



REPUBLIC OF KENYA



**Keroche Breweries Limited v Coretta Limited (Civil Case 34 of 2014)  
[2024] KEHC 8902 (KLR) (Civ) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 34 OF 2014**

**AN ONGERI, J**

**JULY 4, 2024**

**BETWEEN**

**KEROCHE BREWERIES LIMITED ..... PLAINTIFF**

**AND**

**CORETTA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff's suit was dismissed on 14/3/2023 for want of prosecution and the defendant proceeded with the counterclaim *ex parte*.
2. Subsequently the plaintiff filed an application dated 1/8/2023 to arrest the judgment of the court slated for 4/8/2023 and have the *ex parte* proceedings set aside and the plaintiff to prosecute their case.
3. The application was allowed and when the case came for hearing the plaintiff failed to prosecute their case for reasons that their witness had left employment and the court again dismissed the plaintiff's case for want of prosecution and reinstated the defendant's proceedings which had been set aside.
4. The plaintiff was allowed to defend the defendant's counter claim by cross-examining defendant's witness.
5. The defendant's counterclaim is for kshs.3,798,500.00 for breach of implied conditions and the supply of defective products made up as follows;
  - a. Costs of purchasing defective stock 2,736,000.00
  - b. Loss of profit on the defective stock 1,062,500.00Total 3,798,500.00



6. The defendants also claimed a further kshs.76,307,195 made up as follows
  - c. Initial capital outlay ksh.10,722,000
  - d. Loss of profits for 5 years & 3 months (June 2013 – February 2014) which was kshs.943,890.00 to 59,464,070
  - e. Costs of leasing the warehouse for the remainder of the 5 years 3 months ksh.4,830,000
  - f. Fittings fixtures and equipment for the kshs.634,584.00
  - g. Stock in store ksh.4,247,640.00
  - h. Goodwill kshs.10,000,000.00
  - i. Salary expenses paid to stop of the super distributor during the pendency of the court proceedings ksh.100,000/=.
7. The total amount the defendant is claiming against the plaintiff in the counterclaim is Ksh.83,290,835.63
8. The defendant called one witness PDW1 David Kimani Muthondu who adopted his witness statement dated 19/7/2015 as his evidence in chief.
9. PDW1 said he is a director for the defendant company. He said the defendant was a super distributor of the plaintiff company having signed an agreement dated 29/5/2013.
10. The territory of distribution was Ruiru, Thika and Juja.
11. He said by a lease dated 1/4/2013, the defendant leased a warehouse for a period of 5 years and 3 months at Thika Industrial Area on Plot no. CR No. 4953/442.
12. PDW1 stated as follows in his statement Clause 5 of the agreement provided that the Plaintiff would manufacture and supply alcoholic and non-alcoholic beverages and the Defendant would purchase directly from the Plaintiff's breweries for sale to all retailers and customers within the Thika region stipulated in the agreement.
13. There was an implied condition of the contract that;
  - a) The goods would be reasonably fit for distribution for consumption by its costumers;
  - b) The goods would be of satisfactory quality.
  - c) The goods would be of merchantable quality and meet all Kenya Bureau of Standards requirements.
14. The said conditions were implied into the contract by virtue of Sections 14, 15 & 16 of the [Sale of Goods Act](#), Chapter 31 Laws of Kenya.
15. PDW1 stated in his written statement that on 22<sup>nd</sup> and 29<sup>th</sup> January 2014, the Defendant purchased directly from the Plaintiff 700 crates of Summit Lager and 150 crates of Summit Malts for a consideration of Kshs.2,052,000.00 and 684,000.00 respectively. He produced at Page 5 and 6 of the Defendant's bundle of documents copies of the RTGS fund transfer forms dated 20<sup>th</sup> January 2014 and 27<sup>th</sup> January 2014 in the Defendant's bundle of documents.



16. He further stated that the Defendant collected the said products from the Plaintiffs factory on the diverse dated of 22<sup>nd</sup> January 2014 and 29<sup>th</sup> January 2014. He produced copies of the delivery notes as Page 7 and 8 in the Defendant's bundle of documents.

17. In breach of the express and implied terms of the contract, the goods purchased were not reasonably fit for distribution; they were not of satisfactory quality and were not merchantable.

#### Particulars of Breach

i. On or about February 2014, the Defendant received a complaint from its customers (Retailers and Distributors) that the beer they had bought from the Defendant had unusual yellowish colour and substances.

ii. That upon conducting an internal check on the stock purchased on 22<sup>nd</sup> and 29<sup>th</sup> January 2014, the Defendant confirmed that the beer had peculiar yellowish substances.

iii. That an analysis carried out by the Plaintiff on the defective beer confirmed that the goods were not of satisfactory quality.

18. The goods procured were manufactured and supplied exclusively by Keroche Breweries as provided for under Clause 5 of the agreement.

19. PDW1 stated in his statement that the Defendant did notify the Plaintiff of the complaints as required by Clause 12 of the Distribution Agreement, which obligated the Defendant to refer any complaint regarding the quality of the supplied products to the Plaintiff for further action.

20. By reason of the breach of the implied conditions and the supply of defective products, the Defendant has suffered loss and damage of Kshs.3, 798, 500.00 made up as follows.

#### Particulars of Loss and Damage

a. Costs of purchasing the  
defective stock - Kshs.2,736,000.00

b. Loss of profit on the  
defective stock - Kshs.1,062,500.00

Total - Kshs.3,798,500.00

21. In addition, by a letter dated 17<sup>th</sup> February 2014 the Plaintiff unlawfully suspended the Super Distributor Agreement on the basis that the Defendant was involved in counterfeiting its products and the Defendant herein was informed that it was not authorized to distribute any other products pending outcome of investigations. He produced a copy of the letter dated 17<sup>th</sup> February 2014 at Page 9 of Defendant's bundle of documents.

22. PDW1 stated that without informing the Defendant of the outcome of the investigations, on 3<sup>rd</sup> March 2014, the Plaintiff terminated the Super Distributor agreement by way of a public notice and appointed Palemtu Limited as the new Super Distributor. He produced copy of the public notice at Page 11 of Defendant's bundle of documents.

23. He further stated that the public notice was a repudiation of the contract by the Plaintiff and the Defendant was left with stock in its warehouse, which it could not sell and distribute to its customers. The Defendant has accepted the repudiation of the contract by the Plaintiff.



24. By reason of the Plaintiffs breach and repudiation of the contract, the Defendant has suffered loss and damage and the Defendant claims damages.

Particulars of Damages

- i. Initial capital outlay of Kshs,10,722,000.00
- ii. Loss of profits for 5 years 3 Months where the average monthly gross profit for the period June 2013-February 2014 was Kshs.943,890.00-Kshs.59,465,070.00
- iii. Cost of leasing of a warehouse for the remainder of the term of 5 years 3 months Kshs.4,830,000.00
- iv. Fittings, fixtures, and equipment of the warehouse Kshs.634,584.00
- v. Stock in store of Kshs.4,247,640.00 of the following brands;

Item	Quantity	Recommended Selling price	Amount (Kshs)
Summit lager	1638 crates	2,280	3,734,640.00
Summit Malt	152 crates	2,100	380,000.00
Viena Ice	53 crates	1,300	68,900.00
Crescent 250ml	17 cartons	2,100	35,700.00
Valley Wine Red	1 carton	4,200	4,200.00
Valley Wine Red	3 cartons	3,600	10,800.00
Crescent 750ml	4 cartons	3,350	13,400.00

- vi) Goodwill of Kshs.10,000,000.00 as provided for and contemplated in Clause 9 of the Distributorship Agreement.
  - vii) Salary Expenses salary paid to the staff of the Super Distributor during the pendency of the proceedings at Kshs.100, 000.00 per month from March 2014 until payment in full.
25. In cross-examination PDW1 said when they received complaints about a yellowish substance found in the beer they reported immediately to the plaintiff.
26. PDW 1 said the distributor agreement was terminated on 3/3/2014 by way of newspaper advertisement.
27. PDW1 said that the defendant did not tamper with the products.
28. The parties filed written submissions as follows; the plaintiff submitted that Messrs. Kabugu & Co. Advocates came on record for the Plaintiff vide a notice of change attached to a consent as pursuant to order 9 rule 9 of the Civil Procedure Rules 2010. The firm Messers. Waruiru, Karuku & Mwangale Advocates were previously on record up until the 20/6/2023, when they handed over the file back to its client. The Plaintiff upon perusal of the file established that the matter was reserved for a judgment for



failure of appearance during the proceedings and thus acquired the services of the firm Messrs. Kabugu & Co Advocates.

29. It was thus the submission of the plaintiff that according to Article 25 (c) of the constitution it has a right to a fair hearing which was threatened as they were not heard nor did they tender evidence. That further the mistake of counsel should not be visited upon the litigant as no prejudice will be occasioned to the defendant. it is in the interest of justice if the suit is opened allowing the plaintiff to avail its witness and evidence in chief.
30. The defendant alternatively submitted that the firm of Wambugu and Company Advocates to be deemed properly on record on behalf of the Plaintiff herein after the Plaintiffs suit was dismissed, the said firm of advocates was required to obtain leave from this Court. Although the firm filed a consent with the previous firm of advocates, to come on record no leave has been sought either in the present application or separately. The defendant contended that the Court having dismissed the Plaintiffs suit, the instant application is incompetent as the firm of Kabugu and Company Advocates has failed to comply with the mandatory requirements set out in Order 9 Rule 9 of the Civil Procedure Rules.
31. On review the defendant submitted that no sufficient reasons have been provided by the plaintiff to warrant the grant of the orders sought herein. The Plaintiff having admitted to being aware of the reserved hearing date and having intentionally failed to attend court for the hearing, cannot claim that their right to fair hearing under the Constitution as guaranteed under Article 48 and 50 has been violated.
32. The defendant argued that the plaintiff claim that the non-attendance was on account of a mistake on the part of their former advocates but no reason has been given for the same. That it is not enough for the plaintiff to simply blame its advocates as the case belongs to the plaintiff and the plaintiff admitted to being aware of the reserved hearing date.
33. It is the duty of the defendant to prove its counterclaim to the required standard in civil cases which is on a balance of probabilities.
34. The issues for determination in this case are as follows;
  - i. Whether the plaintiff was in breach of super distributor agreement dated 29/5/2013.
  - ii. Whether the respondent is entitled to the remedies it is seeking against the plaintiff in the counter claim.
35. On the issue as to whether the plaintiff breached the super distributorship agreement dated 29/4/2013. I find that there is evidence that plaintiff and the defendant entered into the agreement and the defendant agreed to distribute only products manufactured by the plaintiff.
36. The plaintiff supplied the defendant with defective goods and they subsequently repudiated the contract.
37. The defendants witness DPW1 said they learnt about the termination from the newspaper on 3/3/2014 by a public notice which stated that the plaintiff had appointed Palemto Ltd as the new super distributor.
38. The defendant's witness said they had received a complaint on the product and had done investigations and confirmed the beer had a yellow peculiar substance.



39. PDW1 stated in his statement that the Defendant did notify the Plaintiff of the complaints as required by Clause 12 of the Distribution Agreement, which obligated the Defendant to refer any complaint regarding the quality of the supplied products to the Plaintiff for further action.
40. The super distributors agreement state at paragraph 12 as follows;  
12”In the event of the distributor receiving any complaint regarding the quality of Keroche’s products, he will not make an admission, accept liability or make any binding commitments on behalf of Keroche, but will refer those complaints to Keroche for further action.”
41. I find that the defendant complied with this clause and there is no evidence that the defendant was in breach of the distributorship agreement.
42. I therefore find that it was the plaintiff that breached the terms of the super distributorship agreement between the parties.
43. The agreement provided failure to meet targets as one of the reasons for termination of the agreement and there is no evidence that the defendant failed to meet the set targets.
44. There were other grounds for termination that were not breached by the defendant.
45. A perusal of the super distributorship agreement states at clause 3 that;  
3.”The distributor will be expected to distribute all Keroche products. He/she will commit a minimum monthly purchase of stock (as shown below). Failure to meet the targets will lead to automatic termination of the distributorships. Note that the targets given below may be varied from time to time at the discretion of the company.”



PRODUCT	QUANTITY(Crates/Cartons
Beers	
Larger 500ml	10,000
Malt 339ml	2,000
Spirits	
Crescent 250ml	3,000
Ready to drink Vodkas;	
Viena Ice 500 ml	10,000
Viena Lemon Twist 750 ml	
Table Wines; Valley Wine pinotager Red 750 ml	
Valley wine Chenin Blanc (White)	
Valley wine Sauvignon Blanc (White)	

46. On the issue as to whether the plaintiff is bound to pay the defendant the damages sought, I find that the plaintiff is bound to pay the defendant damages for breach of contract.
47. The goods supplied by the plaintiff were not of satisfactory quality and the same were not merchantable and therefore they were not reasonably fit for distribution.
48. There is evidence that as a result of the breach of the implied conditions and the supply of defective products, the Defendant suffered loss and damage of Kshs.3, 798, 500.00 made up as follows;
- Particulars of Loss and Damage
- c. Costs of purchasing the defective stock - Kshs.2,736,000.00
- d. Loss of profit on the defective stock - Kshs.1,062,500.00
- Total - Kshs.3,798,500.00
49. By a letter dated 17<sup>th</sup> February 2014 the Plaintiff unlawfully suspended the Super Distributor Agreement on the basis that the Defendant was involved in counterfeiting its products.
50. Further, there is evidence that while the matter was pending investigations by the plaintiff and without informing the Defendant of the outcome of the investigations, on 3rd March 2014, the Plaintiff terminated the Super Distributor agreement by way of a public notice and appointed Palemtu Limited as the new Super Distributor.
51. The public notice was a repudiation of the contract by the Plaintiff and the Defendant was left with stock in its warehouse, which it could not sell and distribute to its customers.



52. The defendants witness DPW1 said they learnt about the termination from the newspaper on 3/3/2014 by a public notice which stated that the plaintiff had appointed Palemtu Ltd as the new super distributor.
53. The defendant further claimed the following from the plaintiff;
- a) Initial capital outlay ksh.10,722,000
  - b) Loss of profits for 5 years & 3 months (June 2013 – February 2014) which was kshs.943,890.00 to 59,464,070
  - c) Costs of leasing the warehouse for the remainder of the 5 years 3 months ksh.4,830,000
  - d) Fittings fixtures and equipment for the kshs.634,584.00
  - d) Stock in store ksh.4,247,640.00
  - f) Goodwill kshs.10,000,000.00
  - g) Salary expenses paid to stop of the super distributor during the pendency of the court proceedings ksh.100,000/=.
54. The defendant is entitled to the stock in store of ksh.4,247,640.00 since the distributorship agreement did not allow them to sell the stock to anyone else.
55. The distributorship agreement did not also allow the defendant to sell any other products and defendant would have been entitled to the costs of hiring premises.
56. However, there is no evidence that the defendant paid the said amount at the start of the distributorship agreement and in any case once it became known to the defendant that the plaintiff repudiated the agreement the defendant had an option to terminate the lease agreement for the premises.
57. Costs of leasing the warehouse for the remainder of the 5 years 3 months ksh.4,830,000, are therefore not awardable in the circumstances.
58. I find that amounts sought by the defendant in respect of Initial capital outlay of ksh.10,722,000 and loss of profits for 5 years & 3 months (June 2013 – February 2014) which was kshs.943,890.00 to 59,464,070 are not a direct result of the breach and the same are not contained in the distributorship agreement and the plaintiff is not responsible for the said costs.
59. The said loss of profits, for 5 years 3 months is speculative since there is no guarantee that the defendant would have made such profits and the same are not payable.
60. In addition, the money claimed in respect of good will of Ksh. 10,000,000 is not within the contract entered into by the parties and the same is not payable.
61. I award damages for breach of contract as follows;
- i. Cost of defective stock purchased Kshs: 2,736,000.00
  - ii. Loss of profit on defective stock 1,062,500.00
  - iii. Stock in store/in trade 4,247,640.00
- Total 8,046,140.00



62. Judgment be and is hereby entered in favour of the defendant’s counter claim against the Plaintiff in the sum of ksh.8,046,140.00 as detailed above, together with costs and interest at court rates from the date of filing suit until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF JULY, 2024.**

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**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... **for the Plaintiff**

..... **for the Defendant**

