



**Uchumi Supermarket PLC v Aljazeera City Market (Commercial Case E706 of 2021)
[2025] KEHC 8802 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E706 OF 2021
JWW MONG'ARE, J
JUNE 20, 2025**

BETWEEN

UCHUMI SUPERMARKET PLC PLAINTIFF

AND

ALJAZEERA CITY MARKET DEFENDANT

JUDGMENT

1. On 18th October 2018, the parties entered into a franchise agreement for a term of eight years and two months (“the Agreement”). A fundamental term of the Agreement was that the Defendant, as the franchisee, would pay the Plaintiff, the franchisor, an initial fee, also known as goodwill, of Kshs.12,000,000.00/= on or before 18th October 2018. By a Plaint dated 14th July 2021, the Plaintiff contends that the Defendant has breached the Agreement in several ways including that the Defendant only paid Kshs.6,000,000.00/= of the initial goodwill, leaving a balance of Kshs.6,000,000.00/= still due, that it failed to remit royalties, calculated at 2.5% of Gross Monthly Sales, amounting to Kshs.1,080,000.00/=, that it failed to pay rent of Kshs.1,566,000.00/= resulting in arrears of Kshs.18,502,500.00/=, that the Defendant allegedly moved out of the business premises and illegally took the Plaintiff’s assets worth Kshs.1,092,621/=. The specific assets listed include an Upright Fridge (2 doors), Bread Slicer Macadams, 50kg Del Gas Cylinder, 2 Burner Gas Cooker & Gas Piping, Upright Glass Fridge, Stainless Steel Table Top, Server HP Proliant ML370, and Router Cisco 891-K9 series.
2. The Plaintiff claims the Defendant sold goods below safety standards, with most lacking the Kenya Bureau of Standards (KEBS) mark of quality and that it allegedly operated businesses outside the franchise agreement without the Plaintiff’s express permission. The Plaintiff also accuses the Defendant of failing to obtain insurance covers for employees, loss of profits, business interruption, professional indemnity, and fires and that it did not adhere to the trademark requirements of the Plaintiff’s brand name. The Plaintiff contends that these breaches have resulted in significant monetary



loss, including lost rent, royalties, goodwill, and potential business ventures and that they have also compounded the Plaintiff's financial woes, leading to lost earnings and expenses incurred while trying to compel the Defendant to meet its obligations.

3. The Plaintiff states that despite numerous attempts and demand/notice of intention to sue, the Defendant has neglected or refused to comply with its obligations and the Plaintiff seeks the following from the court:
 - a. A declaration that the Defendant is in breach of the Franchise Agreement dated 18th October 2018.
 - b. An order for specific performance of all obligations borne by the Defendant against the Plaintiff.
 - c. An award for special damages of Kshs. 26,675,121.00 for unpaid goodwill, royalties, rent, and assets.
 - d. Costs of the suit.
 - e. Interest on (c) and (d) above.
4. The Defendant opposes the suit and has filed a defence and counterclaim dated 27th January 2022, seeking a refund of the Kshs.6,000,000/= paid as goodwill. The Defendant asserts that the Plaintiff breached the Agreement by unlawfully increasing rent and demanding funds outside the Agreement's scope. The Defendant also claims the Plaintiff vandalized their sales system, closed the supermarket doors, crippled their business, and damaged their properties during eviction. Furthermore, the Defendant avers the Plaintiff misrepresented the premises' strategic location and potential daily sales of over Kshs. 3 million, and neglected its duty to provide business support as per the Agreement.
5. When the matter was set down for hearing, the Plaintiff presented its Chief Executive Officer (CEO), LAWRENCE MUSYIMI NGAO as its witness (PW 1). PW1 relied on his witness statement dated 14th July 2021 and produced the Plaintiff's List and Bundle of Documents of the same date (PEXhibit 1-13). The documents include a Demand Letter, the Agreement dated October 18, 2018, CR12 for the Defendant, Complaint Letter dated 30th July 2019, Complaint Letter dated 25th August 2019, Complaint Letter dated 15th January 2020, Default Notice dated 15th August 2019, Schedule of Assets claimed, Understanding with Franchisee dated 30th July 2018, Termination Notice dated 3rd September 2019, Various invoices dated and marked A-M and the Lease Agreement for the Business Premises.
6. The Defendant's counsel informed the court that the Defendant would not be calling any witness and thus, it closed its case and defense without calling any witness or producing any evidence. Thereafter, the parties were directed to file written submissions which are on record and together with the evidence on record, I will make relevant references to in my analysis and determination below.

Analysis and Determination.

7. I am in agreement with the parties' submissions that in making this determination, I should be guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In



Miller V. Minister Of Pensions 1947 ALL E.R. 372, Lord Denning aptly summarized the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

8. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (KLR) simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ As stated, the Defendant filed a defence and counterclaim but it did not call any witness or produce any evidence. This means that the Plaintiff’s case remains unchallenged (See *Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers* [2001] KEHC 375 (KLR)] and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] KEHC 4017 (KLR)]. However, even though the Defendant failed to challenge the Plaintiff’s case, the latter still has a duty to prove its case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Karugi & another v Kabiya & 3 others* [1983] KECA 38 (KLR) where it was stated that, “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] KEELC 3981 (KLR) the Court held that, “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
9. With the above in hindsight, I will now proceed to determine this matter which from the Plaintiff’s submissions, it seeks the court to determine three issues:
 - a. Was the Agreement a legally binding contract?
 - b. If so, was the Defendant in breach of that contract?
 - c. Is the Plaintiff entitled to the reliefs sought?

Validity of the Agreement.

10. The Plaintiff asserts that the Agreement was a valid contract, possessing all essential elements: offer, acceptance, and consideration. The Plaintiff notes that the Defendant admitted the existence of the Agreement in their statement of defense and counterclaim. I agree. It is indeed not controverted that the parties entered into the Agreement and there was no contention by the Defendant that the same was invalid or not legally binding upon the parties. I therefore find that the Agreement was a legally binding contract between the parties.

Defendant's Breach of Contract.

11. The Plaintiff submits that the Defendant breached the Agreement by failing to pay the balance of the initial fee/goodwill due to the Plaintiff, failed to remit rents and royalties due to the Plaintiff and to operate within the business hours set in the Agreement. The Plaintiff produced its Demand Letter of 27th July 2020 addressed to the Defendant where it seeks the goodwill balance amount



of Kshs.6,000,000.00/=, Royalties amounting to Kshs.1,080,000.00/= and rent balance amounting to Kshs.18,502,500.00/=. The Plaintiff also produced various invoices issued to the Defendant. My reading of the Agreement and the Non-Binding Understanding dated 30th July 2018 provides that these were sums expected to be paid by the Defendant as the Franchisee. There was no rebuttal evidence from the Defendant demonstrating that these sums had been paid as per the Agreement meaning it was in outright breach of the Agreement. I therefore find that the Defendant was in breach of the Agreement for failing to pay the balance of the goodwill, rent and royalties that were due to the Plaintiff.

Entitlement to Reliefs.

12. The Plaintiff argues they are entitled to the reliefs sought because they have proven, on a balance of probabilities, that the Agreement existed and that the Defendant breached it. The Plaintiff emphasizes that claims for special damages must be specifically pleaded and strictly proven and its submit that evidence has been provided in their bundle of documents to prove the sum pleaded in their plaint's prayer (c). It cites legal precedents to support the principle that an innocent party is entitled to compensation for the loss incurred due to a breach of contract, aiming to put them in the position they would have been in had the contract been performed.
13. Going through the reliefs sought by the Plaintiff and my findings above, I find that it is entitled to prayers (a) and (b) of the Plaint. On special damages, I find that it has also demonstrated through its letters, invoices and schedule of assets produced that the goodwill, royalties and rent remain unpaid and that the Defendant carted assets worth Kshs.1,092,621.00/=. The Plaintiff has therefore pleaded and proved that it is entitled to the sum of Kshs.26,675,121.00/= sought. I also find that it is entitled to interest on this amount and as it has been successful in its claim, it is also entitled to the costs of the suit and counterclaim by the Defendant that has failed.

Conclusion and Disposition.

14. In conclusion, I now issue the following final orders:
 - a. The Defendant's counterclaim dated 27th January 2022 is dismissed.
 - b. Judgment is entered for the Plaintiff against the Defendant as follows.
 - a. A declaration be and is hereby made that the Defendant is in breach of the Franchise Agreement dated 18th October 2018.
 - b. An order be and is hereby made directing the Defendant to perform all obligations owed by it to the Plaintiff.
 - c. The Plaintiff is awarded special damages of Kshs.26,675,121/= for unpaid goodwill, royalties, rent, and assets together with interest at court rates from the date of filing till payment in full.
 - d. The Plaintiff is awarded costs of the suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JUNE 2025

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J.W.W. MONG'ARE

JUDGE

IN THE PRESENCE OF:



Mr. Kibet for the Plaintiff.

Ms. Karue holding brief for Mr. Chimei for the Defendant.

Amos - Court Assistant

