant on 1st May 2008. He produced the said agreement as P Ex 1. That he was to transport the defendant's goods using his own vehicles. That he had vehicle registration Nos KAC 642 S Mitsubishi Fuso, KAC 816 V Fh Mitsubishi and KZV 256 Mitsubishi. In addition, he hired another lorry in order to give the transport for the defendant's goods. He also hired a driver for each vehicle and two turn boys to load and offload the said goods. The vehicles in question used to park at the defendant's premises in Ruaraka and each morning they were loaded with the defendant's goods and transported and delivered to various destinations as directed by the defendant, to their customers. That he used to make an average of shs 980,000 per month. He produced copies of cheque payments made to him by the defendant as P ex 2. The plaintiff also produced copies of log books for the said vehicles used to transport the defendant's goods to its customers as P ex 3.

6. The plaintiff testified that on or about 5th November 2009 he was informed by his drivers that the Stores Personnel of the defendant had been directed by Mr Jack Odundo & Mr Kiili not to load any of the plaintiff's trucks with any goods and that this was on the orders of Mr Boaz Chimanzi.
7. That on 19th November 2009 the plaintiff met Mr Boaz Chimanzi who informed the plaintiff that indeed those were the defendant's Senior Management's orders. Mr Chimanzi then referred the plaintiff to a Mr Paul Odupa and Ms Justine Musau who suggested to the plaintiff that he accepts an increase from shs 75,000/- insurance excess to kshs 600,000 and which request the plaintiff requested that it be made in writing which the defendants refused to do. That although he was verbally informed that his transport services had been terminated, the defendant refused to put it in writing stating that they did not communicate to small people like the plaintiff. Thereafter, that the plaintiff met the defendant's Managing Director a Mr Odupa who was also the defendant's group distribution manager who instructed that the plaintiff's vehicles be fitted with car trackers at the plaintiff's own cost but that again the plaintiff was stopped form fixing the said to car trackers until he received confirmation from the General Manager.
8. That the plaintiff waited for communication from the General Manager to no avail and after two weeks, his vehicles were removed from the defendant's premises and were not allowed back in the defendant's premises.
9. The plaintiff then wrote to the defendants inquiring on why they had stopped assigning him work but he received no response. He also instructed his advocates to write to the defendants but still no response was forthcoming. That he made an average of 1 million a month and as a result, of the defendant's breach of contract, he was unable to make ends meet as he was not earning any income and he suffered financial and social embarrassment. He had a loan, to pay workers and other financial obligations which he could not meet yet to date there was not any notice in writing to terminate the contract. That the defendant had refused to resolve the dispute through Alternative Dispute Resolution or to formally terminate the contract compelling the plaintiff to file this suit.
10. The plaintiff also produced a letter dated 18th November 2009 complaining to the defendants of lack of work for his trucks as P exhibit 4 and the one dated 20th November 2009 as P exhibit 5 to which no responses were received. He also produced P exhibit 6 a letter written by his advocate to the defendants asking for unpaid dues for the past work done. He also produced P exhibit 7 letter from the defendants dated 6th January 2010 advising the plaintiff's advocate that the claim for breach of contract did not lie and a reply dated 20th February 2010 by his lawyers.
11. The plaintiff urged this court to find that the defendants had breached the contract hence they should pay him damages, costs and any other relief.
12. In cross examination by Mrs Nasser, the plaintiff stated that he had been in the transport business before the material contract and that prior, he had worked with DHL and others. He responded that the nature of his business required that he had trucks and drivers. He referred to Article 3 of the material contract and stated that it never showed that he was to be assigned work on a need basis or on notice. He denied that he used to be telephoned or notified before going to carry the goods. He maintained that his vehicles were stationed at the defendant's premises throughout for picking and delivering goods and that it was the defendants who suggested that the vehicles park at the collection premises. He denied that he had any issues with the defendants when they stopped assigning him work in November 2009. He denied being given any letter demanding for shs 650,000/- in insurance excess but that it was a verbal demand. He stated that clause 14 of the contract was clear that he could pay a maximum of shs 75,000/- insurance excess. He admitted that a theft took place in November 2009. He admitted that clause 13 provided for Alternative Dispute Resolution as a means of resolving disputes and that the plaintiff wrote to the defendant seeking for an amicable resolution to the dispute but the defendant refused d to respond.
13. In cross examination, the plaintiff stated that carjacking and loses in that kind of business was a normal occurrence. Further, that any issues concerning the losses were resolved and that the vehicles were parked at the defendant's premises to comply with loading and delivery times. He stated that the contract was for two years and was valid at the time it was breached.
14. The plaintiff also called PW2 Benson Silibwa who testified on oath that he knew the plaintiff.

The witness worked for the plaintiff as a driver for 8 years and that they did transportation work for the defendant. He relied on his witness statement made on 24th February 2012 as his evidence in chief. He confirmed the evidence of PW1 on the contract with the defendant and transport vehicles being stationed at the defendant's premises PW2 stated that he used to report to work at 8.00 am daily and in November 2009 they were informed by Jack Odundo and Mr Kiilu that Mr Boaz Chimanzi had directed them not to load Mr Weche's vehicles and indeed they were never given any goods to carry despite the fact that the tracks were stationed at the defendant's premises and PW2 and other drivers and loaders continued to report to work. That in December 2009 they were instructed to remove the plaintiff's vehicles from the defendant's premises at Ruaraka.

15. Since interlocutory judgment in default of defence had been entered against the defendant, they closed their case without calling any evidence (witness). The parties' advocates filed their respective submissions. The plaintiff's advocates filed their submissions on 28th October 2015 whereas the defendant's advocates filed theirs on 6th October 2015.
16. In the plaintiff's submission, his counsel relied on the plaint dated 17th June 2015 as amended, list of documents dated 24th February 2012, list of witnesses and oral evidence tendered in court by the plaintiff and his witness Mr Benson Silibwa and all the exhibits as produced. The plaintiff did not frame any issues for determination but submitted that clause 10 of the agreement dated 1st May 2008 was clear that the agreement would be terminated by either party giving the other one month notice in writing indicating intentions to terminate the agreement and such notice would be delivered at the defendant's registered offices by registered post or acknowledged hand delivery to the Managing Director's office.
17. On the other hand, the notice to the transporter would be served by registered post to his last known postal address and deemed to be received 4 days from date of posting. It was submitted that no such termination notice was ever issued to the transporter by the defendant company and further, that the defendant frustrated the plaintiff's efforts to have the dispute on termination of the agreement resolved amicably by remaining silent.
18. According to the plaintiff, the defendant made oral but unjustified demands for a sum of shs 650,000/- payable to the insurance company as excess and refused to make the demand in writing despite the agreement providing for a maximum of shs 75,000/-. It was further submitted that the defendant's failure to provide to the plaintiff goods to carry as agreed caused him damage and loss of about I million which he could not make in November 2009 hence he should be compensated for that loss of income as a result of breach of contract.
19. The plaintiff's counsel submitted that the agreement was to last for 2 years up to 1st May 2010 and that he should be compensated for loss of income for 6 months which is 6 million plus interest at court rates from 1st May 2015 till payment in full.
20. The plaintiff's submissions never applied any decided cases or authorities. Nonetheless, the advocate filed a list of 5 authorities without stating their applicability or relevance to this case. I shall however turn to that issue in detail later.
21. In the defendant's submissions filed on 6th October 2015, 4 issues were famed for determination and discussed.
22. On the first issue of whether the defendant in its conduct breached the terms and conditions of the transport agreement dated 1st May 2008 executed between the parties hereto, it was contended that there was no dispute that the agreement was executed between the parties hereto which was to be in force for 24 months. It was contended that there was no breach of the agreement on the part of the defendant but that it was the plaintiff who breached the agreement. It was also submitted that although the plaintiff claimed for loss of income amounting to shs 6,000,000 for six months, the same was neither pleaded in his plaint nor particularized.
23. It was further submitted that clauses 1 and 3 of the agreement only provided that the plaintiff would only provide transport of defendant's goods on a need basis and such instructions were to be in writing. That the two articles do not envisage a continued day to day engagement of the plaintiff by the defendant. That he was only expected to avail his vehicles to the defendant's premises once notified in writing by the defendant and that the plaintiff failed to produce such notification for 6 months period claimed hence any loss if any was suffered, was self inflicted by the plaintiff.

24. It was further submitted that the plaintiff had admitted that there were pertinent issues pending relating to loss of goods weighing 7 tons and which the plaintiff was obliged to indemnify the defendant but which he had not made good in accordance with the transportation agreement hence he breached he terms of the agreement and also failed to agree to pay excess fees of shs 75,000/- or shs 650,000 to the insurance for purposes of compensation to the defendant hence that issue was pending, which was as per Article 14 of the agreement of 1st May 2008.
25. 25. On whether the plaintiff is entitled to damages for breach of contract in the sum of shs 6,000,000. It was submitted that the agreement did not guarantee assignment of work to the plaintiff as alleged and that neither did the defendant notify the plaintiff of any engagements within the said period of 6 months. It was also submitted that the transportation lease agreement produced was drafted by the plaintiff himself and neither was it witnessed hence it was not in existence.
26. Further, that a mere letter of offer from the bank was not evidence of any loan advanced to the plaintiff hence he did not prove any loss capable of being compensated. Reliance was placed on **Chimanlal Meghji Naya Shah & Another V Oxford University Press(EA) Ltd HCC 566/2005** where a plaintiff sought damages/rent for an agreement of lease which was terminated prematurely. The court equated the lease in question to a contract quoted in Black's Law Dictionary definition of a liquidated claim as:

> "Claim ***amount of which has been agreed in the parties to action or is fixed by operation of law. A claim which can be determined with exactness from parties agreement or by arithmetical process or application of definite rules of law without reliance on opinion or discretion. Claim for debt or damages is liquidated in character if amount thereof is fixed, has been agreed upon or is capable of ascertainment by mathematical computation or operation of law."*** That the claim of shs 6,000,000 is not grounded on any agreement hence it should be dismissed.

27. On whether the plaintiff adhered to the agreed alternative dispute resolution mechanisms under Article 13 of the Transport agreement of 1st March 2008 it was submitted that no adherence to Alternative Dispute Resolution mechanism was done by the plaintiff before filing suit hence this suit is prematurely filed as the requisite procedure for mediation was not followed.
28. Finally, it was submitted that it was the plaintiff who breached Articles 4, 6, 13 and 14 of the agreement hence he is not entitled to the equitable relief as he has not come to equity by doing equity hence the suit should be dismissed with costs to the defendant.

Determination

29. I have carefully considered the plaintiff's claim as pleaded, his evidence and the evidence of this witness and the documents produced as exhibits. I have also considered both parties' advocates' rival submissions and the filed authorities. I have however noted that the plaintiff's counsel never made any attempt to explain to the court how the bulky authorities that she filed were relevant to her client's case. In other words, the plaintiff's counsel simply dumped her authorities to this court to make sense out of it. Nonetheless, this being a fresh hearing, this court is entitled to decide this matter whether or not the parties submit or file authorities.
30. From the above position, in my view, the following issues arise for determination:

1. Whether there was an agreement between the parties hereto or transportation capable of being breached.
2. Whether the defendants were in breach of the said Transport Agreement by failing to assign the plaintiff any work and without giving any notice of intention of termination of the agreement.
3. Whether the plaintiff is entitled to damages for breach of agreement and if so, how much.
4. What orders should this court make?
5. Who should bear the costs of the suit?

31. On the first issue of **whether or not there was transportation agreement between the plaintiff and the defendant**, the plaintiff pleaded and he testified, supported by his witness PW2 and produced an exhibit which is a transportation and lease agreement dated 1st May 2008 between the plaintiff and defendant and duly signed by the said two parties. Although the defendant's counsel in their submissions purported to state that the agreement was executed and drafted by the plaintiff and not witnessed, I find that submission frivolous since the rest of the defendant's submissions claim that it was the plaintiff who breached the agreement between the two parties. If there was no valid agreement between the two parties then what was the plaintiff being alleged to have breached? Further, I must mention that most of the submissions by the defence counsel were evidential in character and not based on legal principles. The defendant did not avail any witness to deny the averment by the plaintiff that the agreement produced was not entered into between the two. Counsel for the defendant could not, therefore, by way of submissions purport to state in his submissions that there was no agreement.
32. The plaintiff has interlocutory judgment in default of defence on record. The issue of him being in breach of contract is therefore not in issue since he produced the agreement and proved that it was executed by the defendant. The plaintiff was therefore formally proving the damages that he allegedly suffered following what he considered to be a breach of the transportation agreement between him and the defendant. Although the burden of proof lay on the plaintiff to show what damages he suffered as a result of the alleged beach, in this case, I find that the defendant's advocate by getting answers in cross examination from the plaintiff and by seriously submitting on that **" disputed"** contract, those submissions and answers in cross examination are not and cannot in law be substituted for defence evidence, save for any valid challenge on a point of law. This position is fortified by the decision in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the Court of Appeal stated as follows concerning the role of submissions:

> ***"So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."***

33. In this case, the plaintiff's evidence on the existence of the contract which he produced and which this court has had an opportunity to peruse is uncontroverted and unchallenged. In the end, I find that there was a valid agreement for transportation of the defendant's goods made on 1st May 2008 between the plaintiff and defendant and which was capable of performance and or being breached.
34. **On the second issue of whether the defendants were in breach of the said transportation and lease agreement by failing to assign the plaintiff any work and without giving any notice of termination of the agreement**, the plaintiff testified and referred to several clauses of his agreement with the defendant dated 1st May 2008. He stated, and his evidence was corroborated by the testimony of PW2 that the agreement was for 24 months from 1st May 2008. That he was to transport goods from the defendant's premises at Ruaraka to its customers as would be directed by the defendant. He produced copies of log books for the vehicles he used in the transportation. He also stated that on 5th November 2009 without any notice, the defendant's agents/servants informed his drivers that they would not be allowed to load or transport any goods and that his efforts to get written communication on the same fell on deaf ears even after meeting Mr Boaz Chimanzi the Managing Director. That thereafter the defendant's agents

started making unreasonable demands of shs 650,000 as excess insurance but that they refused to demand it in writing. His vehicles remained at the defendant's premises until December 2009 when his drivers were instructed to remove them. He also stated that the defendant's agents contemptuously stated that they would not communicate to small people like the plaintiff. That at one point when he met the Managing Director and Group Distribution Manager Mr Odupa, he instructed the plaintiff to fit his vehicles with car tracking devices at the plaintiff's own costs and again stopped him from doing so until he received confirmation from the General Manager. That he waited for such communication from the General Manager which was never availed until December when his vehicles were ordered to be removed from the defendant's premises. Further, that despite his concerted efforts of writing to the defendants to inquire on the issue, the defendants remained silent, not responding even on the mode of resolution of the dispute as provided for in the agreement, hence, the institution of this suit.

35. The above evidence has not been controverted by any other evidence except that the defendant's counsel as earlier stated has purported to controvert that evidence and contended in their submissions that it is the plaintiff who breached the agreement in that the agreement was not guaranteeing daily assignment of work; that the plaintiff was only to go to the premises upon written notification and that there were pending issues following loss of 7 tonnes of goods belonging to the defendant while in the custody of the plaintiff. Further, that the suit is premature as the Alternative Dispute Resolution mechanisms/procedures provided for in the agreement were never adhered to prior to the ruling of the suit herein.

36. I have carefully perused the agreement subject of this suit. It is dated 1st May 2008 and signed by Mr Lawrence Joe Weche Transporters and Vaneet Khurana Head of Supply Chain as the lawful representative of the defendant company on 19th May 2008 and 15th May 2008 respectively. Article 1 of the agreement provides in clear terms that the plaintiff was appointed as transporter in his own vehicles for the transport of PZ Cussons (the defendant's) goods for the agreed route or such other routes as shall from time to time be agreed in writing between the parties. The agreed routes are stipulated in Article 3(a) whereas the contract rates are provided in that table with provision for 5% incentive on the load delivered to the customers if the delivery is done within the stipulated lead times from the time of loading as per the appendix schedule 1. The said Article also provides that the company shall ensure that advance warning of maximum 24 hours will be given to the transporter prior to collection of goods.

37. Although the defendant claims in their submissions that the contract was not breached by non assignment of any work to the plaintiff during the month of November 2009 by virtue of the above clause, my humble view is that to so hold would be to misinterpret the intentions of the parties when they entered into the contract. The tenure of the contract was clearly 2 years from 1st May 2008 and not enforceable on a need basis. If that were to be the case, then there would be no need for the plaintiff to be required as a matter of fact, which evidence was not controverted, to station his vehicles at the plaintiff's premises to ensure that the loading and offloading of the collected/delivered goods was done in real time and more so, when an incentive of 5% was given to the plaintiff for meeting the real time requirements of delivery as per the Appendix Schedule 1 in the respective areas.

38. In addition, as the contract was clearly for 2 years, if for any good reason the defendant had no need of the plaintiff's trucks or had no goods to be transported for the 6 months period commencing November 2009 to the end of the contract in May 2010, there is no reason why the defendant did not communicate that decision to the plaintiff instead of remaining silent and frustrating the plaintiff. Further, there would in my view no need to provide for a one month notice of termination of the contract by either party if the contract was based on a need basis.

39. The plaintiff testified on oath and stated that he was treated with contempt when the defendant's officials refused to respond to any of his inquiries and attempts to resolve the issues if any by amicable settlement. That they said that they would not communicate with small people like him. Those officials nonetheless met the plaintiff and verbally made demands that he increases the maximum insurance excess from shs 75,000 to shs 650,000 and when he requested them to put that demand in writing, they rejected and remained silent about it. This court notes that the shs 75,000/- maximum insurance excess was part of the written contract. It could therefore only be varied by another contract in witting and not verbally.

40. In addition, the demands that the plaintiff fixes car tracks on his vehicles at his own cost was not part of the contract. It was a new term being introduced by the defendant's officials verbally. And despite his willingness to comply, he was stopped and told to wait for confirmation from the General Manager. That communication never came by.
41. Furthermore, Clause 10 of the Agreement was clear that the agreement may be terminated by either party giving the other party one (1) month's notice in writing (not in silence) indicating the intention to terminate the same. The mode of delivery of the said notice of termination in writing is also provided under the said clause/article. The evidence that is uncontroverted as adduced by the plaintiff is that no such one (1) month notice of termination of the contract in writing was given by the defendant of its intention to terminate the agreement. If the contract was on a need basis, then why would there be a clause for termination notice of one month? This court does appreciate that the agreement in issue was made by lay persons and there is no evidence that it was drafted with the assistance of any legal mind and therefore the possibility of ambiguous terms being present is very highly probable. Such clause that this court finds ambiguous and therefore contradictory to the subsequent clauses is the clause that ***the company shall ensure that advance warning of maximum 24 hours will be given to the transporter prior to collection of goods.*** It is not clear whether the warning was for the plaintiff not to collect any goods or for the plaintiff to collect goods.
42. In this case, therefore, It follows that the agreement in issue must be read as a whole in order to establish the real intentions of the parties. It would not be in order to isolate a portion of a clause in the agreement to give effect to the intentions of the parties. If the agreement was intended to be one on a need basis and not intended to be a continuous one for 2 years as stipulated in Article 2 thereof, and with a clause for notice of termination in writing and mode of delivery of that notice to the opposite party, then this court does not see why Clause 10 and Clause 15 would be present therein. Clause 10 thereof as stated is on termination of the agreement whereas Clause 15 stipulates that the defendant would conduct half yearly performance review on the transporter's performance of its obligations within the agreement in accordance with the performance measurements attached in Appendix Schedule C. The key performance indicators in Schedule Appendix 2 are:

1. ***On time delivery with a target of 100***
2. ***Damages free deliveries at 0***
3. ***Return of complete documents on time target being 100.***

43. There is no evidence adduced by the defendant to show that it had done a half year performance review of the plaintiff's performance of his obligations under the agreement and that it had found him incapable of meeting the targets as per the key performance indicators stipulated in Appendix 2, for it to claim that he had breached the terms of the agreement.
44. It is, therefore, on those grounds and reasons advanced that I find the defendant's arguments that it was the plaintiff who breached the agreement unsupported and unconvincing.
45. To the contrary, I find that it was the defendant who by its express conduct, breached the terms of the contract by failing to assign any work to the plaintiff; failing to give notice of termination of the contract and simply attempting to vary terms of the contract/agreement which was in writing through oral maneuvers. Although common law allows for a written contract to be changed by subsequent mutual agreement from time to time, that mutual agreement must be in writing. The argument by counsel for the defendant that there were pending issues of loss of the defendant's goods to the tune of 7 tones and that the issue of insurance excess of shs 650,000/- payable by the plaintiff had not been resolved, in my humble view, is an attempt by the defendant to impose to the plaintiff terms of a contract which did not form part of the contract. Furthermore, those allegations are emanating from the bar by an advocate through submissions and not from the defendant by way of tested evidence on oath. The role of counsel is confined to legal representation and advise and to submitting to clarify the issues on record and not to seek to adduce evidence on behalf of his client as was the case on the part of the defendant's counsel in this case which is very unfortunate. I find that part of the submission which the defendant's counsel gathered from answers in cross examination is no evidence for the defendant that there were issues of insurance excess and loss of the defendant's goods in transit pending between the

parties. If that was the case, the question is, why did the defendant not file a defence in time to that effect and seeking compensation by way of a counterclaim and secondly, why did the defendant not write to the plaintiff notifying him of its intention to terminate the contract as per Clause 10, on account of those alleged pending issues?

46. Section 98 of the evidence Act Cap 80 Laws of Kenya is clear that parole evidence shall not be admitted to vary the terms of a document which is required to be in writing. See also **Kinyanjui and another V Thande & Another [1995-98] EA 159.**

47. In my humble view, submissions by counsel from that bar cannot amount to evidence which seeks to assert a counterclaim for the alleged loss of goods belonging to the defendant while they were in custody of the plaintiff. Submissions are not the forum for lodging counterclaims. A counterclaim or set off has to be by way of pleadings and evidence adduction. In this case I find no counterclaim filed by the defendant and therefore I reject that submission and dismiss it. In addition, from the payment vouchers produced in evidence, it is clear that where there was any alleged loss of goods, the plaintiff was always surcharged for the loss and the value thereof deducted from the amount due and payable for the month after deliveries/loss. It cannot therefore be true that there was any other issue pending between the parties, and which is not apparent on record.

48. On the issue of Alternative mechanisms of resolving the dispute between the parties hereto, Clause 13 of the agreement proposed the manner of resolution of any dispute between the parties to the agreement. However, that clause, in my view, does not oust the power and or jurisdiction of this court to hear and determine the dispute for reasons that the plaintiff testified and produced documents showing his concerted efforts and communication in writing to the defendant, seeking for an amicable settlement to the issue but the defendant contemptuously remained silent and its agents told him verbally that they could not communicate with the plaintiff who was such a small person to them. With that kind of bossy attitude exhibited by the defendants agents/officials against the plaintiff, what could the plaintiff small person have done? The answer was to revert to the court for resolution of the dispute since even the so called Alternative Dispute Resolution mechanism proposed in accordance with the mediation procedure was not proved to have existed. There were no proposals as to the mediation procedures to be applied in case of a dispute arising from enforcement of the material agreement.

49. Furthermore, this court does not see how the Managing Director of the defendant would be the nominated officer responsible for seeking resolution of the dispute. Was he going to be a neutral mediator when he was an interested party to the outcome of the dispute? Would he not be a judge in his own cause? In my view, the jurisdiction of this court which is granted by statute and the Constitution was not ousted by that vague clause which did not state where the mediation procedures applicable would come from. Accordingly, I find that the plaintiff was right in seeking the remedy from an established court of law since the defendant chose to remain non committal and non responsive to all correspondence send to it by the plaintiff. It was not until the plaintiff threatened to sue the defendant-that Paul Odupah by his letter of 6th January 2010 wrote to the plaintiff's counsel claiming non clearance of accounts for November 2009 was due to the plaintiff's liability for loss of several customers' goods which had not been delivered. The said letter also indicated that the plaintiff had already been paid November dues less what was still under reconciliation.

50. The above position then leads me to discuss the issue of whether in view of the clear breach of contract by the defendant that is, failure to notify the plaintiff by giving him one month notice of its intention to terminate the contract and instead, remaining silent on that issue of termination, the plaintiff suffered any loss and damage and if so, how much damages would the plaintiff be entitled to?

51. In the plaint dated 24th February 2012 and as amended on with leave of court, the plaintiff pleaded that he had lost profit or income of approximately kshs 1 million following breach of contract by the defendant. He also claimed that he suffered financial stability and may not recover at all. In paragraph 12, the plaintiff claimed that he was earning approximately kshs 1 million per month hence he claimed damages for breach of the contract that was never terminated until 1st May 2010. The period between November 2009 and 1st May 2010 is 6 months. If the plaintiff was earning shs 1,000,000 per month, then according to his pleadings and testimony, he would be entitled to shs 6,000,000 per month, until the contract was

terminated on 1st May 2010.

52. The question is, would the plaintiff be entitled to such sum of money as pleaded and testified on? The plaintiff produced remittance advise vouchers as P Exhibit 2 which showed that several vouchers would be prepared according to the delivery of goods and he would be paid the amounts due, less lost goods. Going by the remittance advices produced for July 2009, August 2009, February/March 2009, April 2009 , May 2009 and June 2009, it is clear that the plaintiff was paid according to the deliveries and on a monthly basis. For example in July/August he had 8 deliveries and was paid kshs 809,629.70. In February 2009 he had 6 deliveries and he received kshs 919,343.80. In March 2009 he had 9 deliveries and received 843,191.55. In April 2009 he had 12 deliveries and was paid 1,122,185.70 together with one delivery in February 09 less lost goods. The plaintiff calculated his lost earnings based on what he used to earn per month. However, the payment vouchers clearly show that payment was in accordance with the specific deliveries and in some cases, in one month, he could be paid for deliveries made the previous month or several other dates falling in different months.
53. In my view, there is clear evidence that before the defendants completely stopped assigning the plaintiff goods to transport, the plaintiff earned between 809,000 and 1.21 million in a month depending on the number of deliveries and those payments were made every end of the month.
54. A claim for damages for breach of contract is a liquidated damage which must be specifically pleaded and strictly proven. In this case, the plaintiff pleaded that he used to earn about 1 million and that he lost this amount for six months. He also testified that his tracks used to stay at the defendant's premises to load and deliver goods in time. That evidence was never controverted.
55. However, although the plaintiff claimed for shs 6,000,000 to cover six months lost income, I am unable to award him those damages as claimed for reasons that upon realizing that the defendant was in breach of the agreement and was no longer assigning him any work during the month of November 2009, which information reached him through his drivers on site, and asking him to remove his trucks from the defendant's premises in December 2009, the plaintiff ought to have mitigated the damages that he was suffering following non assignment of work. He could not be expected to have sat there and mourned over the breach of agreement. He should have looked for alternative contracts elsewhere. This was not a contract of employment but a contract to provide transport services. It was therefore a service contract and not an employment contract as was in the case of **Bonventure Wanjala Kimasis V Shanga Engineering Ltd IC cause No. 372 of 2011** (**Marete J**) cited by the plaintiff, where general damages could be awarded for the remainder of the contract period as provided for in the statute. This was a service contract for transportation of goods. In **African Highland Produce Ltd V John Kisono CA 264/99 [2001] e KLR the** Court of Appeal held that:

> ***"the trial judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff was only entitled to loss of user for 21 days which period was necessary to effect in full all repairs on his BMW car. The judges of appeal allowed the appeal on the ground that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. The court further stated that the question of what a plaintiff would do in mitigation of loss or damages is not a question of law but one of fact in the circumstances of each case and the burden of proof is upon the defendant***. **(See also Halsbury's Laws of England VOL 11 page 289 3rd Edition 1955**."

56. The Court of Appeal in the above case further stated that:

> " ***it was the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim damages of any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by breach of contract or a tort, and he is then bound to get, as best as he may, not only in his own interest but also in those of the defendant. He is, however, under no obligation to injure himself, his***

character, his business or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages, or embark on dubious litigation. The question of what is reasonable for the plaintiff to do in mitigation of his damages being one of fact and not law, and depending on the circumstances of each particular case- and the burden of proof being upon the defendant."

57. I am also inclined to accept the decision in **Chiman lal Meghji Naya Shah** (supra) where Warsame J was clear that:

> ***" In law, a party faced with a breach of contract is obliged to mitigate his/her loss so that the liability and obligations of the parties is minimized with no much detrimental effect…."***

58. In that case, the landlord sued a tenant for damages for breach of contract. He sought rent for the remainder of the period of the tenancy which was terminated in breach. The court held inter alia…….

> ***"……..there is no evidence to show, that the plaintiffs have not gotten another tenant for the remaining period. It is incumbent upon the landlord of a premises to take the necessary steps to look for tenants. They cannot just sit back and say the tenant who left would have to shoulder the rent for the remaining lease period……the landlord cannot perpetually wait and waste the premises simply because he had a fixed lease with no termination clause……"***

59. In the instant case, there is evidence that the defendant breached the contract by unilaterally terminating it without giving the required one month's notice in writing and delivered to the plaintiff in the mode spelt out in the contract. There is however, no evidence that the plaintiff could not get alternative contract of transportation. He never stated that he looked for that alternative work and failed hence, the total loss for 6 months for which the contract was to terminate. It would indeed be a great injustice if this court was to order the defendant to pay damages for the whole period of 6 months as there was a possibility of the plaintiff being contracted to transport goods to some other person. There was also no evidence that the contract between the parties hereto tied the plaintiff transporting only goods belonging to the defendant during the subsistence of that contract and that therefore the plaintiff was bound to hang onto the defendant without the slightest opportunity to get alternative contracts for that period.
60. In this case, although the plaintiff alleged that he suffered financial embarrassment as he could not meet his obligations of paying workers and repaying a bank loan, he did not call any evidence that he owed any worker any sums of money due to the breach of contract. Furthermore, there was no documentary evidence that the plaintiff had taken any loan from the bank and that he was unable to repay it due to the breach of contract. Application for a bank loan is not the same as a bank loan or default in repayment. This court cannot award special damages based on an assumption. As contrasted from the case of **Gateway Insurance Company Ltd Vs Simon Muchiri Kahoro HCCA 572/2009** cited by the plaintiff's counsel, the claim therein was for total value of stock in trade insured together with fixtures and household goods worth kshs 1,650,000 following destruction of the plaintiff's property which were insured by the defendant (appellant). That contract of insurance is totally different from this case where the contract is for provision of transport services. That notwithstanding, *the learned Judge in that case did observe that a party who beached his part of lawfully contract by refusing to honour its terms by unreasonable delay should be required to compensate for the loss incurred thereby*. What the judge was concerned with in that case is the quantified loss which was proven.
61. In this case, although the plaintiff has claimed for six million Kenya shillings being the loss he suffered until the contract legally came to an end, Iam unable to find for him for that sum. Instead, In view of the fact that the contract provided for one month notice of termination and the mode of service of the contract was also specifically provided, which notice was not given by the defendant, I find that the plaintiff is entitled to income /earnings for one month in lieu of notice,

this being any other relief that this court deems just and appropriate to grant as prayed for in prayer No. (d) of the plaint. As the estimates for monthly earnings were provided, though not uniformly, taking the average for three months vouchers produced in evidence, I would award the plaintiff damages of **Kshs 950,386.**13 being the average of **809,629.70;919,343 and 1,122,185.70.**

62. For those reasons, I find that there was a valid service contract between the plaintiff and the defendant which the defendant unilaterally breached. However, the plaintiff has failed to prove that he is entitled to damages for the six months remainder of the contract period as a result of the breach of contract. However, Iam satisfied that the plaintiff was highly inconvenienced by the defendant's failure to give him any work for transportation for the month of November 2009. There is clear evidence that the plaintiff arbitrarily, unilaterally and without any notice terminated the contract and in December, 2009 evicted the defendant's Lorries from its premises. In **Arch. Katerega & Another =vs= Uganda Posts Ltd (2012) UG COMMC 70** the High Court of Uganda stated interalia that an award for damages for breach of contract is made to compensate for the inconvenience and hardship subjected to a party for failure to pay.
63. In the end, I hold that the plaintiff has established his claim against the defendant on a balance of probabilities on the prayer for any other remedy or relief that the court deems fit and just to grant. I award him damages equivalent to one month's earnings in lieu of Notice of termination of contract totaling Kshs **950,386.13**. I also award costs of the suit to the plaintiff and interest at court rates on the sum awarded from date of filing suit until payment in full.

Those are the orders of this court.

Dated, signed and delivered at Nairobi in open court this **31st day of May 2016.**

R.E. ABURILI

JUDGE