



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 10 OF 2003

TOTAL KENYA LIMITED.....PLAINTIFF

VERSUS

MUMBI KIGUNDU.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Plaint that was dated 9th January 2003 and filed on 10th January 2003, the Defendant had entered into a Marketing Licence Agreement (hereinafter referred to as “the Agreement”) with the Plaintiff who was operating Mwihoti Service Station in Sagana. Pursuant to the said Agreement, on diverse dates between August 1996 and April 1999, the Defendant supplied the Plaintiff with assorted petroleum products worth Kshs 6,127,622.95 which payments were to be made thirty (30) days from the date of invoice. Despite acknowledging owing the Plaintiff the said sum on 5th January 2000, the Defendant had refused, neglected and/or failed to pay the same.
2. The Plaintiff therefore sought the following reliefs:-
 - a. **Kshs 6,127,622.95.**
 - b. **Costs of the suit.**
 - c. **Interest on (a) and (b) above at court rates.**
 - d. **Any other relief that this Honourable Court would deem fit to grant.**
3. The Plaintiff’s Reply to Defence and Defence to Counterclaim was dated and filed on 13th May 2003. Its initial List of Documents was dated 1st February 2006 and filed on 6th March 2006 while its Statement of Agreed Issues was dated 27th February 2006 and filed on 6th March 2006. On 25th January 2012, it also filed another List and Bundle of Documents and Witness Statement both dated 24th January 2012.
4. On 1st March 2013, it filed a Notice of Motion dated 28th February 2013 in which it had sought leave to amend its List of Documents dated 24th January 2012. The said application was allowed as the same was unopposed. Its Supplementary Affidavit dated 11th March 2013 was thus filed on 15th March 2013. Its Written Submissions were dated 30th September 2014 and filed on 3rd October 2014.
5. The Defendant filed a Defence that was dated 25th February 2003. She had filed a List of Documents and a Further List of Documents on 3rd March 2006 and 24th November 2008

- respectively. The Defendant's List of Documents and Statement of Agreed Issues were dated and filed on 3rd April 2006. The Statement of Defence was amended on 11th March 2003. Following a consent that was dated and filed 4th May 2010, the Defendant filed a Further Amended Statement of Defence that was dated and filed on 19th May 2010.
6. Subsequently on 21st July 2011, she filed another List and Bundle of Documents of even date and another List of Documents dated 9th August 2012 on 14th August 2012. In her evidence and her Written Submissions, the Defendant solely relied on her List and Bundle of Documents that were filed on 21st July 2011. Her Witness Statement was dated and filed on 7th December 2011 while her Written Submissions were dated 22nd October 2014 and filed on 23rd October 2014.
 7. The Defendant denied owing the Plaintiff the said sum of Kshs 6,127,622.95 or at all and stated that all petroleum products had been fully paid for by various cheques, credit notes and fuel cards credit. She stated that she bought and installed at her own expense, one (1) EM41 computerised wheel balancer, one (1) battery charging machine and one (1) wheel alignment (hereinafter referred to as "the Equipment") all valued in the sum of Kshs 285,000/= which the Plaintiff took and had refused to release back to her. As a result, she contended that she had suffered loss and damages.
 8. The Defendant therefore sought the following reliefs:-
 - a. **The plaintiff's suit be dismissed.**
 - b. **Judgment for a sum of Kshs 285,000 plus interest at court rates from the date of the counterclaim until payment in full.**
 - c. **Costs of the counterclaim and interest at court rates.**

LEGAL ANALYSIS

9. Right at the outset, the court wishes to state that on 23rd January 2012, the Plaintiff filed a Notice of Motion dated 20th January 2012 in which it had sought to have its Plaint amended to indicate the value of the assorted petroleum products as Kshs 7,926,572.95 instead of Kshs 6,127,622.95. The Defendant filed its Grounds of Opposition dated 26th January 2012 on 27th January 2012. However, on 20th February 2012, Musinga J (as he then was) dismissed the said application for want of prosecution.
10. As matters stand now, the value of the assorted petroleum goods that the Plaintiff was claiming remained at Kshs 6,127,622.95 as was shown in the Plaint dated 9th January 2003 and filed on 10th January 2003, which figure is what the court adopted for purposes of determining the dispute between the Plaintiff and the Defendant.
11. The Plaintiff's Agreed Issues were as follows:-
 1. **Was there a legal enforceable Marketing Licence Agreement dated 1st November 1996?**
 2. **Did the Plaintiff supply assorted petroleum products worth Kshs 6,127,622.95/= to the Defendant as her instance on diverse dates between August 1996 and April 1999?**
 3. **Did the Defendant fail to pay for the products 30 days after the date of invoice?**
 4. **Was any demand and notice of intention to sue given to the Defendant?**
 5. **Did the Plaintiff take into its custody any machine or at all from the Defendants custody contrary to the Market Licence Agreement?**
 6. **Who breached the Market Licence Agreement?**
 7. **Is the Plaintiff entitled to the prayers in the plaint?**
 8. **Is the Defendant entitled to her prayers in the counterclaim?**
 9. **What is the appropriate order as to costs?**
12. In her Statement of Agreed Issues, the Defendant had listed the following as the issues for determination by the court:-
 1. **Was the defendant at all material times in a marketing licensing agreement with the plaintiff operating Mwihoti Service Station in Sagana Town as had been alleged in paragraph (3) of**

- the plaintiff?
2. **Did the plaintiff supply the defendant with assortment petroleum products worth Kshs 6,127,622.95 at defendants (sic) request?**
 3. **Further was the said petroleum products supplied at diverse dates between August 1996 and April 1999?**
 4. **Was the defendant required to pay the said petroleum products 30 days after the date of invoice? (sic) and when was the invoice dated?**
 5. **Was the defendant served with a demand notice?**
 6. **Did the plaintiff take possession of a machine valued at Kshs 285,000/= belonging to the defendant as claimed in the counter-claim?**
 7. **Did the said machine belong to the plaintiff as per the marketing licensing agreement as claimed in paragraph 4 if the defence to counterclaim?**
 8. **Who breached the Licensing marketing agreement? Was it the plaintiff as claimed in paragraph 7 (a) of the counterclaim?**
 9. **Was the defence (sic) entitled to the prayers sought in the counter-claim?**
 10. **Was the plaintiff entitled to the relief sought in the plaintiff?**
13. From the documentation that was presented before the court, it was not disputed that the Plaintiff and the Defendant had entered into the aforesaid Agreement. According to DW 1's evidence, she had a relationship with the Plaintiff from 20th October 1993 until 5th May 1999. In her Witness Statement, she admitted that she had paid for all petroleum products that the Plaintiff supplied to her Petrol Station in the sum of Kshs 6,127,622.95.
14. It was therefore the view of the court that Issues Nos (1) and (3) were agreed facts and did not require any determination by the court. Issue No 4 did not appear to have been contested by the Defendant. Neither of the two (2) witnesses adduced any evidence that would have resolved Issue (5) and (8). In any event, the Defendant did not deny ever having been issued with a demand to the pay the sum that had been demanded by the Plaintiff. It therefore appeared to the court that the only issues that were for determination by the court were Issues Nos (2), (6), (7), (9) and (10).
15. The court found that Issues Nos (2) and (10) could be dealt with under one (1) heading as they were related while Issues Nos (6), (7) and (9) could also be merged under one (1) head. The court therefore identified the following issues as those for determination by the court:-
- a. **Did the Plaintiff supply the defendant with assortment petroleum products worth Kshs 6,127,622.95 at the Defendant's request and if so, was the Plaintiff entitled to the reliefs it had sought in its Plaintiff?**
 - b. **Did the machine valued at Kshs 285,000/= belong to the Plaintiff as per the Agreement and if so, did the Plaintiff take possession the machine belonging to the Defendant contrary to the provisions of the said Agreement?**
 - c. **Was the Defendant therefore entitled to the reliefs sought in the Counterclaim?**

THE PLAINTIFF'S CLAIM

16. Paul Mwiti (hereinafter referred to as "PW 1) stated that Defendant (hereinafter referred to as "DW 1") had not made any payments to the Plaintiff emanating from a Trading Account in the sum of Kshs 6,127,622.95. It was his testimony that the said amount due was for products that were supplied to DW 1 by the Plaintiff but not paid for as was evidenced in its invoices.
17. He denied that DW 1 was advanced a Product Loan. He explained that a Product Loan was ordinarily given to a station operator to assist him in having enough stocks for the day to day running of a petrol station. He was emphatic that the Plaintiff did not issue invoices for Product Loans but rather in such cases, it gave a credit amount which enabled the station operator source for whatever product he wished to get.
18. The Plaintiff produced Statements of Accounts on pp 13-19 of its Bundle of Documents dated 24th January 2012 in which the outstanding balance was shown as Kshs 6,127,623.32. Reconciliation on pp 20 and 21 in the said Bundle of Documents showed the same figure as having been the outstanding amount that was due to it from the Defendant. Both the Plaintiff and a Mr Ndolo for the Plaintiff affixed their signatures on that page of the said Reconciliation.

19. The Plaintiff also referred the court to a document on pg 22 of the said Bundle of Documents in which a total sum of Kshs 2,662,836.65 was said to have been disputed by DW 1 who had contended that she had paid the same but that she had not provided proof of payment of the same. There was also an indication that there were invoices that were missing from the Petrol Station's file but were present in its Statement amounting to a sum of Kshs 195,606.50.
20. Both Mr Ndolo and DW 1 then affixed their signatures confirming these facts with an indication that, as per the reconciliation of 9th December 1999, the undisputed sum owed to the Plaintiff by DW 1 was Kshs 4,697,134/=.
21. It was, however, DW 1's evidence that all the forty four (44) invoices listed on pp 1-45 in the Plaintiff's Supplementary List and Bundle of Documents had been paid as was shown in pp 34-37 of her Bundle of Documents dated 21st July 2011. This was a Schedule of Invoices and Payments to the Plaintiff showing that she had all payments related to the invoices that were the subject matter of this suit. It was also indicated that a cheque in the sum of Kshs 1,000,000/= was to be paid by the end of 1995 and cheques paid in 1996, period that were not in contention in this matter. It was, however, not clear from the said schedule which cheques the Defendant was referring to as cheques listed in (v) – (viii).
22. Doing the best it could, the court was unable to get the total amount of the invoices from 18th January 1999 to 26th May 1999 as some of them were illegible. The Plaintiff did not make it any easier for the court as the particulars of the computation of all the invoices was not itemised and/or furnished to the court. The court had to painstakingly go through the Schedule of Invoices and Payments, invoices and letters from the banks mentioned herein below to come up with the figure of unpaid invoices, a duty that squarely fell upon the Plaintiff. In short, the case was badly set out. Similarly, although DW 1 alluded to Credit Note Nos 20404008, 20403664, 20603732, 2063901, 20604283 and 603666, she did not provide any evidence of the same.
23. However, having perused the Plaintiff's documents which included a letter dated 5th August 1999 from Barclays Bank of Kenya, an undated letter from Consolidated Bank of Kenya, a letter dated 28th July 1999 and that dated 11th November 2006 in the Plaintiff's Further List of Documents dated 9th August 2012 and filed on 14th August 2012 on pp 2- 10 against the Schedule of Invoices and Payments in the Defendant's Bundle of Documents, it appeared to the court that DW 1 had effected payments of the invoices she received from the Plaintiff save for the following:-

<u>Item</u>	<u>Amount</u>
a. Debit Note No 02398838	Kshs 34.70
b. Debit Note No 02399019	Kshs 18.50
c. Debit Note No 02399045	Kshs 69,698.60
d. Debit Note No 02399869	Kshs 13,885.45
e. Debit Note No 02400228	Kshs 22,000.00
f. Invoice No 01261714	Kshs 363,170.00
g. Invoice No 01262522	Kshs 25,420.00
h. Invoice No 01262880	Kshs 352,481.80
i. Balance of Invoice No 01268204	Kshs 2,629.50
j. Invoice No 01263367	Kshs 11,048.15
k. Invoice No 01263715	Kshs 16,722.70
l. Invoice No 01264269	Kshs 32,736.15
m. Invoice No 01264364	Kshs 25,420.00
n. Invoice No 01265211	Kshs 15,289.05
o. Invoice No 01265196	Kshs 14,893.00
p. Invoice No 01264674	Kshs 1,679.00
q. Invoice No 0126509	Kshs 43,648.20
r. Invoice No 0126587	Kshs 358,111.30
s. Invoice No 01265893	Kshs 17,394.45
t. Invoice No 01266112	Kshs 44,478.20
u. Invoice No 01266251	Kshs 441,109.60
v. Invoice No 01267203	Kshs 366,170.40

w. Invoice No 0126699	Kshs 181,953.00
x. Invoice No 01266952	Kshs 20,061.20
y. Invoice No 01268204	Kshs 351,023.00
z. Invoice No 01268380	Kshs 31,836.00
a. Balance of Invoice No 01268380	Kshs 1,538.00
b. LPG	Kshs 21,036.40
bc.LPG	<u>Kshs 53,938.03</u>
	<u>Kshs 3,265,594. 84</u>

- 24.The cases of Kazungu Fondo Shutu & Another vs Japhet Noti Charo [2014] eKLR, Sam Wanjama Waweru vs Trans Enterprises Limited & Another [2007] eKLR and Stanley Osango Ekaya vs British American Tobacco (K) Limited [2012] eKLR that were relied upon by the Plaintiff were duly noted by the court. However, the same were not of assistance to the court for the reason that the fact that DW 1 had executed the Reconciliation Statement was not in itself proof that she owed the Plaintiff the said sum of Kshs 6,127,622/=.
- 25.Indeed, she may have appended her signature on the said Statement willingly or unwillingly as she had contended but the fact remained that the burden was upon the Plaintiff to demonstrate how this figure was arrived at. The Plaintiff's submissions that DW 1's evidence that she was coerced to execute the said document, though noted, could also not come to its aid. The Plaintiff could only be awarded what it had proven to the required standard. Its claim for the sum of Kshs 6,127,622/- or Kshs 7,926,572.95 as had been claimed by PW 1 therefore fell by the wayside. It was only entitled to a sum of Kshs 3,265,594.84 from the Defendant as was shown hereinabove.

THE DEFENDANT'S CLAIM

- 26.DW 1 testified that she had purchased the Equipment on 24th May 1995. She relied on the provisions of Clause 29 (b) of the said Agreement which stipulated as follows:-
- “Ancillary equipment such as battery charger vulcanizers and tools shall be purchased by the Operator as specified by the Company.”**
- 27.She referred the court to an Agreement dated 24th May 1999 in which it was shown that she purchased one (1) EM41 computerised wheel balancer, one (1) battery charging machine and one (1) wheel alignment from one (1) John Michael Maina Kanyeki with whom she had entered into an agreement for the purchase of the said Equipment (hereinafter referred to as “the Sale Agreement.”) for a sum of Kshs 186,188.30. Interest on the said sum was said to have been in the sum of Kshs 40,000/=. The said Sale Agreement was duly stamped and registered and was contained on pg 31 of the Defendant's List and Bundle of Documents dated and filed on 21st July 2011.
- 28.The Purchase price for the said Equipment appeared to have been paid in instalments. This was evidenced in an undated Acknowledgment that showed that the Defendant had paid the said John Michael Maina Kanyeki a sum of Kshs 285,000/= and an acknowledgment dated 24th May 1995 on pp 32 and 33 of the said Defendant's List and Bundle of Documents respectively.
- 29.On his part, PW 1 stated that as per the Agreement, at all material times, the Equipment remained the Plaintiff's property and that it was not aware that the DW 1 had equipped the Petrol Station with her own equipment.
- 30.The court found that the Defendant was not able to persuade the court to find that she was successful in her Counterclaim for the reasons shown hereinbelow. This was irrespective of the fact that the Plaintiff did not file a Defence to Counterclaim. Even where no defence has been proffered, a party must prove its case on a balance of probability.
- 31.Firstly, as was rightly submitted by the Plaintiff, there was no provision in the Agreement that provided that the Defendant could demand the purchase price of the Equipment. In any event, there was nothing in the Agreement to show that the Plaintiff was required to refund her the sum she had incurred in the purchase of the said Equipment.
- 32.Clause 29 (e) of the Agreement that provided as follows:-

“The Plant and equipment including replacements shall remain the property of the Company (emphasis court) and the Operator shall not allow any item thereof to be subject to seizure or lien by operation of law contrary to the interest of the Company. In the event of any such seizure, lien deterioration or destruction the Operator shall give immediate notice to the Company.”

33. Secondly, from the evidence that was adduced before the court, it was not clear whether DW 1 purchased the said Equipment in anticipation of entering into the agreement herein with the Plaintiff. This was a pertinent issue as the Agreement was dated 1st November 1996 while the Defendant contended that she had purchased the Equipment on 24th May 1995.
34. If DW 1 had purchased the said Equipment pursuant to the said Agreement, she did not set out the circumstances leading to the purchase of the same. She did not annex any documentation to demonstrate that her relationship with the Plaintiff commenced on 20th October 1993 as she had told the court, which fact would have persuaded the court to find that the said Equipment had in fact been purchased during the existence of the contract between her and the Plaintiff and perhaps favourably consider her submissions in that regard.
35. Thirdly, a claim for interest in the sum of Kshs 40,000/= for a purchase that took place over a year before the Plaintiff and DW 1 entered into the Agreement was thus unjustified. In fact, as the Acknowledgment confirming payment of the sum of Kshs 285,000/= was undated making it difficult to know when she completed paying for the said Equipment necessitating her to claim interest which she had purportedly paid the said John Michael Maina Kanyeki for the purchase of the said Equipment. Her acceptance to pay the said John Michael Maina Kanyeki the said interest could not bind the Plaintiff so as to compel it to refund her the said interest.
36. Fourthly, there was no single shred of evidence that was adduced by DW 1 to show that her Equipment was taken by the Plaintiff and if so, what efforts she had made to demand for the release of the same if at all the same had been taken by the Plaintiff.
37. Fifthly, DW1 could not purport to claim for a sum of Kshs 285,000/= in 2015 as compensation of replacement of Equipment that was purchased in 1995. Undoubtedly, the element of depreciation would have come in operation which the Defendant did not address while presenting her claim.
38. Alleging facts on the part of the Defendant without proof was untenable particularly after the Plaintiff categorically stated in Paragraph (4) of its Reply to Defence and Counterclaim and PW 1's Evidence that all equipment installed at the Petrol Station belonged the Plaintiff to as per the Agreement and that it was the Plaintiff that installed the Equipment at the Petrol Station ought to have been rebutted by the Defendant by way of documentary evidence. However, this was done by adducing documents that were outside the period that was in contention between the parties herein.
39. Indeed, the burden of proof was on her to demonstrate this fact to the court but she failed to do so. Having failed to do so, the court could only come to the conclusion that her Counterclaim had to fail in its entirety.

DISPOSITION

40. In the circumstances foregoing, having considered the pleadings, documents, and their written submissions in support of the parties' respective cases, the court came to the following conclusion:-
 - a. **THAT Judgment is hereby entered in favour of the Plaintiff against the Defendant in the sum of Kshs 3,265,594.84 together with interest at court rates from the date of filing suit till payment in full and costs of the suit.**
 - b. **THAT the Defendant's Counterclaim in the sum of Kshs 285,000/= is hereby dismissed with costs to the Plaintiff.**
41. It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of March, 2015

J. KAMAU

JUDGE