REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO 462 OF 2008

JEDUS COMPANY LTD

T/A MBAGATHI WAY PETROLSTATION…..……..
……PLAINTIFF

VERSUS

CHEVRON KENYA LTD

(FORMERLY CALTEX OIL LIMITED)……..…DEFENDANT

JUDGEMENT

1. The Plaintiff had instituted a claim against the Defendant vide its Plaint dated 14th August 2008. The claim arose out of two (2) agreements between the parties dated 8th August 1989 and 1st October 2000.
2. The claim by the Plaintiff was for loss of business for the period where the Plaintiff claimed that the Defendant did not supply products during the pendency of the Operator's Agreement, as well as costs for improvement and development carried out on the property known as LR No 209/10605 where the service station was situated.
3. The total claim made by the Plaintiff against the Defendant was for Kshs 9,450,000/-. These averments and claims were reiterated in the Reply to Defence to Counterclaim dated 10th November 2009.
4. The Defendant denied the allegations raised by the Plaintiff in its Defence and Amended Counterclaim dated 24th November 2008. Therein, it was contended that the Plaintiff's claim was frivolous and vexatious, bad in law, and that it raised no reasonable cause of action.
5. Further, it was reiterated in the Counterclaim that the Plaintiff was in breach of the terms and conditions of the Operator's Agreement dated 1st October 2000, and that in any event, the agreement had terminated in October 2006, and that the Defendant was under no obligation, under contract or howsoever, to the Plaintiff to supply it with products at the expiry of the contract. It was alluded that the Defendant suffered business loss, loss in costs for utility bills and replacement costs all amounting to Kshs 23,722,554.47 excluding interests on the amount, and inclusive of brand equity losses estimated at Kshs 9,000,000/-.

The Plaintiff's Case

6. The Plaintiff called upon one witness, Mr Duncan Murigo, the Managing Director of the Plaintiff Company. He relied upon his statements dated 11th December 2011 and 8th February 2012and

which were admitted into evidence at the hearing of the Plaintiff' case on 2nd July 2012. He, DW1, further reiterated that the parties had entered into an agreement (hereinafter referred to as Operator's Agreement) on 8th August 19889 and 1st October 2000.

7. On 29th November 2006, the Plaintiff issued a ninety (90) day termination notice to the Defendant as per the Operator's Agreement Clause 14(b) of the Operator's Agreement with effect from 1st December 2006. On 23rd February 2007, the Defendant accepted the notice of termination, and further indicated that they would send their officers to the service station on 28th February 2008 in order to facilitate the handover of the station to the Defendant.
8. They, however, visited the service station on 31st May 2007. The Plaintiff contended that during the period of December 2006 and 31st May 2007, they incurred loss in business revenue to the tune of Kshs 4,650,000/- and that as such, they were liable to be compensated for such loss.
9. They loss in business was attributed to the failure by the Defendant to supply it with products. As with regards to costs incurred in the development and improvements carried out on the service station in the amount of Kshs 4,800,000/-, it was contended that these improvements and developments were sanctioned by the Defendant, as they had been duly notified in the letter dated 16th November 1995 and pursuant to the agreement dated 8th August 1989.

The Defendant's Case

10. The Defendant called upon two (2) witnesses, Gibson Mutua and Arthur Ombima, who relied on their statements dated 7th May 2012 and 7th February respectively. DW1, Gibson Mutua who was the Defendant's Networks Manager, reiterated that he dealt with leases of service stations. He stated that the issues with the Plaintiff emanated from the time that it started issuing dishonoured cheques and refusing to stock-up on the Defendant's products.
11. Further, he stated that under the Operator's Agreement, any structures that the Plaintiff intended to put up on the service station were to be approved by the Defendant, and that, all costs incurred were at the expense of the Plaintiff.
12. It was reiterated that there was no consent or approval that had been authorized by the Defendant, and as such, they were not entitled to compensate the Plaintiff for costs. With regards to the handing over that was intended to take place on 28th February 2007, it was averred that upon visiting the service station, there was no one present for the handing over, and that subsequently, through his lawyers, the Plaintiff wrote to the Defendant on 7th March 2007, stating that it was not ready to hand over the service station without the issue of compensation being addressed.
13. The Defendant responded in a letter dated 20th March 2007 that they intended to visit the service station for a second time for the hand over, which was followed up by a subsequent visit to the service station on 21st March 2007. As on 28th February 2007, no one was present for the handing over. The handing over was finally done on 31st May 2007. It was further stated that the Defendant did not at any time fail to supply the Plaintiff with products, and that this only happened after the Plaintiff's line of credit was terminated, and further, that the Operator's Agreement did not allow for the Plaintiff to be supplied products by its competitors.
14. On his part, DW2, the Territorial Manager for the Defendant, and whose role was to supervise dealers who were managing the Defendant's service stations, reiterated that the dealt with the Plaintiff from 2006 to mid-2007. He stated that the claim for compensation by the Plaintiff was invalid, for the reason that it was not mutually agreed upon that the Defendant was to compensate the Plaintiff for costs for development and construction at the service station and without prior approval of any such developments. Further, it was stated that between 28th February 2007 and 31st May 2007, the service station was neglected, and that the Defendant sustained damage to its reputation and loss of business. And further, and with regards to the compensation claim by the Plaintiff, DW2 stated that the Plaintiff was responsible for their own losses, and that the claims were unjustified under the Operator's Agreement.
15. I have considered the Plaintiff's claim instituted through its Plaint dated 14th August 2008 and the Reply to Defence to Counterclaim dated 10th November 2008, and the documents in support of the claim, to viz, the witness statement by the Plaintiff dated 11th December 2011 and 8th February

2012, the Bundle of Documents dated 8th November 2010, the Supplementary Bundle of Documents dated 13th March 2013 and the oral arguments made before Court on 2nd July 2012, 8th June 2015 and 9th February 2016. Further, the Court considered the Defence and Counterclaim filed by the Defendant on 25th November 2008, the Bundle of Documents dated 5th October 2012 and Supplementary Bundle dated 16th May 2012, as well as the oral dispositions made by the two (2) witnesses on 9th February 2016.

16. There are three (3) issues for contentions that arise between the parties; (1) whether the Plaintiff or the Defendant was in breach of the Operator's Agreement dated 1st October 2000; (2) whether the Plaintiff is entitled to compensation for costs for the development and construction carried out on the service station; and (3) whether the Defendant's Counterclaim raises reasonable cause of action.

17. In following the Operator's Agreement signed by the parties, each of the parties had certain obligations that were to be carried out respectively. With regards to the Plaintiff, as the dealer, it had obligations under the various clauses of the Operator's Agreement. These included, in regards to issues relevant to the instant matters, providing guarantee and security under Clause 3, terms of the dealership under Clause 6, which included, purchasing exclusively from the Defendant for products, and other obligation as stated under Clause 8 of the Operator's Agreement. It was the Plaintiff's contention that the Defendant had failed to supply products to it and hence loss of business, and further, that it had failed to compensate it for costs incurred in the development of the service station.

18. However, it was the Defendant's assertion that they had not failed to supply the Plaintiff with products, but that the Plaintiff had, on different occasions, issued cheques that had been dishonoured upon presentation for payment. In a letter dated 11th September 2002, the Defendant wrote to the Plaintiff stating as follows;

"As you will be aware, you are currently trading on cash or bankers cheque basis. Your order for September 10th 2002 was for Kshs 675,865.70 whereas your bankers cheque received the same day was for Kshs 599,934.00. The money paid is not adequate for us to supply the order and still maintain the total outstanding in your trading account (Ksh 1,991,723.64) to the bank secured level of Kshs 1.5 Million. For this reason, we are unable to supply the order unless we receive further payments from you to make the account good. Once again we wish to reiterate our concern that you have continued to breach Clause k(i) and (ii) of the Operator's Agreement that you have with us by running out of fuel since Monday September 9, 2002 consequences of which you are aware of."

The Defendant had earlier written a letter on 10th September 2002, in which they had stated inter alia;

"We note with disappointment that despite our past correspondence and reminders, you have continued to run out of products for resale at your service station contrary to clause k(i) of your Operator's Agreement with us dated October 1, 2000."

On 20th January 2003, the Defendant wrote the following letter to the Plaintiff;

"We have confirmed that from Saturday 18th January 2003 afternoon up to today the 20th January 2003 your station has not been having diesel. The frequency of product stock out at your service station is alarming and is totally unacceptable to Caltex as it's a contravention of Clause 8(k)(i) & (ii) of your operator's agreement with us, consequences of which are well known to you."

19. It would appear that the Plaintiff had failed to make any orders for products for resale at the service station from the Defendant. The Court would therefore be hard pressed to understand how the Plaintiff could claim for loss of business, if there was no business running in the first place. The Defendant has given a plausible explanation as to why they did not supply products to the Plaintiff: on several occasions, namely on November 2002 and 1st January 2003, the Plaintiff

issued dishonoured cheques for Kshs 649,873 and Kshs 744,535.95 respectively. These action were subsequently detrimental to the line of credit that they had with the Defendant which was not restored. They thus operated on a cheque and cash basis, of which still, the Plaintiff was unable to sustain. Following this, the Plaintiff was not supplied with products as per the letter dated 11th September 2002, as they had not fully paid up for the products they had ordered for.

20. In reading Clauses 6(a)(iii) as well as 8(k)(ii), the Defendant was not obligated to supply the Plaintiff with products, if it was beyond the Defendant's purview to do so. Under Clause 6(a)(iii), it was provided that;

"CALTEX shall not be obliged to supply petroleum products to the DEALER if the DEALER fails or refuses and/or neglects to comply with any provision of this agreement. CALTEX shall not be liable for any failure to sell and deliver any petroleum products ordered by the DEALER if such failure is due to any cause beyond the control of CALTEX or if the DEALER failed to comply with any of his obligations under this agreement**.**

21. Further at Clause 8(k)(ii), it was provided that;

The dealer shall be duty bound to;

(ii) ensure that product stock out do not occur except for reasons of CALTEX's inability to supply or other circumstances beyond the control of CALTEX or the DEALER.

22. The Defendant was justly apprehensive in cutting off the Plaintiff's line of credit, and that is why it revised the terms and decided to supply only on a cash or bankers cheque basis. The Plaintiff had on several occasions failed to pay for the products it had ordered for, necessitating the Defendant to take the actions that it did, on insisting for either cash or banker's cheque for the order of products.

23. It therefore, did not fail to supply products within the provision of Clause 6(a)(iii), and neither did it fail to comply with Clause 13(b) which provided that;

Should CALTEX be unable to supply the DEALERS requirements of CALTEX petroleum products due to the above mentioned causes (under Clause 13(a)), the DEALER may, upon receipt of written consent from CALTEX buy from other sources such quantities of petroleum products required for the DEALER's retail needs that CALTEX is unable to supply.

24. The Plaintiff has been unable to establish from its claim that the Defendant failed to honour its obligations under the Operator's Agreement to supply it with products, and that thereby, it suffered loss of business. As has been established otherwise, it was the Plaintiff, by its own misdeeds, that failed to order for products or to pay for the products that it had ordered from the Defendant, and thereby caused upon itself loss of business.

25. Further, it has not been able to show that it took adequate measures to ameliorate the situation at hand, by properly and sufficiently taking up the two (2) other options that were available to it, that is to say, to pay by banker's cheque or by cash, for the products to be supplied by the Defendant. To put it in more succinct terms, the Plaintiff was the mastermind of its own shortfall, and thus cannot make for any claims of loss of business against the Defendant.

26. The issue of compensation for costs incurred for the development of the service station was also raised by the Plaintiff. On its part, the Defendant only admitted to the construction of the garage shed that had been sanctioned through the agreement dated 8th August 1989.

27. In the said agreement, at Clause D, the Defendant agreed to the request by the Plaintiff to construct a garage shed, but such was to be in accordance with other terms under the agreement. At Clause d(3), the Plaintiff was to be the costs of the construction, as was stated *inter alia*;

3. The entire cost for this construction work and any planning approval fees shall be borne and paid by the operator.

28. Under Clause 18 of the Operator's Agreement, it was provided that;

No amendment, variation or modification of the Agreement shall be legally binding on either party hereto unless reduced to writing and signed by both parties who in the case of CALTEX shall not include any person who is not a director of CALTEX.

The terms of Clause d(3) resonate with the terms as stipulated in Clause 18 of the Operator's Agreement, in that, any variation of the terms of the Operator's Agreement had to be reduced in writing. Such was the case when on 8th August 1989, the Plaintiff agreed with the Defendant to construct the garage shed, as per the terms stipulated therein. Further, and as reiterated by the Defendant, there was no agreement that allowed the Plaintiff to construct a restaurant and bar, and that the same was therefore, in breach of the terms of the Operator's Agreement, more particularly Clause 8(i)(i) & (ii) which provided that;

Not without the prior consent of CALTEX in writing;

i. **make any alterations (which include additions, relocations and removals) to, upon, within or about the service station.**
ii. **Change or modify the colour scheme of the interior or exterior of the service station or alter or modify the size, location or composition of any sign, symbol, mark or advertisement upon, within or about the service station.**

29. The Defendant further relied on a letter dated 20th August 2000, in which it was stated *inter alia*;

"We refer to the above and several discussions that we have held since your station was revamped into the new image and wish to note our concern about how you are operating restaurant. You will agree with us that it does not meet Caltex operating standards, which we must all adhere to. Due to the forgoing, we wish to advise that Caltex would like you to wind up the restaurant operations as we sort out our investment(s) proposals. You have got up to 30th October 2000 to clear up and close the facility to enable us develop a better facility that conforms to Caltex operating standards."

By this letter, the Defendant was acknowledging two (2) things; (1) that it was aware that the Plaintiff was operating a restaurant business and (2) that the same may have been approved by the Defendant. However, what is not clear is of which of the parties had expended costs in either the construction of or revamping of the restaurant, if the same had been *in situ*.

30. From the documents presented before the Court, it is not clear what the position was at the service station prior to the letter dated 20th August 2000. What has been presented, however, was the letter dated 16th November 1995, in which the Defendant's Retail Marketing Manager states inter alia;

"We refer to our earlier correspondence and discussions on the subject matter and the agreement on the garage shed and snack bar and hereby address your questions and fears regarding the garage and snack bar agreement in which Clause 4 states "upon termination of the Operator's License, the operator shall, if required by Caltex, to demolish the shed and clear all materials to restore the site to the condition it was before construction."

Further, in the letter addressed to the Plaintiff dated 13th December 2000, the Defendant further demands of the Plaintiff to remove the restaurant operations on the service station. The letter reads in part;

"Therefore you are hereby notified that we require vacant possession of the space to commence the development works before or by 5th January 2001."

31. It would seem therefore that prior to the letters by the Defendant dated 20th August 2000 and 13th December 2000, that they were aware that the Plaintiff was running a restaurant business at the service station. Further, and from the letter dated 16th November 1995, the Plaintiff and Defendant may have entered into an agreement for the construction of a snack bar, which may be construed to have been a restaurant. If there was an agreement, of which none has in the instant been presented to the Court, then the same would be deemed to have been subject to the conditions reiterated in the agreement for construction dated 8th August 1989. But this would only be an issue of conjecture, as none of the parties has been able to produce before the Court such agreement. In the absence of such agreement therefore, the Court would not be able to make an opinion based only on the agreement that was presented of 8th August 1989.
32. What may be discerned from these letters was that the Defendant may have been aware that the Plaintiff was operating a restaurant, and that they sought vacant possession in order to allow them proceed with developments that they deemed as being in conformity with its standards. On its part, the Plaintiff has not shown that it had acquired any written consents from the Defendant to construct the restaurant, if such consent was required in the first place and what the terms of agreement were in relation to such developments and construction. In the absence of such succinct and/or explicit terms of engagement, the Plaintiff would be basing its claim purely on assumptions, which are neither founded nor submitted for admission in Court. The agreement dated 8th August 1989 provides for the construction of a garage shed, with terms of engagement contained therein. Nowhere does it state or provide for the construction of a restaurant or snack bar, and it would be deemed therefore, that the same, in absence of contrary evidence thereto, was constructed without the written consent of the Defendant. No consent has been shown to have been given by the Defendant for the construction of other amenities on the service station, and hence, the Plaintiff cannot make claim for costs incurred. As provided under Clause 20, there was exclusion of implied terms, and that the Plaintiff had to conform to the provisions of the Operator's Agreement. Therefore, without any consent as provided under Clause 8(i)(i) & (ii) and as read together with Clause 18, the Defendant would not be liable for any costs incurred in either the construction or development on the service station, or their demolition thereafter.
33. Resorting to the Defendant's Counterclaim, it was stated that the Plaintiff opted to terminate the Operator's Agreement by invoking Clause 14(b) thereof. The said Clause reads;

Either party shall have the right to terminate this agreement by giving the other three (3) calendar months' written notice.

In its letter dated 29th November 2006, the Plaintiff wrote to the Defendant as follows;

"Accordingly and as provided under Clause 14(b) of the Operator's Agreement in force, we hereby give you three months' notice effective from 1.12.2006 to terminate the said Operator's Agreement. For the reasons given above, we make a request to vacate the premises before the expiry of the three months."

The Plaintiff had earlier written to the Defendant expressing its desire to leave the business and revert the same back to the Defendant. In its letter dated 28th August 2005, the Plaintiff wrote;

"After very wide consultation with people in the petroleum business, we are seriously considering surrendering the station back to Caltex by the end of the year 2005."

34. Under Clause 15 of the Operator's Agreement, it set out the consequences of termination of the agreement. Under Clause 15(b) it was provided that;

The DEALER, his heirs, executors, administrators or assigns and/or agents will surrender forthwith possession of the service station and the station equipment to CALTEX.

Further, at Clause 15(c) it was stated thus;

Should the DEALER fail to hand over the service station within the prescribed time or such period as may be extended at the sole discretion of CALTEX the dealer shall pay to CALTEX liquidated damages. The damages shall be computed based on CALTEXs full profit margin on petroleum products based on the monthly sales potential of the service station plus any rental payable for any additional facilities at the station.

The Defendant claimed that between 21st March 2007 and 31st May 2007, they lost income from the service station to the amount of Kshs 3,774,300/-. It was contended that under the Operator's Agreement, the service station was to be handed over to the Defendant by 21st March 2007 when the termination period would expire. It was thus the Defendant's contention that since the station was not handed over on 21st March 2007 as per the termination processes, then the Plaintiff was liable to compensate the Defendant under Clause 15(b) aforementioned in terms of liquidated damages.

35. With regards to claims for liquidated damages, it was enunciated in **Civil Appeal No 69 of 2005 Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya Ltd; (2015) eKLR** that for claims of liquidated damages, the claimant has to set out the claim in the particulars, and then specifically prove them. The Court of Appeal held inter alia;

"By reason of the words "shall be deemed to be liquidated" denotes that any party wishing to avail itself of that provision has to lay its claim in the manner liquidated claim is laid, that is by being specifically pleading it with particulars, and then specifically proving it."

Further, in **Civil Case No 788 of 1990 Mawji v Kaderdina Majee Essak Ltd; [1992] eKLR**, Wambilyangah, J (as he then was) held that;

""Liquidated demand" is defined in Stroud's Judicial Dictionary 3rd Edition at p. 1160 as "including liquidated damages." And "a claim for short delivery of goods sold is a liquidated demand." With regard the definition of the words "Liquidated damages" I find them well explained in a passage in Law of Contract by Chesire and Fifoot 4th Edition at p. 510 which reads:

> ***"First it may be a genuine pre-estimate of the loss that will be caused to one party if a contract is broken by the other. In this case it is called liquidated damages, and it constitutes the amount no more and no less, that the plaintiff is entitled to recover in the event of breach without being required to prove actual damage. Liquidated damages mean that it shall be taken as the sum which the parties have by a contract assessed as the damage to be paid whatever may be the actual damage."*** (Emphasis added).

36. According to the above cited cases, the Defendant has to specifically prove the damage, but not show the actual damage that was incurred. In the instant case, the Defendant contended that in the months of 21st March 2007 to 31st May 2007, they incurred losses to the tune of Kshs 3,744,300/-. This was a pre-estimate of the claim of the losses that they contended occurred in the stated period.
37. However, no evidence was adduced to show the profit margins on the petroleum products based on the monthly sales potential of the service station. With no records being adduced before the Court showing the Defendant's estimates to be the correct state of affairs, they cannot claim for the sum as stated for liquidated damages. As reiterated in **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya Ltd** (supra), the claim has to be specifically proven for the Court to make an award for liquidated damages.
38. With regards to loss of business, the Defendant averred that between 31st May 2007 and 15th November 2007, they had lost business to the amount of Kshs 9,025,500/-. This amount was arrived at, as stated by the Defendant's witness, as the average potential for the products sold at the service station for any given month. The unit profit margins were also set out by the Defendant's witness.

39. However, as in the claim for liquidated damages, not evidence was adduced to show that the estimates contended by the Defendant were actually estimates that had been proven after carrying out a survey on the potential of the service station. No records were adduced before the Court to show how these estimates were arrived at, and as such, the Defendant's claim for loss of business was not sufficiently proved.
40. Turning to the issue of general damages for loss of brand equity, the Defendant claimed that they had a dominant presence in the Kenyan market, and that the service station was in a prime location where prime services were expected. They further claimed that these exceptional services were not offered to their clients between the months of December 2006-November 2007.
41. They further alleged that their clients moved to other service stations within the precincts of the service station and were thereby occasioned great loss, which according to the Defendant, amounted to Kshs 9,000,000/-. With regards to brand equity or goodwill, it was stated in ***Kerly's Law of Trade Marks and Trade Names, Fifteenth Edition (Sweet & Maxwell)*** at para. 18-024 that;

In the context of passing-off, goodwill has been stated to represent, in connection with any business or business product, the value of the attraction to customers which the name and reputation possesses.

42. Further, it was reiterated in **IRC v Muller & Co Margarine (1901) AC 217** at 223 as follows;

"It [goodwill] is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing that distinguishes an old established business form a new business at its first start. The goodwill of a business must emanate from a particular center or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there…For my part, I think that if there is one element common to all cases of goodwill it is the attribute of the locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business and the goodwill perishes with it, though elements remain which may perhaps be gathered up and revived again. No doubt, where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localize goodwill."

43. In **Civil Appeal No 102 of 2012 Kenya Oil Company Limited & another v Kenya Pipeline Company; [2014] eKLR** it was held *inter alia*;

"In relation to the award for damage for loss of consumer and investor goodwill, the arbitrator awarded USD 11.98 million on the basis of a report by Vista Capital Limited that "states that the claimants have suffered loss to the tune of US$11.98 million." We do not think that a statement in such a report could in the circumstances, by itself without more, be a basis for establishing loss in the nature claimed to the required legal standard of balance of probabilities."

In**Civil Appeal No 4 of 2011 Johnson Mugwe Wanganga v Joseph Nyaga Karingi; [2014] eKLR**, the Court of Appeal held *inter alia*;

"As regards the claim for goodwill, it is our considered view that goodwill is a claim for special damages which must be proved and particulars given. In the instant case, there are no particulars of the goodwill pleaded in the plaint and the Honourable Judge erred in not indicating how the sum of Ksh. 542,820/= was arrived at representing lost goodwill. (Emphasis added).

Further, in **Misc Civil Application No 129 of 2014 Kenya Tea Development Agency Ltd & 7**

others v Savings Tea Brokers Limited; [2015] eKLR, Gikonyo, J held as follows;

> ***"Further, even where a claim for goodwill is made in the alternative, the test applicable is one of ''reasonably foreseeable consequence''. See Lord Diplock in the case of Reckitt & Coleman Products VS Borden Inc. & Others (1990) AllER 873 where he laid down the test on granting an award for damages for goodwill as follows:***
>
> > ***"There should be a misrepresentation made by a trader in the course of trade to prospective customers of his or his ultimate consumers of goods or services supplied to him which is calculated to injure the business or goodwill of another trader (in the sense that this is reasonably foreseeable consequence and which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia time action) will probably do."***

44. It is not enough for the Defendant to lay claim that it had or has dominance in the Kenyan market in terms of the products and services that it provides, those are mere suppositions as far as the Court in concerned.
45. The Defendant has to establish, and prove, as in the present case where it claims for general damages for loss of brand equity, to show that the loss was actuated by the actions of the Plaintiff, and that there was indeed financial loss from the loss of reputation and goodwill.
46. The Defendant needed to establish the actual harm or loss that was incurred by the damage to its reputation, if there was such damage, and which in any event has not been established, to sustain its claim for loss of brand equity and/or goodwill.
47. As was reiterated by the Court of Appeal in **Kenya Oil Company Limited & another v Kenya Pipeline Company** (supra), the Defendant had to show more in order for the Court to consider its claim for loss of brand equity, and to award general damages to it
48. In the circumstances, the Defendant's only lay to claim was that there was perceived loss of brand equity from the customers who occasioned the station to receive the premium services that it was said to offer.
49. There is no justification for the demand of the award of Kshs 9,000,000/- that has merely been demanded for supposed loss to other brand offering the same services within the precincts of the Defendant's service station.
50. For the Court to award such colossal sum, it was the onus of the Defendant to prove on a balance of probabilities that it was deserving of such damages, which presently, it has failed to establish.
51. It is the Courts final rendition with regards to the aforegoing, is that the Plaintiff has failed to establish it claim for costs for construction and development of the service station and loss of business for the period mentioned in its claim.
52. Further, the Defendant has not established, in its Counterclaim, the purported loss of business, loss of brand equity or loss of income between the months of 21st March 2007 and 31st May 2007.
53. The only costs that the Defendant managed to establish were costs for the removal and replacement of items in the amount of Kshs 1,812,754.47 and utility costs, although the same, as per the documents placed before the Court, summed up to Kshs 54,456.45. Therefore, the court awards these cost, totaling Kshs 1,867,210.92 as well as interest on this amount set at Court rates from 31st May 2007 until payment in full to the Defendant, as well as costs for the Counterclaim.

Dated, signed and delivered in court at Nairobi this 27th day of May, 2016.

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C. KARIUKI

JUDGE