

further denies that the Plaintiff suffered any loss as claimed in paragraph 7 of the amended plaint and terms the claim as spurious and non maintainable in law.

The distribution contract was terminated by a letter dated 15/6/2000 addressed to the Plaintiff by the Marketing and Circulation Manager of the Defendant. The reason given for the termination of the contract was that the Plaintiff's accounts with Defendant reflected an outstanding balance of approximately Ksh.14 million as at 15/6/2000.

Counsel for the Defendant submitted that the Plaintiff contravened the provisions of clause 7.25 of the contract which provided for prompt payment for all products delivered to the Plaintiff by the Defendant. This court argued, brought into operation the provisions of clause 14 of the contract which allowed the Defendant to terminate the contract immediately.

According to the Defendant, the defence for counter-claim is a mere denial since the Plaintiff has not provided any evidence of payments to the Defendant, not provided statement of accounts relating to the distributorship as provided for in clause 11 of the contract.

In reply, counsel for the Plaintiff contended that the application is premature as the orders sought cannot be approached for. Mr. Makokha established that there are triable issues which renders this application incompetent.

He asserted that the Plaintiff should have been given a four (4) week notice as stipulated in clause 15.1 of the contract. He further argued that the matter should have been referred to arbitration, in accordance with the provisions of clause 16 of the contract.

I have anxiously considered this application. The provisions of the contract (distributorship) are clear and unambiguous. Clause 14 provides:

“14. The publisher shall have the right to immediately terminate the agreement by giving notice in writing.....”

Clause 15.1 states that either party has the right to terminate agreement by giving the other four (4) weeks notice in writing. My interpretation of the contract is that the notice envisaged in clause 14 of the agreement is the four (4) weeks which was prescribed in clause 15.1.

The letter of termination dated 15/6/2000 addressed to the Plaintiff is in effect a notice which could only take effect at the expiry of four (4) weeks from the date of issue. In my view, the Defendant was in breach of the contract by terminating the agreement and appointing another agent prematurely.

The four (4) weeks notice was for a purpose – either to give time to the Plaintiff to wind up the distribution hurdles for both parties to resort to some other form of settlement.

This is an issue which the Plaintiff has raised in the amended plaint and it is a triable issue.

The Defendant annexed a copy of its statement of accounts with the Plaintiff. The Plaintiff has not agreed with the contents of the statement of accounts. In his submissions, counsel for the Plaintiff argued that the accounts could have

been manipulated to favour the Defendant. This was a contract touching on the supply of newspapers and magazines by the Defendant to the Plaintiff. I expected the Defendant to support its application with evidence of receipt of the items by the Defendant production of signed invoices. A bare statement of accounts not approved by the Plaintiff is not enough to convince me that it reflects the time of affairs. It is for the person who alleges to prove his/her allegations.

A letter dated 17th May, 2000 addressed to the Plaintiff by the Defendant is meant to serve as evidence of admission of liability to the Defendant by the Plaintiff. Regrettably the copy attached to the affidavit in support of the application is not endorsed with the Plaintiff's signature.

I am not in any way suggesting that the Plaintiff does not owe the Defendant. My observation is that the Defendant has not convincingly and sufficiently laid out its case to merit the argument that the Plaintiff has no reasonable defence to the counter-claim. The suit in its entirety raises issues that should go for trial. This is not a case for determination by affidavit evidence. This application fails. It is dismissed with costs to the Plaintiff.

J. K. MITEY
JUDGE

Dated this 7th day of October, 2003.

Delivered and Signed by Hon. Lady Justice F. N. Muchemi

This 29 day of April 2010 in the presence of

Mr. Makokha for the defendant.

F. N. MUCHEMI
JUDGE