REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMALI COMMERCIAL COURTS

CIVIL CASE NO. 3325 OF 1994

JANEVAMS LIMITED …….. PLAINTIFF

V E R S U S

CALTEX KENYA LIMITED ……..…..… DEFENDANT

JUDGEMENT

In a plaint dated 14th September 1994 and filed on the same day, the plaintiff Janevams Limited sued the Defendant Caltex Kenya Limited seeking judgement against the same Defendant as follows:-

> *"(a) A sum of Kshs. 1,978,225.80 together with interest thereon at bank rate from 15 th July 1991 u ntil payment in full;*
> *(b) Damages for breach of contract;*
> *(c) Costs of this suit;*
> *(d) Such other or further relief as this Honourable Court may deem fit to grant."*

The same judgment is sought according to the plaint on the basis that the Defendant breached Operations agreement entered into between the Defendant and the Plaintiff's company and removed the Plaintiff company from the Operations of a Service Station contrary to the terms of the agreement and without any proper reasons, and in so removing the Plaintiff, the Defendant detained and remained with the Plaintiff's several equipment (properties) including documents to facilitate collection of debts by plaintiff despite demands that it releases the same properties to the Plaintiff. Further the Plaintiff alleges in the same plaint that in so removing it from the station, it failed to refund to the Plaintiff interest earned from the deposit earlier on paid to the Defendant which was KSh.491,450.

The Defendant company in its statement of Defence stated in what I do briefly summarise, that the suit offended provisions of Section 6 of the Civil Procedure Act as there were a civil case No.200 of 1991 and Civil Appeal No.116 of 1991 on the same subject which had not been finalised; that the agreement or license was lawfully terminated and KSh.491,449/55 being the credit balance due to the Plaintiff was refunded; that the Defendant is a stranger to the allegations in the plaint that equipment and machinery were installed by the Plaintiff at the suit premises; that the termination of the

operations agreement was lawful as the plaintiff did not achieve the minimum target; that it denies having taken Plaintiff's tools of trade, machines, equipment and trade debts and it denies each and every allegation in the plaint.

The Plaintiff called five witnesses whereas the Defendant did not call any witness in the case.

PW.1 Joseph Matu Mathondu was the Director of the Plaintiff Company. His evidence was in a summary form that in August 1986 his company was appointed by the Defendant as Defendant's dealer in a Petrol Station on Waiyaki Way near A.B.C. Complex in Nairobi. He executed a dealer's agreement Exh.1 and was promised that on satisfying the Defendant, he would be offered operations agreement. The same operations agreement was offered and was dated 1st June 1987 Exh.2. By that agreement, exh.2, he was confirmed as a dealer at the service station. He operated the station from August 1986 to 1989 without any problem, and without any warning from the Defendant and there was no public complaint during that period. On 5.7.1990, he got a letter from Defendant – Exh. 3 asking him to improve the performance. The letter was from the Marketing Manager and it revised the targets. The targets had declined because the road was under repair and hence, the flow of motor vehicles to the station was affected. On 20th August 1990, he was given conditions to meet the targets within three months. He was also given a letter to that effect – exh.4. He stated that he achieved the targets, i.e.both targets given in a letter dated 5.7.1990 and the one given in a letter dated 20.8.1990. However, despite his achieving the targets given, he received a Notice dated 21.12.1990 – Exh.5 which was terminating his dealership. The reason given in the same notice for terminating his dealership is that since 1986 he had never operated to the Defendant's satisfaction. He maintains that this is not true because according to the agreement, if he did not operate to the Defendant's satisfaction he was to be fined but he had never been fined at all which to him meant that he had operated the station to the Defendant's satisfaction. On one occasion on 3rd December 1990, he ran out of product but that was because he had paid for the products on 30th November 1990, but by the time the Defendant's staff checked his products on 3rd December 1990, the Defendant had not delivered the same products paid for on 30th November 1990. That was one example when the Defendant found him out of products and that was in the morning when the checking took place whereas products were delivered by the Defendant in the afternoon of the same day. He produced Exh.6 & 7 as evidence of what happened. Another example was that on 14th December 1990 he paid for products which were never delivered till 17.12.1990 afternoon whereas Defendant carried out a check in the morning of that same 17.12.1990 before Defendant delivered products. He produced Exh.8 & 9 as evidence of the same. He complained to the company on their conduct vide a letter dated 31.12.1990, Exh.10. he had also complained about flooding next to the station which was interfering with accessibility to the station especially by small vehicles. After the notice of 21.12.1990, the Plaintiff did not move out of the station but he was evicted. He filed application for injunction in court but that was rejected and he was evicted on 15.2.1991, by two employees of the Defendant company Mr. Murila and Sam Gakiria who were accompanied by auctioneers and 20 guards. He was evicted and Sam Gakiria who used to supervise the station took over the running of the station as a dealer. Actioneer took all personal belongings, chairs, tables but left at the station a number of important equipment and properties of the Plaintiff which are as per the plaint and their

values were also given in the plaint. The same values, according to this witness were obtained from the dealers and were the values at the time he got the quotations and the invoices. The equipment retained by the Defendant were Wheel Balancing Machine, Tyre Change Machine, Trolley Jack, Wheel Aligner, Welding machine and Spraying machine. If he had those machines, he would have employed himself elsewhere after he was removed from the service station. There was a vehicle he was repairing at an agreed amount of KSh.38,000/-. As he was removed from the station he could not repair it and he lost that money. He also failed to do engine overhaul work for another customer who pulled his vehicle away and demanded KSh.96,000. He had to pay the same. This was all because he was removed from the station. He identified Proforma invoices he got from Avon Rubber company Kenya Ltd. for the equipment and machines, that were retained by the Defendant. He also identified one invoice he obtained from East African Oxygen in respect of Oxygen Acetylene Cylinder' which were on lease from the same East African Oxygen. He claimed further that he was prevented from pulling down a garage he had constructed and which had an estimated value of KSh.35,000/-, and there was a Volks Wagen vehicle door also at the garage which he could not get access to as he was removed. He paid the owner of that vehicle door KSh.20,000/-. There were other motor vehicle accessories in the shelves such as condensers, bulbs, and reflectors of Peugeot vehicle which were valued at KSh.8,000/- and which he did not take with him as he left the station. He used to give credit to his customers. As a result of his being removed from the station, he could not recover KSh.104,000/- from some of the customers. Lastly, the Defendant paid him his deposit plus the value of the product that was at the station when he was removed. The total he was paid was KSh.491,449/55 but this was paid after 3 ½ years – i.e. in June 1994. He needed interest on that money and he asked for interest at the rate of 35% because he used to operate the business on overdraft from the bank. He stated at the end of his evidence in Chief that he was claiming KSh.1,978,225.80 and interest on that amount which he did demand and was not paid by the Defendant. On the question as to whether there were any cases pending by the time this case was being heard he said that the Plaintiff had withdrawn the case that was pending and this was done with the consent of the Defendant so that there were no cases pending as at the time this case was heard. The Plaintiff's profits from the station were KSh.30,000 per month from the garage side and KSh.30,000/- from the Petrol Station side.

In cross-examination he agreed that under the agreement, the Defendant could have terminated the agreement by one month's notice but with reasons. On being shown clause 8 of exhibit 2 and clause 3 of the same exhibit, he admitted that there were times when Defendant could summarily terminate the license. He also agreed that Defendant gave Plaintiff one month's notice – Exh. 5. Following the notice he filed an application in the High Court H.C.C.C. No.200 of 1991, but the application for temporary injunction was dismissed. He appealed vide Civil Appeal No.116 of 1991 but that appeal was later withdrawn and Defendant paid Plaintiff's deposit as well as value of fuel in 1994, but he agreed that he was paid his money in 1994 whereas he withdrew the cases in 1998 so that payment of his money had nothing to do with the withdrawal of the suits that were then pending. On the claim for interest of KSh.560,530/80 the Plaintiff claimed, he said he had letter from the bank on the same but he had not produced the same in the court. He did not demand his deposit between 1991 and 1994, as the cases were still pending and Defendant maintained that he was not a licensee whereas he maintained that he was a licensee. Plaintiff was a licensee upto

15th February 1991, but on 15th February 1991 the Plaintiff ceased to be a licensee of the Defendant as it was evicted from the Defendant's premises. He wrote to Defendant demanding the money in February 1994. The letter of demand was dated 25th April 1994 and was written by Kimundi & Company Advocates on behalf of the Plaintiff company and it was written 3 ½ years after the Plaintiff had been removed from the station. The same letter included claim for Volvo repairs whereas the Plaintiff's claim was not for Volvo repairs. Plaintiff's claim was for Prime Chemicals vehicle and not for Volvo repairs. He admitted that what was stated in paragraph 9 of the plaint was not correct as the Plaintiff was not making any claim for Volvo repairs. He did not produce any documents in respect by East African Oxygen Ltd., stated at paragraph 5 (I) of the plaint. Although the receipt of payment in respect of Prime Chemicals says he paid on 25.5.92, that is not so as he paid the amount of KSh.91,613/- by installments and did not pay it at once as indicated in the receipt. He said he did not make any complaint to the police about Plaintiff properties detained by the Defendant because he was dealing with a company. On the day of eviction he made a complaint to the police that the Plaintiff was being evicted without a court order. He admitted that he had not shown the court documents to show that the properties he was claiming were his and he admitted plaintiff's items were old and had been used for many years. Shown MFI.D2 he accepted that the auctioneers took the items recorded in that document only and that he later collected all the items that the auctioneers took away from the same auctioneer Rossam Enterprises. He stated that his assets were only tools in the workshop and machineries which the Plaintiff was demanding and not the motor vehicle. The items the plaintiff is claiming, he said were not in the garage. They were outside in the greasing bay and auctioneers never took them. Shown the Affidavit, he signed in his appeal to the Court of Appeal earlier on, the stated that what was in the Affidavit to the effect that the equipment belonging to him were few was correct. The debtors that had not paid a total of KSh.104,500/- were Plaintiff's customers and not customers of the Defendant, but he agreed that those who paid their debts did so after Plaintiff left the station and he had not sued the few customers who had not paid the outstanding debts. One customer, the Nation Newspapers refused to pay as copies of LPOs were not available. It owed KSh.67,000/-. There were documents taken by the auctioneers and got misplaced by the same auctioneers. He did not make any complaints about the same because at that time the important matters were the money and the properties detained by the Defendant. The amount of KSh.491,450 Plaintiff was claiming was made up of KSh.100,000/- the Plaintiff paid to Defendant as deposit and KSh.391,450/- which was the value of the products namely, Premium and Regular Petrol as well as lubricants which had been paid for and were properties of the Plaintiff. He admitted that his first formal letter of demand was dated 25th April 1994. He had no tax returns to show he was getting a total profit of KSh.720,000/- per year, but he insisted, he used to make that money as profit. He had no audit report for the business although last audit report was made for 1988 but he did not have that report either. He admitted that he had no documents to show that the properties he was claiming belonged to the Plaintiff as he also had no audit report that would have shown that the properties belonged to the Plaintiff.

In re-examination, he said he was claiming either the same goods or the value of the goods and that was why he produced Proforma Invoices. He first demanded the release of the accessories in February 1994. In respect of the Prime Chemicals, the Plaintiff's claim was engine part which got lost. That was engine that was taken to the station for repairs and which had been

partly repaired but at the time Plaintiff was evicted, the spare parts got lost and the owner demanded the replacement of the engine and the Plaintiff paid the same money to the owner by installments. The witness did not make any reports about the detained equipment because Defendant said the same would be paid for. The witness then described in details where equipment taken by the auctioneers and those that he claimed from the Defendant were before the Plaintiff was evicted from the station. He stated that the list of debts was prepared a week after the Plaintiff was evicted. He did not sue the four auctioneers who had not paid a total of KSh.104,000/- as he did not have the original documents with him. They were misplaced when papers were taken by auctioneers. He ended his evidence by saying that the garage equipment belong to Plaintiff.

Samuel Gakiria Kingori, was PW.2. He worked for Defendant from 1986 to 1991. He was then Sales Representative in charge of Retail and Consumer Customers. Plaintiff was one of the Defendant's dealers at a Petrol Station along Waiyaki Way. In the years 1990 to 1991 he was incharge of Nairobi Central and Plaintiff was one of the Petrol Stations he was in-charge of. He was aware that Plaintiff's dealership was terminated in February 1991. According to this witness the Plaintiff performed well and that was the reason why the Plaintiff was given operations license and also that was why Plaintiff was not penalised for failing to achieve the target as he never failed to achieve the target set by the Defendant and revised by the same Defendant. He said it was not true that the Plaintiff did not meet the target. On 15.2.1991 he was called by his boss Baraka and one Murila and was directed to go and evict the Plaintiff from the Petrol Station. He went with Auctioneer Rossam to evict the Plaintiff. PW.1 was not at the station at that time of eviction. They evicted the Plaintiff and collected the goods in full packets and loaded them in a vehicle and the key was given to Murila. He gave to the court, the names of the Defendant's items that were at the Petrol Station. Murila gave the keys to this witness who did not become a dealer but was running the station for the Defendant. They were using some of the Plaintiff's equipment which had remained there. These were equipments such as wheel alignment machine, wheel balancing machines, acetylene gas, spraying machines, loan mower, Garage chain, two doors of a vehicle, some cases, some vehicles. None of these were released to the Plaintiff during this witness's stay at the station. When he took over, there were fuel products which were valued and which he took over. He left the station in June 1991 and a Mr. Singh took over and at that time the accessories and equipment of the Plaintiff were still there. In cross examination, this witness stated that he was the one supervising the dealers work on the ground so that if the dealer was not achieving its target, he would tell the Defendant. He was the man placed between the Defendant and the Plaintiff. He attended meetings which decided on the targets for the dealers but he was not in the meeting referred to in a letter dated 5th July 1990. The Plaintiff was achieving the targets set for it. He was present when the Plaintiff was being evicted and he told Mr. Murila that it was not proper to evict the Plaintiff. The eviction was peaceful and there was no fight and security was not called. He did not see well what the auctioneers took away from the station. He stated that he was the one running the service station after Plaintiff had been evicted. Wheel balancing machine was inside the office and it was operational. Tyre changer was outside the office. Trolley jack was in use sometimes outside and sometimes in the office, wheel balancing was there and welding machine was in the shed. Lawn Mower was in the shed, spraying machine was in the shed while acetylene cylinder and BMW door were in the garage. The Plaintiff never

collected the same properties while the witness was still running the station. Although he signed operations agreement with Defendant, he was not running the service station on his own. He remained an employee of the Defendant and was running to station on behalf of the Defendant and he signed the dealer's agreement only as a proxy. He admitted that he signed an affidavit on 17th May 1991 which affidavit had annexed to it several documents like ledger cards, and documents not in the letter-heads of the Defendant but he said that he did not know the contents of the same affidavit as the Defendant's advocate gave him only the last page to sign and he signed it without knowing the contents of what he signed. He said what was contained in that affidavit was false. After running the service station he went back to the Defendant company and fell sick. He was admitted to hospital. When he returned from the hospital he found allegation being made that he had misappropriated Defendant's funds and he was summarily dismissed. There is a case in court on that dismissal. He was not charged with any offence in a court of law. He ended his examination in chief by saying he did not know whether Defendant advertised for the vehicles that were left by the Plaintiff at the service station. In re-examination he mainly confirmed that he did not read the contents of the affidavit he had signed earlier in the case; that he was not a signatory to the accounts of the station when he was running it after taking over from the Plaintiff and he never benefited financially from the station and that he was still in the Defendant's payroll at the time he was running the station. He had not been required to pay the defendant which the dealers are required to pay. The station was earlier on achieving the targets set for it by the Defendant and only failed to do so when the adjacent road was under reconstruction and also because the same the company revised the target. He added that he objected to Mr. Murila against the eviction of the Plaintiff and felt it was not fair because the road was closed and so no sales could be made as no vehicles could access the service station. Indeed the Plaintiff was never penalised for failure to meet the target as would have happed under the normal circumstances. The items he took over from the Plaintiff were not recorded in the Defendant's document MFI.D9 and lastly that the items left at the service station which belonged to the Plaintiff were items necessary for the running of a service station.

Joseph Waimeri Gathui worked for the Plaintiff as Pump attendant from 1986. He was the Plaintiff's third witness. He was later promoted to the position of a clerk and was doing accounting work as well as banking. He was also dealing with suppliers. When Plaintiff acquired the service station, this witness was there. He confirmed that the items claimed to have been left there were then at the service station. They belonged to Muthondu PW.1 and they were Wheel balancing machine, Trolley Jack, cash paying machine, welding machine, cylinder of Oxygen, Tyre changer, wheel aligner. In the office there were metal safe and balancing machine, three brooms and water horse pipe. All the items belonged to PW.1. Things in the garage were brought within six months of the Plaintiff taking over. Defendant had properties such as building, fuel tanks and others. The debt list Exh.19 was written by this witness and he says it is in his handwriting. He prepared the list on 14.2.1991. When eviction was taking place he carried with him the Debtors book. Some of the Debtors were people who had taken fuel and sum were people whose vehicles were repaired. He took the list to PW.1 and he did not know if the debts were recovered or not. The auctioneer who removed them took some items but never took the items which were left behind by the Plaintiff which he has mentioned above. After the eviction of the Plaintiff, this witness returned to the Petrol Station

and was employed by the Defendant as pump attendant in April the same year. The same equipments were still there and when he left the service station in December 1991, the same equipments were still there. He produced the Debtors list he prepared as Exh.19. In cross-examination, he was shown Defence document which was marked for identification as D4 and he agreed that though it looked like Exh.19, there were however some differences and it was not a copy of MFI.D4 and he could not be sure under what circumstances he prepared MFI.D4 but both Exh.19 and MFI.D4 were prepared by him. He could however not remember the total amount that was owed to the Plaintiff. He agreed that according to Exh.19,, the amount owed to Plaintiff by Debtors was KSh.343,176/- whereas according to MFI.D4 the amount owed to Plaintiff was KSh.451,883/-. He said he took the amount of KSh.451,883/- from the entries in Exh.19 and it is the debt as on 14.2.1991. He became involved with the Plaintiff's properties when he became a clerk and that was six months after Plaintiff employed him. He however could not remember when Plaintiff took the items to the Petrol Station but they were there although he got involved with them when he became a clerk. When he was working there soon after the Plaintiff's removal PW.2 was paying the workers but he cannot remember if all that time he was dealing with PW.2 only. He could not remember when the garage shed was built. Shown Exh.19 (list of debtors) he admitted that these debtors were customers and they could look for them if they delayed in payments.

In re-examination he said that he obtained information which he used in preparing Exh.19 and MFI.D4 from Debtor's book. He first entered that information into Exh.19 but later transferred the information into MFI.D4 and ignored exh.19. When he was working at the Petrol Station before working with Plaintiff, the items he called Plaintiff's items were not there. The same items were owned by PW.1 who also owned the Petrol Station before he was evicted. He concluded his evidence by saying that he knew the debtors in Exh.19 and the same debtors could be traced even by telephone numbers but he had no records which could be used in tracing them.

Charles Gichuru Mbuthia sells chemicals under the name Prime Chemicals. He was PW.4 in the case. He used to buy Petrol from Plaintiff in 1991 and 1992. They used to repair his vehicles. He took his vehicle KUD 369 to the Plaintiff for repairs. That was towards the end of 1991. It was not repaired for a long time and when he went to take it back he noticed the engine was missing. He went for the vehicle in early 1992. He reported the matter to the Petrol Station. He demanded another engine. They got another engine for KSh.91,613/- from Sharmas. He bought the same engine but Plaintiff paid i.e. refunded to him the amount by installments and he gave a receipt for the total payment on 25.5.92. The money was paid by three or four installments. He produced the Invoice No.3901 as Exh. 11(a) and Receipt as Exh. 11(b)

In cross-examination he said that he took the vehicle to Plaintiff towards the end of 1991 and went to collect the vehicle in February 1992 as he had been sick for a month. The vehicle was at the Plaintiff's workshop at Caltex Petrol Station in Westlands opposite Army Barracks and that was where he took the vehicle. He was adamant that he collected the vehicle in February 1992 but he had no receipt for the money he paid to Sharmas. He said the amount of KSh.91,612/- included the cost of labour in fixing the engine and this was not the value of the engine alone. He admitted that there could be confusion on dates as he was sick. In re-examination he said he

could not remember when he took the vehicle from PW.1, but PW.1 was not there when he took the vehicle there and PW.1 was not there when he went to check the vehicle and he was not there when this witness took the vehicle away. The amount of KSh.91,613/- included cost of labour as well.

The last Plaintiff's witness was Patrick Gakuru Kanoga. He worked at Avon Rubber Company (Kenya) Ltd as General Manager. In 1993 Plaintiff sought Proforma Invoices in respect of Garage equipment from their firm. The equipment for which Proforma invoices were required by the Plaintiff were Tyre changer, wheel balance, a jack and wheel aligner. He issued the required proforma invoices as they deal with the same garage equipment. He identified the same proforma invoices and the prices quoted in the same proforma invoices which prices were prices prevailing between 1990 to 1995. The Plaintiff did not purchase the same equipment and the same invoices were prepared by a former colleague of the witness who had left the company but who was in the witnesses' department. He produced the proforma invoices as Exhibits 12, 13, 14, and 15.

In cross examination, he said Avon Rubber Products were not the only suppliers of the equipment. They had other competitors. He agreed that there are other models of the same equipment and prices vary with the models. The prices of the same equipment might have been different in 1986 but the difference margin was small. According to the witness, VAT may make a difference but that difference would be known as the VAT would range from 15% to 18% of the price. He ended his evidence by stating that prices are not the same as every competitor fixes his own price depending on where the equipment is imported from - as some come from China while some come from Europe.

The above was the evidence adduced in the entire case. I do not pretend to have recorded everything that was given in evidence here, but I have endeavored to record the above which I do feel reflect the salient aspects of what the witnesses did state in evidence, both in chief and in cross-examination as well as in re-examination including references to the exhibits that were produced.

I have considered the pleadings, the evidence as well as the able submissions that were made by the learned counsels.

I do not think, the first four issues in the agreed statement of issues dated 12th January 1995 and filed on 23rd January 1995 are any longer issues. No reference was made on the same and record shows that HCCC No.200 of 1991 which gives rise to these issues was in fact withdrawn before the commencement of the hearing of this suit. Civil Appeal No.116 of 1991 was also withdrawn and consequently the questions as to whether the suit is bad in law and is an abuse of the court process and ought to be struck out are no longer available.

I will in considering the entire case start with what is put down as issue No.8 in the statement of issues i.e. whether the termination of the agreement of 1st June 1994 and subsequent taking over of the service station was lawful or justifiable. I do feel this issue is not properly written down as there as no agreement of 1st June 1994. The agreement which the Plaintiff alleges existed was one of 1st June 1987. The Defendant is not disputing that allegation and so I will consider whether the termination of agreement of 1st June 1987 and subsequent taking over of the service station was lawful and

justifiable. There is no dispute as I have observed above that the Plaintiff was at first a dealer at the Defendant's Service Station situate along Waiyaki Way in Nairobi and particularly at Westlands opposite the former Department of Defence Baracks and near ABC Complex – particularly on L.R. No.990/14. A letter addressed to Mr. Muthondu PW.1 dated 6.8.86 from the Defendant and which was at the end of it signed by both Muthondu PW.1 and Mathews Nyangor for the Defendant offered the same PW.1 licence to occupy the service station from 6th August 1986 till 7th February 1987. It also stated that that period of six months license of occupation could be extended for such further period as was to be agreed upon. That license could be terminated at any time by the Defendant by giving the same Mr. Muthondu seven days notice. In that letter of offer (which was accepted), the Defendant clearly spelt out the sales targets which the same Mr. Muthondu was to reach and at the end of it was states as follows:-

> *"Operations Agreement*
>
> *Subject to your conducting the Service Station to our satisfaction during the term of this license, you will be offered an operation's Agre ement upon such terms as we shall consider fit and upon execution thereof by you this license will automatically determine."*

As I have indicated herein above, that license was given to Muthondu PW.1 and was duly accepted by the same PW.1. The same Muthondu is the Director of the Plaintiff herein. He produced the same letter as Exh.1 and it was not disputed that he was a dealer of the station during the licence. I am conscious of the legal position that Muthondu PW.1 and Plaintiff Janevams Ltd. are separate and different personalities but in this case, it does not appear that the same difference was pronounced, neither is there any allegation that Muthondu himself considered Janevams Ltd, the Plaintiff as significantly different from him to the extent that his business was affected by the introduction of the Plaintiff at the stage of entering into operation agreement with the Defendant. I do find that the Defendant was at all times aware that the same PW.1 he offered dealers licence was later the director of the Plaintiff company and the Defendant felt comfortable with that situation.

Be that as it may on 10th July 1987, the Plaintiff and the Defendant signed operator's agreement drawn between the two and dated 1st June 1987. Clause 3 of the same agreement states as follows:

> *"3. The licence shall commence on the 1 st day of June 1987 and shall, subject as stated in Clause 8, continue until terminated by either party giving to the other one month's written notice to that effect expiring at any time."*

Clause 8 states as follows:

> *"8. The licence may be terminated by Caltex forthwith on the happening of any of the following events:*
> *(a) If the operator shall fail to perform any of the obligations on the part of the operator herein contained.*

(b) If the operator s hall be convicted of any offence against the laws for the time being in force regulating the sale, storage or use of petroleum products.
(c) If the operator shall commit an act of bankruptcy or, being a company, shall enter into liquidation whether voluntary or compulsory, or make any arrangement or composition with the operators creditors or suffer execution to be levied upon the goods of the operator."

Thus, according to the agreement that was entered into between the Plaintiff and the Defendant, the agreement could only be terminated if the Plaintiff failed to perform any obligation in the agreement, or if the operator was convicted of any offence related to the sale, storage and use of the products or if the Plaintiff committed an act of bankruptcy, otherwise the agreement would continue and would only be terminated by one party giving the other party one month's written notice. My understanding of clauses 3 and 8 of the agreement is that if the Plaintiff committed any of the acts mentioned in Clause 8, then Defendant would terminate the agreement without notice. If however, the plaintiff did not commit any of the acts specified in clause 8, then the agreement could be terminated by either party giving one month's notice in writing. It seems to me that under that clause no reason needs to be given. It is however clear to me that the Defendant had to elect under which clause to proceed in case it wanted to terminate the agreement. The Plaintiff however had no choice but to proceed under clause 3 in case it wanted to terminate the agreement.

On 5th July 1990, the Defendant, in a letter dated the same date revised the targets and warned the Plaintiff that if the same revised targets were not met, then the Plaintiffs' dealership would be cancelled. A copy of that letter Exh.3 indicates that the Plaintiff was supposed to sign a copy of the same letter to confirm that he read it and understood the contents and to undertake in that copy to voluntarily surrender the service station back to Defendant if the targets were not met but there is no evidence that it did so although there is evidence that the Plaintiff did write to explain his position and that letter to the Defendant was dated 24th July 1990. Reacting to that letter the Defendant wrote Exh.4, a letter dated 20th August 1990, in which the Defendant gave Plaintiff three months from 1st August 1990 to improve the performance. Apparently the Defendant felt there was no improvement and so vide a letter dated 21st December 1990 produced as Exh.5 the Defendant gave the Plaintiff one month's Notice terminating the agreement. The letter states as follows:

"21 December 1990

Janevams S/Station
P.O. Box 53504
Nairobi.

Dear Sir,

<u>TERMINATION OF DEALERSHIP</u>

We refer to our letters dated 5 th July 1990 and 20 August 1990 regarding poor performance and we regret that despite the various verbal warnings by our Marketing Staff your Service Station performance still remains below the expected level.

You have constantly run out of products particularly on Monday due to low stocks carried during weekends. You recall that on Monday 10 th December 1990 you were completely out of stock of Premium Petrol while regular Gasoline was only being served through one pump as the other one was dry. Since you acquired dealership of Janevams S/Station in 1986 you have never operated it to our satisfaction and we are now totally convinced that you are not the right dealer for the Petrol Station. We have given you ample time to improve on your performance but no improvement is being noted. As a result we are giving you one month notice to vacate the service Station. Our company representative will come to your service station on 21 January 1991 and you will be required to hand over all company equipment and premises. The tanks wil l be dipped and you will be given a credit note for any stock balances taken over. Full cartons of company branded tubes will also be taken over if you so wish. Any damage to company equipment or loss caused by you over negligence will be charged to your A/C at replacement cost.

Kindly sign and return one copy of this letter as an acceptance of the above notice.

Yours very truly,

Caltex Oil (K) Ltd.
WS TIFFANI – MANAGER DIRECTOR"
By Signed

M. BARAKA – MARKETING MANAGER."

This was the letter of termination of the agreement between the Plaintiff and the Defendant. Was it written pursuant to Clause 3 of the agreement? That clause does not require reasons to be given for termination of the agreement. In any case, the Defendant has not specifically stated that that notice was issued pursuant to that clause. It gives reasons that the Plaintiff has not operated the service station to the satisfaction of the Defendant. It could only have been under clause 8 of the agreement. That clause however does not provide for one month's notice. However, in the confused state of affairs as was created here by the conduct of the Defendant in failing to state under what clause of the agreement it was proceeding and as the notice clearly gives reasons for termination of the agreement, I can only see it proceeding under clause 8 and particularly under clause 8(a) which allows the Defendant to terminate the agreement if the operator fails to perform any

of the obligations on the part of the Plaintiff as contained in the agreement. When one reads the notice against the backdrop of the exchanges in the letters of 5th July 1990, Exh.3, letter dated 20th August 1990, letter from Plaintiff dated 24th July 1990 in reply to the letter of 5th July 1990, then one sees that the main complaint that necessitated the termination was the alleged Plaintiff's inability to meet the targets set out by the Defendant. That in effect meant that the termination letter was issued on the basis that the Plaintiff did not comply with clause 5(b) of the agreement which states as follows:

> *"(b) Subject as hereinafter stated, the operator shall purchase from Caltex in each calendar month the minimum quantities of petroleum products specified in column 2of the second schedule provided always that Caltex may at its sole discretion –*
>
> *(i) alter such minimum quantities from time to time by giving to the operator seven days notice in writing of any such alterations;*
>
> *(ii) in any one or more calendar month or months waive the obligation of the operator to pur chase the said minimum quantities but any such waiver shall not affect the obligation of the operator in respect of any calendar month subsequent to the waiver."*

It is clear to me that the Defendant's notice proceeded under an allegation that the Plaintiff had not satisfied this clause in his operation of the subject service station and therefore fell under clause 8 (a) and hence the notice.

Was the notice valid? i.e. were there good reasons for termination of the agreement under that clause. Put another way, Is there evidence that the Plaintiff breached clause 5(b) of the agreement? PW.1 in his evidence maintains that his company, the Plaintiff had never failed to meet the targets set for the Plaintiff except when the adjacent road and which is in effect the road of access to the station was under construction and it became difficult for vehicles to access the station. He also says, as concerns the allegation that the station tanks were dry particularly on Mondays, that he used to order for fuel in good time but the Defendant delayed in the delivery of petrol. He has said in his evidence and in a letter Exh.10 and another one of 24th July 1990 that it was the Defendant to blame for the Plaintiff's predicament as far as shortage of fuel was concerned and has given instances when the same omission took place. These allegations have not been refuted as the Defendant never called any witnesses in its Defence. The allegations remain as they were made even in July 1990 and I have not been shown any letter refuting the same by the Defendant.

Further, the Defendant in its letter terminating the agreement says that since the plaintiff acquired the dealership of Janevams S/Station in 1986 the Plaintiff had never operated it to the Defendant's satisfaction. Can that be true? I doubt it. From what I have stated above and from the records available as exhibits, the dealership was offered to PWI, as notice says in 1986, specifically it was on 6th August 1986. In that letter offering

dealership, there is a claim at the end which is headed ‘operations agreement, it states as follows:-

> *“Operations Agreement*
> *Subject to you conducting the service station to our satisfaction during the term of this licence, you will be offered an Operations Agreement upon such terms a s we shall consider fit and upon execution thereof by you this licence will automatically determine.”*

Thus the plaintiff could only be offered Operations agent if it conducted the service station to the satisfaction of the Defendant during the term of the licence. The licence was given on 6th August 1986 and was to last for only six months unless extended. It was extended from time to time till 1st June 1987 and on that day operations agreement was offered to the Plaintiff. The operations agreement was to be offered to the Plaintiff (according to the dealers licence I have quoted above) only if the operator(or dealer) conducted the service station to the Defendant’s satisfaction. It goes without saying that the act of the Defendant offering the Plaintiff operations licence on 1.6.87 was in itself a clear evidence that the condition in the dealers licence had been satisfied, i.e. that the Plaintiff had conducted the service station to the Defendant’s satisfaction for otherwise the Defendant had no business offering the operators licence to the plaintiff. I therefore find that the Defendant cannot be serious in its termination letter when it says that since the Plaintiff acquired dealership for the service station in 1986 the plaintiff had never operated it to the Defendant’s satisfaction. That cannot be true. In any event, if that were true then one is bound to wonder where the Defendant was all these over four clear years since the Plaintiff took over the station and why it never took action earlier on. I do find that I am not satisfied that the Defendant’s Notice of termination, was given upon valid reasons. I come to that conclusion because no evidence has been adduced by the Defendant to support the alleged reasons for termination of the agreement and some of the reasons appear to me as I have stated above clearly untenable. Thus my answer to issue No.8 of the statements of issue is that the termination of the agreement of 1st June 1987 and subsequent taking over of the service station was not lawful and or justifiable.

I will now consider what the Defendant, having been found to be in breach of the agreement, is liable to pay to the Plaintiff (if any). The Plaintiff in its plaint is seeking judgment against the Defendant for a sum of KSh.1,978,224/80 which is total amount of money in respect of the value of equipment (KSh.1,154,292.00), loss of money to Debtors which it said it could not successfully recover as its documents for proving the same debts were lost during the taking over of the station, (KShs.245,243.00), accessories (KSh.18,160/-_ and interest earned from the deposit of KSh.491,450/- which interest the plaintiff says amounts to KSh.560,530.80. All these prayers are lumped together as prayer No.1 in the prayers for judgment and all amount to KSh.1,978,225/80. It is also seeking damages for breach of contract, costs and such other or further relief as the court may deem fit.

The Defendant states as regards these claims that it did refund to the Plaintiff the amount of KSh.491,449/55 which was credit balance of the Plaintiff’s trading account with Defendant. As regards the claim for equipment and accessories, it says that it is a stranger to the same and puts

the Plaintiff to strict proof of the same but it denies having taken over the Plaintiff's tools, and trade debts, machinery and equipment as alleged. All these matters are covered by issues Numbers 5, 6, 7, 9, 10, 11, 12, and 13 of the statement of issues filed by the parties. I do feel however that I need to consider each special claim separately and I will consider them before I consider the prayer for damages for breach of contract which though not specifically stated, I do understand to be general damages for breach of contract.

First, I will consider the claim for interest on KSh.491,450/-. At paragraph 8 of the plaint the Plaintiff states as follows:

> *"At the time the Plaintiff was thrown out of the premises it had a deposit account Number 100335 with the Defendant which as at 31 st March 1994 stood at KSh.491,450/ - and an interest of KSh.560,530/80 calculated from 1 st February 1991 and last applied in June 1994 at 35% per annum."*

The Defendant's response to this allegation is at paragraph 4 of the statement of Defence and is as follows:

> *"Save that upon lawful terminat ion of the said licence by the Defendant the Defendant refunded the Plaintiff the sum of KSh.491,449/55 being the credit balance of the Plaintiff's trading account with the Defendant the allegations contained in paragraphs 5 and 8 of the plaint are denied in toto."*

Thus it is not in dispute, that the Plaintiff did pay to the Defendant a sum of KSh.491,450/- as deposit which was refundable. I have not seen this aspect in the agreement itself, but as both parties agree that it was payable and was actually paid, I do accept that it was payable. The Plaintiff says it was to be refunded immediately on the determination of the agreement and claims that as that was not done, it was entitled to interest on the same. The Plaintiff was evicted from the service station on 15th February 1991. The deposit was not refunded on that day neither is there any evidence that it was offered to the plaintiff. PW.1 says the same deposit was paid to the Plaintiff in June 1994, some three years and four months later. In cross-examination, it would appear that the Defendant is claiming that the payment was delayed because there were court cases which were initiated by the Plaintiff. It is however not suggested that this money was ever offered to the Plaintiff and was rejected by the Plaintiff. The Defendant has not availed any evidence or any legal proposition that necessitated this delay in the payment being made. In my mind, as the Defendant has given what it called one month's notice to the Plaintiff of its intention to take over the station, it should have been prepared to refund this deposit on the very day of taking over the station as it knew all along for over a month that it was going to take over the station. This was money for business. Its delay in being released to the Plaintiff meant loss to the Plaintiff and the only way to compensate that loss is to award interest on it for the period it delayed with the Defendant so that the Plaintiff is reinstated to the position it would have been had the money been paid in time and used for business. The Defendant has not challenged the rate that the Plaintiff alleges was applicable at the relevant time and has in fact not challenged the quantum claimed of KSh.560,530/80. It will be

awarded as claimed.

The next claim I do now consider is the claim for equipment and accessories that were allegedly taken over by the Defendant. These are all claimed at paragraph 10 and their value is also given in the same paragraph. They are wheel balancing machine, Tyre changer, trolley jack, wheel aligner, welding machine, Lawn mower, car spraying machine, garage shade, oxygen acetylene cylinder, B.M.W two doors, fixed metal safe, car repair tools, complete assembly of rear left light, two folks plus three brooms and horse pipe. The amounts claimed for each is also included in the plaint at the same paragraph No.10. The first aspect, I need to consider is whether it has been proved that these equipment and accessories were indeed at the service station and were left there when the Plaintiff was evicted. The next matter I will consider is whether their alleged valued has been strictly proved as is required in law for their loss is claimed as special damages and must be strictly proved according to the law. PW.1 says Plaintiff had certain items which he was not allowed by the Defendant to take with him at the time he was evicted. He said in part of his evidence as follows:

> *"Auctioneers took all my personal belongings' chairs, tables, etc but they left the most important aspects and those were motor vehicle repair tools and machines which are the subject of my case. I was not allowed to take them. I am not asking for items such as accessories in the second schedule of the operations agreement. The machines I claim are:*
> *(a) Wheel balancing m achine;*
> *(b) Welding machines as per list.*
> *I have given the value of the same in the plaint. The value of the machines, I was refused to take are as in the plaint. I got the value from the dealers and the values are as at the time I got quotations and invoic es:*
> *(a) Wheel balancing machine*
> *(b) Tyre changer machine*
> *(c) Trolley jack*
> *(d) Wheel aligner*
> *(e) Welding machine*
> *(f) Car spraying machine."*

He then proceeded to give evidence about a vehicle, he was to repair, at an agreed amount of KSh.38,000/- and another vehicle which was for engine overhaul for which he had to pay KSh.96,000/- as the overhaul was not done and the owner had to buy a new engine. The Defendant has not adduced any evidence to rebut the Plaintiff's evidence that the same equipment and accessories were at the service station. The Plaintiff says through PW.1 that he was not allowed to take them with him i.e. he was refused access to them and that again has not been rebutted. I have no alternative but to accept evidence of PW.1 that the same equipment, machines and accessories were at the service station prior to the Plaintiff's eviction. In any case PW.2 who took over the station from the Plaintiff and who was prior to taking over the station working with Defendant company as supervisor of the same station among others, PW.3 who was earlier on working at the station before Plaintiff took it and who continued working there for the Plaintiff, both

support PW.1 that the same machines, equipment and accessories were at the station; that they were in possession of the Plaintiff while at the station and that the Plaintiff did not take them with it when it was evicted from the station. Plaintiff is the one who took them to the station. I do find on the evidence before me which I accept that the equipment and machines listed at paragraph 6 of the plaint namely wheel balancing machine, Tyre changer, a trolley jack, wheel aligner, welding machine, lawn mower, car spraying machine, garage shade, oxygen acetylene cylinder, brooms, horse pipe, and forks were at the service station, under the control of the Plaintiff who took them there. I also find that the Defendant did not allow the Plaintiff opportunity to take away the same equipment. I did not have sufficient evidence on the existence of car repair tools the which tools the Plaintiff claims to have left there. I do not think it is enough to just state that car repair tools were left behind without specifying which tools were left behind. Each car repair tool has a name and generalities cannot suffice. Further I was not told in evidence to my satisfaction as to where the metal safe was in particular and it was never described to satisfy me that such a safe existed when the Plaintiff left the subject premises. I therefore do find that no satisfactory proof has been adduced to satisfy me as to their existence. I do reject them. Lastly no evidence was adduced on the existence of what is stated at on paragraph 10 on accessories as complete assembly of rear left light. I do reject that claim also.

As I have stated above, the next matter I need to consider is whether the value of the equipment and accessories I have found were at the premises, and belonged to the Plaintiff and which it was not allowed to take away have been proved as required by law i.e. has been strictly proved. The Plaintiff did not produce receipts for the equipment in question, it has alleged certain values to each of them. It has not stated specifically when each of the same equipment and accessories were bought. It has not availed the detailed account of how much he paid for the materials and construction of the garage shade. PW.1 in his evidence identified proforma invoices. These were proforma invoices in respect of wheel balance valued at 468,460/-. The invoice was dated 22nd December 1993, invoices for automatic Tyre changer which showed an amount of KSh.225,000. It was also dated the same date 22nd December 1993. Invoice for KSh.175,000/- in respect of the value of Trolley jack and Invoice for wheel aligner valued at KSh.75,000/-. The last two invoices were both dated 22nd December 1993 also. These four equipments were the ones in respect of which the Plaintiff made some effort to prove their values. But even the same proof was only in respect of new ones as on 22nd December 1993 and thus did not reflect their true values as on the date the Plaintiff was evicted from the service station. In any case as no evidence was availed as to when they were purchased and thus as to how long they had been at the service station, it cannot be said that these values in the proforma invoices did reflect the true values. Further no attempt was made to prove how far they had depreciated since they were purchased. In cross-examination, PW.5 agreed that there were different models of the same equipment and that value added tax element could also have made some difference in the value of the same equipment and that there were other suppliers who were competing with Avon Rubber company (Kenya) Ltd and could have different values for the same equipment. With all these in mind, and doing the best I can, I will reduce the value given in the invoices, i.e. in Exh. 12, 13, 14, and 15 by 25% in an attempt to arrive at a value which would reflect all the above. Thus I do allow an amount of KSh.351,345/- for Wheel Balance, I allow KSh.168,750/- as the value of tyre changer. For Trolley jack, I accept the amount of KSh.131,250/- and finally on that, I do

allow KSh.562,250/- for wheel aligner. These were the only equipment whose values were to an extent availed in accordance with the legal requirements. PW.1 indicated that he had received some other proforma invoices from Car and General in respect of the values of spraying machine, welding machine, and proforma invoice from East African Oxygen. These proforma invoices were marked for identification as MFI.16, 17 and 18 but the records do not show that they were produced as exhibits in the case. In fact MFI.18 which was meant to be proforma invoice for Oxygen Acetylene Cylinder was an invoice for compact set and it was not explained as to whether that was a cylinder. Be that as it may proforma invoices for the other equipment in this category were not produced as exhibits and I cannot assess any value for the same equipment. I had earlier stated the law that these were special damages and needed to be proved strictly. This had not been done in respect of welding machine, lawn mower, car spraying machine, and oxygen acetylene cylinder. No attempt was made to prove the values of two forks, three brooms and horse pipe. There was no proof of the value of B.M.W. two doors alleged to have been left in the service station as well. In fact the witness PW.1 talked of V.W. vehicle doors and not B.M.W. As to Garage shade all that PW.1 has said is as follows:

> *"I had constr ucted a garage, I would have pulled that one down and would have taken away the materials and CI sheets then. The estimate of the garage is KSh.35,000/ - i.e. Garage shade."*

That evidence cannot be anywhere near proving the value of the alleged Garage Shade. I cannot rely on it to say the shade was valued at KSh.35,000/- and award the same amount as indeed there was nothing like valuation report produced or receipt for materials and for labour charged to prove the alleged estimated value of the garage.

What I have stated above leave only the claims for loss alleged to have been incurred by the Plaintiff in respect of its inability to recover what Plaintiff states at paragraph 9 of the plaint as "Volvo repairs settlement made to the Defendant company on the Plaintiff's behalf" plus claim for what is stated as "Garage Work in progress as at February 1991, stores of car accessories and East African Oxygen Head Deposit. The total claim under that heading is KSh.245,243/-. The claim in respect of garage work in progress was stated to be KSh.38,000/-. The only evidence in support of that claim is by PW.1 who says:

> *"There was a vehicle I was to repair and the agreed amount was KSh.38,000/ -. I had bought all the necessary spare parts for that vehicle. As I was ejected out of the place, I could not repair the vehicle and I was not able to get that money."*

He never stated what vehicle it was. Surely vehicles in Kenya are normally registered and they have registration numbers. He did not state what spare parts he had bought for the same vehicle. He did not produce any receipts for the same alleged spare parts nor did he state whose vehicle that was and whether any agreement existed for the same repair at KSh.38,000/-. He did not state where the spare parts went to and what was the labour charge and the cost of materials. If he had bought spare parts and remained with the same then he could sell them to recover the costs of materials for the repair of the same vehicle and thus would have lost only in respect of labour which

had not been spent as yet and is in any event unknown. It is not possible to allow this claim. I reject it. There is also a claim for stores of car accessories sold by Defendant company for which an amount of KSh.8,000/- is claimed. No evidence was given to support this claim and also no evidence was adduced to support claim for East African Oxygen Head Deposit and how the same claim came about.

I will now consider the claim for KSh.91,613/- and the claim for uncollected debts. On claim for KSh.91,613/- PW.1 says that claim is based on the allegation that there was a customer who had taken his vehicle to the service station for the overhaul of engine. Plaintiff could not complete the work (presumably because the Plaintiff was evicted from the station before he could complete the work). The owner took away his vehicle and had it repaired on their own and then claimed the cost of the same repair. Plaintiff paid owner KSh.96,000/- and got a receipt for the same from the owner. It thus claims that amount as, according to plaintiff, that was a loss arising directly from the eviction of the Plaintiff by the Defendant. There are two matters that make it difficult to understand and appreciate this claim. These are first whether this claim arose directly from eviction of the Plaintiff by the Defendant and secondly (even if I feel it was not remote) whether this claim is supported and proved in the light of the evidence adduced by PW.4. Overhauling motor vehicle engine is a major repair of a vehicle which should normally be done in a fully fledged garage. I do accept that there are minor repairs that can be done at a Petrol Station. I have looked at the operations agreement and I cannot see where such heavy repairs were allowed to be carried out at the subject garage. Further, it is not clear that this was a loss that could be anticipated by the Defendant. However, as I have stated above, the Defendant never adduced any evidence challenging the Plaintiff's evidence and so I will not reject this claim on the two arguments I have raised hereinabove. On the evidence adduced before me there were several disturbing aspects. First PW.1, the Director of the Plaintiff did not state when the relevant motor vehicle was taken to the service station and how long the vehicle was to be there before the owner could collect it already repaired. He does not state when the engine got lost. All he said was that there was another customer who wanted to overhaul engine of his vehicle. That customer was Prime Chemicals. He could not complete work and the owner pulled his vehicle away and repaired it on their own and demanded the expenses incurred of KSh.96,000/- which he paid vide Exh. 11(a) and 11(b) (which receipts show KSh.91,613/- as the amount that was paid). The undisputed evidence however is that the Plaintiff was evicted from the subject service station on 15th February 1991. PW.1 says so in evidence and that is not challenged at all. In the plaint, the Plaintiff is rather vague and talks of having been removed in the month of February 1991 but that vagueness is made clear when evidence clearly said the eviction was on 15th February 1991. The evidence of PW.4 Charles Gichuru Mbuthia is that he used to buy petrol from Plaintiff in 1991 and 1992 and the Plaintiff used to repair their vehicles. At the end of 1991 he took his vehicle to the station and it was not repaired for a long time. He went and took it back but found the engine was not there. It had not been repaired for about three months and he went for the vehicle in early 1992. When he found the engine missing Mr. Muthondu PW.1 was there and Plaintiff's workers were there. He repeated that evidence in cross examination and added that he took away the vehicle in February 1992 and said by 8.3.92 when the invoice was made out he had identified the engine. In re-examination he said he could not remember the actual dates and that when he took the vehicle away Muthondu PW.1 was not there. Three

observations come to mind. First is that PW.4 is not a reliable witness. He clearly changed his evidence in cross-examination and abandoned his earlier stand on dates some of which were specific and also changed his evidence as to whether when he took away the vehicle Muthondu was there or not. Second is that if his evidence in chief is to be believed then whatever date he picked his vehicle plaintiff was still operating the petrol station and cannot say that the vehicle was not repaired because of eviction. Third is that he took away his vehicle because the Plaintiff failed to repair it after three months and that was clearly not the mistake of the Defendant. The other aspect one sees in the matter is that there is no evidence as to who took the engine which necessitated the replacement of the same with a new engine and made it impossible any longer to overhaul the old engine. If PW.4's evidence is to go by then he took the car for repair (note he has not said for overhaul of engine specifically) and it was not repaired within the time agreed. When he went to pick it, engine was not there and the Plaintiff's workers were there (even if one accepts his later version in cross examination that Muthondu was not there). One question that needed to be answered by the Plaintiff (i.e. assuming PW.4 forgot the correct dates and he went to collect the vehicle after eviction), did the Plaintiff have that vehicle at the station with its engine intact (i.e. the engine that was to be overhauled)? There is no evidence on that. The next question is – If PW.4 found Plaintiff's workers there when he went to collect the vehicle, then what did they tell him about the lost engine. In any case, if the engine was still there for overhauling then why hold Plaintiff liable for a new engine. I am not satisfied that the Defendant was in any way involved in the loss (if any) of the alleged engine as the evidence before me does not point to the Defendant even within the required standard, of probability. I will not allow that amount of KSh.91,613 as there is no proper basis for the claim.

The last claim in that category is the claim for uncollected debts which amounts to KSh.104,330/-. The evidence adduced in court on this was as follows:

> *I used to give credit to customers for petrol, diesel and upto the time of eviction the amount due was about KSh.450,000/ -, most of the customers paid me but four took advantage and did not pay. The amount I could not recover is KSh.104,000/ - from four customers. Given another one month and I would have recovered that money from the debtors."*

He then referred to MFI.19. In cross-examination, he said that the four customers who had not paid him were Plaintiff's customers and not those of Caltex. He said further though some of those four such as Nation Newspapers could not pay Plaintiff KSh.67,000/- because the Plaintiff had no copies of L.P.O. as the same copies could not be traced. He felt the auctioneers had taken some documents and the copies could also have been taken by the auctioneers, but he did not make any complaint about that to the Defendant. There is no proper evidence as to why the Plaintiff could not sue the four debtors to recover its money. PW.1 said a letter was written to the four alleged debtors but no copies of such letters were exhibited. In any case the claim that the auctioneers took away the necessary documents that would have enabled Plaintiff sue the four debtors for the recovery of the same amount owed cannot stand as against the Defendant because although auctioneers were agents of the Defendant, there is nothing to show they had

taken the same documents. Debtors list prepared on 14.2.1991 – a date before the eviction was still intact, and in his evidence PW.1 said:

> *"Auctioneers took all my personal belonging, chairs, tables, etc but they left the most im portant aspects as those were motor vehicles, repair tools and machines which are the subject of my case."*

In cross examination, he was much more specific as to what the auctioneers took away and their fate. He said:

> *"I now see this document MFI.D2. Ac cording to this document, auctioneers took 2 tools Boxes, one desk, one executive chair, two metal chairs, two arm chairs, one Frig., Two wheel spares, 2 wooden chairs, assorted engine parts, and drive shaft, one jerrican, one cabinet (wooden), one secreta rial desk, six car doors, seven cans of distilled water, six crates of soda, nine crates of empty bottles, one typewriter IBM. Those were the items taken by auctioneers. I later collected all of them from the auctioneer."*

The above makes it clear that even by the evidence of PW.1 alone, there is nothing to show that documents (let alone documents such as LPOs) were taken by auctioneers. The above also makes it clear that whatever the auctioneers took (even if he were to be shown to have taken such documents), were all recovered by the Plaintiff. Where is the basis of this claim? Why could not the |Plaintiff sue his debtors even after he left the station for they remained its debtors whether or not it was still operating the station? The answer to that question is in my humble opinion – no reason whatsoever or at least no acceptable reason has been adduced. That claim cannot stand.

The sum total of all the above as concerns prayer 1 of the plaint, is that I do award KSh.560,530/- claimed as interest on KSh.491,450/- as at 31st March 1994. I award a total of KSh.706,595 in respect of value of wheel balance, tyre changer, trolley jack and wheel aligner. Thus total allowed under prayer 1 of the plaint shall be KSh.1,267,125/-. The rest of the claims under that prayer are rejected.

I now proceed to consider the claim for damages for breach of contract. The agreement provided as I have stated above that it could, without any reason be terminated by either party giving to the other one month's notice (Clause 3 of the agreement says so.) PW.1 said in evidence in chief that the Plaintiff was making a profit of KSh.30,000/- per month on the garage side and KSh.30,000/- per month on the petrol station side. Thus in a month he alleged that he was making a profit of KSh.60,000/- per month. He did not produce any evidence on the same. He agreed in crossexamination that he did not have tax returns showing that he was paying tax on that profit (which is KSh.720,000/- per year) and he agreed that there was no audit report to indicate that Plaintiff was making that profit. Last audit report for the Plaintiff's business was in 1988 but that was also not availed to the court. It is thus difficult to arrive at a proper figure in respect of general damages. I do agree that the purpose of the award of general damages is to enable one to be as much as possible in the same position as

he would have been had the breach not taken place. Here, without such vital evidence one is at a loss as to what was his position before the breach. However, the Plaintiff must have suffered some loss resulting from the eviction which did not even proceed after a court order. I was not told whether it did relocate elsewhere its garage business, but whatever happened there must have been some elements of suffering by the Plaintiff as a result of what happened. Doing the best I can in the circumstances, I will award KSh.50,000/- as general damages.

The Plaintiff in its submissions by its learned counsel has stated that the Plaintiff has sued the Defendant for and I quote:

> *(a) Release of the equipment, accessories, and the machinery detailed at paragraph 6 of the plaint.*
> *(b) Release of funds held by the Defendant in deposit together with interest thereon at commercial rates and damages for unla wful detention and loss of use thereof.*
> *(c) Damages for conversion and unlawful detention of the equipment, accessories and machinery together with interest.*
> *(d) Compensation for being prevented from collecting debts.*
> *(e) Damages for loss of use of the said equipme nt.*
> *(f) Exemplary damages.*
>
> (g) Costs and interest thereon."

I have reproduced the above because, the claim before me as per plaint (which claim I have also reproduced hereinabove) is in every way different from what the Plaintiff now claims in its submissions unless the plaint the Plaintiff is referring to is a different one from what I have in the file. I have not been shown that other plaint, neither have I been referred to an amended plaint. In the plaint before me there are certainly no prayers for release of accessories, nor for damages for conversion and unlawful detention of equipment, accessories and machinery together with interest; no prayer for damages for loss of use, and finally no prayer for exemplary damages. In law a party must stick by its pleadings and prayers in its plaint. It cannot on the convenience of circumstances seek to have court's judgment for matters it did not plead and prayed for. I am aware that there are situations where courts can make awards on matters that have been made issues during the hearing, but those are matters that both parties were aware of and canvassed during the hearing and during the submissions. In this case the Plaintiff in its plaint clearly opted for the value of the equipment taken and did not in its pleadings seek their return nor damages for conversion and unlawful detention. It had to stick by those pleading and either succeed or fail but not change midstream to seek another judgment without amending the plaint and pleading the same. In fact Plaintiff is clear in its Reply to Defence where it talks of value of the equipment as alternative claim. I have seen and perused the authorities that were submitted. Most of them were on the matters that were not pleaded and they were not of much help to me.

Finally, although during cross examination of witnesses, the Defendant's counsel did show to the various Plaintiff's witnesses various documents which were then marked for identification, these documents were eventually not produced as exhibits as defence never called witnesses in the

case. I have not referred to the same as evidence as indeed they were not exhibits and were not eventually of any value to the court. This judgment is therefore not in any way tainted by the same documents.

In conclusion, judgment is entered for Plaintiff against Defendant in the sum of KSh.1,267,125/- being value of the equipment, plus interest on KSh.491,450/- and also for KSh.50,000/- being general damages for breach of contract. Total amount awarded in KSh.1,317,125/-. Interest on both awards shall be at court rates from the date the suit was filed. The Plaintiff will have costs of the suit. Judgement accordingly.

Dated and Delivered at Mombasa this 4th Day of March, 2003.

J.W. ONYANGO OTIENO
JUDGE