Ahmed t/a Airtime Business Solutions v Celtel Kenya Limited (Civil Case 661 of 2007) [2023] KEHC 20243 (KLR) (Civ) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 661 OF 2007

WA OKWANY, J

JULY 13, 2023

BETWEEN

NASSER AHMED T/A AIRTIME BUSINESS SOLUTIONS ..... PLAINTIFF

AND

CELTEL KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. In the partial judgment rendered by this court on 24th September 2020, parties were ordered to carry out an audit of the Plaintiff's accounts held with the Defendant from the inception of their business relationship to the date of the said judgment in line with prayer A in the Amended Plaint. The court then suspended the determination of the other prayers made in the plaint and counterclaim pending the outcome of the said audit. The order for audit was specific that it was to be conducted within sixty (60) days from the date of the judgment. The matter was then listed for mention on 19th November 2020 to confirm the outcome of the audit.

2. It turns out that the audit was not conducted and through a consent order recorded on 15th March 2023, almost 3 years after the partial judgment of 24th September 2020, parties agreed to set aside the order for taking of accounts and withdrew prayer A of the amended plaint that was in respect to the said accounts. In the said consent, parties agreed to have the suit be determined on the basis of the documents produced in court during the hearing. The file was thereafter forwarded to Nyamira High Court, where I am currently stationed, for the purposes of writing the final judgment.

3. As I had already stated in the initial judgment, apart from the prayer for taking of accounts, the Plaintiff also sought the following orders in the amended plaint dated 25th July 2014: -

    b) Payments for:

i. Installed SIM cards Kshs. 36,354,630.00

ii. Partner support Kshs. 5,706,142.00

iii. Remuneration Kshs. 15,000,000.00

iv. Container deposit Kshs. 2,000,000.00

v. Holiday Prepaid Uhuru bonus balance Kshs. 2,965,161.00

vi. Regional target incentive commission Kshs. 384,804.00

vii. Damages for the loss of business Kshs. 60,000,000.00

Total Kshs. 122,410,737.00

c) An injunction restraining the defendant by itself, its agents, servants and others claiming through it from interfering with the plaintiff's ownership or operation of his business outlets shops, containers and other business assets or from recalling or realizing the Bank Guarantees issued in favour of the plaintiff.

d) Costs of the suit.

e) Interest on (a) and (b) at Commercial Bank Rates.

f) Such further or other remedy as this Honourable court may apt to grant.

4. The Defendant, on its part, sought the repayment of Kshs. 21,972,954 which it claimed was the amount outstanding on the Plaintiff's account as at the time it terminated the Plaintiff's distributorship on 10th December 2007.

5. Besides the claim for Kshs. 21,972,954, the Defendant also sought orders for the return of its assets that were allegedly withheld by the Plaintiff, to wit; 5 Celtel kiosk containers, 6 pieces of Celtel light boxes, a computer with printer, UPS and link antennae or the payment of equivalent monetary value.

6. The Defendant further claimed rent arrears since December 2007 for 5 Celtel kiosk containers used at the Plaintiff's retail shops namely: Westlands Kshs. 15,000/= Eastleigh Kshs. 10,000/=, Voi Kshs. 8800 Malindi Kshs. 8,000/= and Mtito Andei Kshs. 4,000/=. The Respondent added that such rent would be calculated and ascertained when the containers are returned.

7. This court had already summarized pleadings and the evidence tendered by the parties in its earlier (partial) judgment rendered on 24th September 2020 and will not regurgitate the same in this final judgment.

8. I will therefore turn to consider each of the prayers made by the Plaintiff in the plaint and determine if the same was proved to the required standards.

Installed Sim Cards – Kshs. 36,354,630.00

9. The Plaintiff's case was that he sold 74,958 Sim Cards/pre-paid kits and was therefore entitled to Kshs. 485 for each kit. The Plaintiff produced a summarized report, prepared by the Defendant, for all the installed Sim kits as at 10th December 2007 in his list and bundle of documents dated 24th May 2014.

10. It was the Plaintiff's case that under its new distribution remuneration scheme, the Defendant was to pay him a total of Kshs. 485 per kit with effect from 1st October 2007.

11. The Defendant, on the other hand, noted that the Plaintiff's claim emanated from the remuneration introduced by the Letter dated 17th October 2007 which, at paragraph II- (Prepaid Kits-Activation Remuneration-Effective Date 1st October, 2007) clauses 3, 5,6 and 7 provided for the remuneration structure that a distributor was to earn as follows;

    i. Kshs. 235 (inclusive of VAT for every sim card sold, activated and loaded with airtime of at least Kshs. 100/= by the end user and

    ii. Additional Kshs. 235/= as loyalty bonus for every prepaid kit that has consumed Kshs. 300/= and above.

12. According to the Defendant, the two incentive payments amounted to Kshs. 485/= per sim kit sold to an end user with airtime consumption of at least Kshs. 300/=.

13. Regarding the Plaintiff's allegation that he sold 74,958 kits and was therefore, under the agreement, entitled to earn Kshs. 485/= from each kit making up the total claim of Kshs. 36.354,630/=, the Defendant submitted that the Plaintiff needed to prove the following;

    i. That he purchased the alleged 74,958 kits from the Defendant during the relevant period;

    ii. That all the 74,958 kits were sold to an end user;

    iii. That each of the end user loaded and consumed minimum airtime of Kshs. 300/=.

14. The Defendant submitted that this claim was not proved as there were no such sims/kits purchased by the Plaintiff from the Defendant during the relevant period. The Defendant maintained that the Plaintiff was under a duty to strictly prove that he purchased and sold such a number of kits in the relevant period and that it was not enough to merely place numbers before court.

15. The Defendant argued that the Plaintiff did not tender any evidence to show that he sold the alleged number of kits to an end user and that the end user installed the sim card and loaded it with airtime to the threshold set out in the Remuneration Schedule in respect of airtime consumption by the end user in order to qualify for the claimed remuneration.

16. It was submitted that the untitled documents appearing at pages 207 to 211 of the Plaintiff's Supplementary Bundle of Documents do not prove the claim as they do not add up to the 74,958 kits claimed. The Defendant added that the documents do not contain any information to sufficiently identify them or allow the Court to verify their authenticity or the information provided therein.

17. It is trite that a claim for special damages must not only be pleaded but must also be strictly proved before they can be awarded by the Court. This is the position that was taken by the Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

18. Courts have therefore insisted that a claimants must present actual receipts of payments made to substantiate loss or economic injury. In the present case, the Plaintiff contended that he sold 74,958 Sim Cards/pre-paid kits and was therefore entitled to Kshs. 485 for each kit under the new remuneration scheme. For this argument, the Plaintiff relied on a document contained in its list of documents titled

"Summarized report for all installed SIMS per sales channel." I note that the said document is not dated or signed by anyone and neither does it have the Defendant's logo or watermark. I find that the source and authenticity of the said document was not verified or proved.

19. My finding is that even though the Defendant did not contest the claim that its distributors were, under the new remuneration scheme, entitled to payment for installed sim kits, the Plaintiff was still required to prove, through verified documents or receipts, that he indeed sold the claimed number of sim cards during the said period. I note that a determination of the actual number of sim kits sold is one of the issues that the parties could have ironed out during the audit that the court ordered in its earlier judgment.

20. As I have already noted in this judgment, the parties herein opted not to undertake the audit. As matters stand now, this court is not in a position to tell the actual number of sim kits sold by the Plaintiff in the period in question or if the end user of the said kits loaded and consumed minimum airtime of Kshs. 300/= so as to entitle the Plaintiff to earn Kshs. 485/= from each kit in accordance with the agreed remuneration scheme. I therefore find that the claim under this heading was not proved to the required standards.

Payment under the Partner Support Scheme – Kshs. 5,706,142.80

21. The Plaintiff claimed Kshs. 5,706,142.80 made up of Kshs. 1,026,142.80 under Partner Support Scheme and Kshs. 4,680,000.00 under Staff Route Support Scheme.

22. It was the Plaintiff's case that under clause 2 of the new distribution scheme contained in the letter dated 17th October 2007, he was entitled to business planning and execution incentive under the categories of shop infrastructure incentive effective from 1st October 2007 at 1% of airtime purchases, distributor service agents organization incentive and distributor compensation incentive each at 1.5% of the airtime purchases.

23. The Plaintiff argued that he qualified for this scheme as he, at all times, maintained the required number of shops in his territory as well as the prescribed number of distributor service agents. The Plaintiff particularized its claim under this heading, in the Amended Plaint, as follows: -

Month	Purchases (kshs.)	Shop Infrastructure (1%)	Distribution Incentive (3%)	Total
October 2007	12,529,818.00	125,298.18	375,894.54	501,192.72
November 2007	8,741,900.00	87,419.00	262,257.00	349,676.00
December 2007	4,381,852.00	43,818.52	131,455.56	175,274.08
-	25,653,570.00	256,535.70	769,607.10	1,026,142.80

24. The Plaintiff's claim under the Staff Route Support per month was stated to be as follows: -

Shop	No. Of Staff	Rate Per Day	No. Of Days Per Month	Total Due
Malindi	10	400.00	26	104,000.00
Voi	10	400.00	26	104,000.00
Mombasa	10	400.00	26	104,000.00
Taveta	10	400.00	26	104,000.00
Mtito Andei	10	400.00	26	104,000.00
Maungu	10	400.00	26	104,000.00
Mwatate	10	400.00	26	104,000.00
Manyani	10	400.00	26	104,000.00
Makindu	10	400.00	26	104,000.00
Salama	10	400.00	26	104,000.00
Kambu	10	400.00	26	104,000.00
Wundanyi	10	400.00	26	104,000.00
Kibwezi	10	400.00	26	104,000.00
Wote	10	400.00	26	104,000.00
Sultan	10	400.00	26	104,000.00
-	-	-	-	1,560,000.00

25. The defendant, on the other hand, submitted that the claim under this heading was an incentive payment introduced by the Letter dated 17th October 2007 under Paragraph I-Prepaid Airtime Commissions. The Defendant stated that partner support had Three (3) elements, namely;

    i. Shop infrastructure incentive being 1% of the airtime purchases by the distributor;

    ii. Distributor service agent's organization incentive -1.5% of airtime purchases; and

    iii. Distributor service agent's compensation incentive based at 1.5% of airtime purchases.

26. The Defendant submitted that the above incentives were not a matter of course but money earned under the set targets and upon meeting qualification conditions. It was the Defendant's case that in order to qualify for Partner Support incentive, a distributor had to meet the following conditions;

i. a distributor's account balance was required not to be in excess of the amount of security provided by the bank guarantee (clause 3, 12, 17 and 18); and

ii. a distributor's account was required to be current and not to be more than 15 days overdue (clause 4).

27. According to the Defendant, the Plaintiff did not qualify to earn this incentive because as at October 2007, he owed the Defendant the sum of Kshs. 33,533,740/= against a bank guarantee of Kshs. 20 Million.

28. I have perused the Plaintiff's Statement of Account as at October 2007 appearing at page 124 of his Supplementary Bundle of Documents which shows that he owed the Defendant the sum of Kshs. 33,533,740.03. I am not satisfied that this claim was proved to the required standards considering that the incentive under this heading was only payable where a distributors account was current and not more than 15 days overdue. I further find that even if this court was, for argument's sake, to find that the Defendant owes the Plaintiff some amount under the partner support scheme, then the actual sum could only be ascertained through an audit which, I once again reiterate, that the parties opted not to undertake.

Balance of the Holiday Pre-Paid Scheme Bonus – Kshs. 2,965,161.00

29. The Plaintiff claimed that through a letter dated 13th December 2006, the Defendant introduced the Uhuru Bonus Scheme which was to run up to 31st December 2006. Under the said scheme, the Defendant would pay a maximum sum of Kshs. 350.00 per line sold upon attaining 100% of the target. No bonus was payable for 50% achievement of target or less. The Plaintiff's case was that he was only supplied with 29,091 SIM kits which were all sold off thus translating to 66% target achievement yet the Plaintiff's target for the duration was to sell 43,943 SIM kits. The Plaintiff claimed that his attempts to resolve the issue was not successful and that the Defendant unilaterally decided to pay him 66% bonus of the initial target rather than full amount he was entitled to.

30. The Defendant confirmed that the Uhuru Bonus was available to distributors who sold sims/kits between 12th December 2006 and 31st January 2007. The Defendant also confirmed that the Plaintiff together with other distributors attended a presentation on the Uhuru bonus campaign at their office after which official letters for those who wished to participate in the scheme were sent out immediately. The Defendant submitted that the Plaintiff's letter was delivered to his shop on the 15th of December 2006 but he did not sign or return it as had been agreed.

31. According to the Defendant, the Plaintiff came to their offices toward the end of January 2007 when he got a copy of the letter, signed it and backdated it to appear as if he had accepted it when it was issued. It is the Defendant's position that the Plaintiff lodged a false claim for bonus payment on the sales done.

32. The Defendant submitted that the Plaintiff sold and activated a paltry 29,091 kits against the set target of 43,943 prepaid activations between 12th December 2006 and 31st January 2007 and that he did not therefore qualify for the Uhuru Bonus.

33. It was further submitted that the Plaintiff's sales did not reach the set target as he attained 66% below the set target for which he appealed to the Defendant for kind consideration and a waiver. The Defendant added that even though the Plaintiff's appeal was not merited, its management considered the request and gave a favourable decision, purely out of business pragmatism, to pay the Plaintiff 66% equivalent of the would-be bonus had the Plaintiff achieved the target of 100%. According to the Defendant, his was an exceptional step taken in good faith even though not merited and that as such, the Plaintiff should not seek more favours.

34. It was further, the Defendant's case that the exceptional payment was not made on an accrued right but was purely as a matter of discretion by the Defendant arising from a fervent appeal from a leading distributor. It was submitted that the same was not achieved under the set terms or contract and cannot be the subject of this court action because the set target was not achieved.

35. My finding is that the Plaintiff's claim for bonus in the sum of Kshs. 2,965,161 being the equivalent of the remainder of 34%, had he attained the target, is speculative as it relates to an issue that did not happen in actual fact. I find that the same was not specifically proved to have been a loss that the Plaintiff incurred or an entitlement for goods sold.

Special Regional Target of 1.5% of the Total Purchase as Incentive for October, November and December 2007 – Kshs. 348,804.00

36. The Plaintiff claimed that he was entitled to a special 1.5% commission of the total airtime purchases for the quarter beginning 1st October 2007. He stated that since the total airtime purchases for the said period was Kshs. 25,653,570/= 1.5% commissions due is Kshs. 384,803.55.

37. The defendant, on its part, submitted that the Plaintiff's claim is frivolous and he did not attain its target for the period October to December 2007. The Defendant argued that the Plaintiff did not adduce any evidence to prove that he purchased the sim kits in respect of which he claimed the regional target incentive in the said period.

38. Having found that the exact number of sim kits sold by the Plaintiff during the period in question could only be ascertained, with certainty, through an audit, I similarly find that the claim for commissions under this heading was not proved to the required standards.

Injunction

39. The Plaintiff also sought an order of injunction to restrain the Defendant, its agents or anyone claiming through it from entering with its ownership or operation of the business outlets, containers or any other business assets or from recalling or realizing the bank guarantees.

40. It is however not disputed that the distributorship contract between the parties was terminated on 10th December 2007 on account of the Plaintiff's alleged failure to meet its set targets. In a ruling delivered on 27th May 2008 by this court, differently constituted, the court found as follows in respect to the prayer for interim injunction: -

> " This court cannot be called upon to force parties who are no longer willing to engage in a business relationship to remain in such a relationship..... The plaintiff cannot seek orders of this court to force the defendant to engage with him."

41. Taking a cue from the above findings on the application for interim injunction, I find that the prayer for injunction has for all intents and purposes been overtaken by events.

Container Deposit – Kshs. 2,000,000.00

42. The Plaintiff claimed the sum of Kshs. 2 million being the amount he paid as deposit for the containers.

43. The defendant submitted that contrary to allegations by the Plaintiff, he did not pay for the deposit of Kshs. 400,000 required on each container despite delivery and his use of the same. It was submitted that the Plaintiff paid a paltry ksh.300,000 instead of the required deposit of Ksh.2,000,000 for the five containers and still remains indebted to the Defendant for the balance of Kshs. 1,700,000/=.

The Defendant maintained that the Plaintiff did not adduce any evidence to prove that he paid the Defendant the alleged Kshs. 2 Million.

44. I note that the Plaintiff did not make any submissions regarding this claim. At the hearing of the case, however, the Plaintiff testified that he returned the 5 containers he had taken from the Defendant after the agreement was terminated. The Plaintiff testified that he paid Kshs. 400,000.00 for each of the containers. The Plaintiff testified as follows over the issue of containers: -

> " Claim for container deposit for Kshs. 2 million. I had taken 5 containers, placed at Mtito Andei, Eastleigh, Voi, Malindi and Westlands. If I met targets, I would not pay rent, if I didn't I would pay rent.
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> Mtito Andei rent was 10,000/=. Containers were to be returned upon termination of the contract. I returned 4 containers. I paid a deposit of 400,000/= for each container – 2 million for 5 containers. I have proof of payment of 2 million. I could not be given the containers unless I paid."

45. My finding is that the Plaintiff was expected to specifically prove the claim under this heading. I however note that besides his oral testimony, the Plaintiff did not present any proof of payment of the sum of Kshs. 2 million for the containers as alleged. I am therefore not satisfied that the claim was proved to the required standards.

Damages for Loss of Business – Kshs. 60,000,000.00

46. The Plaintiff's case was that owing to his exemplary business performance, he was able to earn an average of Kshs. 5,000,000.00 per month from the distributorship remuneration scheme on activated SIM packs alone. The Plaintiff tendered evidence, in the form of statements, to show that his earnings for the months of June, August, September and October 2007 were Kshs. 4,532,605.00, Kshs. 4,482,940.00, Kshs. 8,585,500 and Kshs. 1,191,320 respectively.

47. It was therefore the Plaintiff's case that following the unlawful termination of his distributorship contract, he was entitled to claim damages for loss of business for 1 year at Kshs. 5 million per month. For this argument, the Plaintiff cited the decision in *Robinson vs Harman* (1848) 1 Ex. Rep 850 where it was held: -

> " The next question is, what damages is the Plaintiff entitled to recover? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

48. Reference was also made to the decision in *Speed Wall Building Technologies Ltd vs County Government of Migori* [2016] eKLR wherein it was held: -

> "The general principle in award of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR)."

49. On the measure of damages recoverable, reference was made to the decision in *Hadley v Baxendale* (1854) 9 Exch. 314 where it was held:-

> " We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.
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> It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and in Blake v Midland Railway Company (18 Q. B. 93), the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at Nisi Prius.
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> "There are certain establishing rules", this Court says, in Alder v Keighley (15 M. & W. 117), "according to which the jury ought to find". And the Court, in that case, add: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."
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> Now we think the proper rule is such as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

50. The Plaintiff argued that he is entitled to the sum of Kshs. 60 million for wrongful and unreasonable termination of the contract as he had invested heavily in the business that already had robust distributorship network and that he had reasonably foreseen that he would be in the business for at least one more year had it not been for the Defendant's actions.

51. The defendant, on the other hand, submitted that the Plaintiff generated the entire figure of Ksh.60 Million out of the blue and that it was therefore not justified since it did not form part of the contract. The Defendant noted that the said sum of Kshs. 60 Million is claimed on the basis of an expected income of Kshs. 5,000,000/= per month for a period of 12 months yet parties did not contemplate that the same would be payable if the distributorship contract is terminated. The Defendant cited the decision in the case of *Board Of Trustees National Social Security Fund vs Judy Wambui Muigai* [2017] eKLR where the Court of Appeal, while deciding whether a party was entitled to receive damages for breach of contract, expressed itself as follows;

> " The general rule as to the quantum of damages to be awarded for breach of contract was stated by Alderson, B in *Hadley Baxendale* (18854) 9 Ex 341 (156 E R 145 at p. 151) in the following terms: -
>
> > "Now we think a proper rule in such a case as the present is this; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the

time they made the contracts the probable result of the breach of it." (Emphasis supplied).

52. The Defendant argued that since the Plaintiff pleaded that he had monthly income of Kshs. 5,000,000/=, the claim for Kshs. 60 Million for a period of 12 months is a claim for special damages, which must be strictly proved. Reference was made to *Tana And Athi Rivers Development Authority vs Joseph Mbindyo & 3 others* [2013] eKLR where it held:

> We cannot help but note that the respondents' claim was in the nature of special damages which are required under the law to be specifically pleaded and strictly proved. In Siree Limited vs Lake Turkana El Molo Lodges (2002) 2E.A. 521 this Court stated that:-
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> > "As regards the special damages awarded, this Court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".

53. Reference was also made to the case of *Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited* [2016] KLR where the Court held that: -

> "Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that: -
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> > "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ..."

54. The Defendant submitted that no evidence was presented to show that the Plaintiff earned monthly profits of Kshs. 5,000,000/= or that he would have make Kshs. 60 Million in profits over a period of 12 months. According to the Defendant, there is no reason or basis for the choice of the period of 12 months. The Defendant added that the claim is purely speculative considering that the Plaintiff's account with the Defendant was always in arrears with his statements for the Financial years ending December 31st 2006 and 2007 showing that he made losses of Kshs. 2,003,798/= and Kshs. 2,003,799/= respectively.

55. The issue that this court has to deal with is whether the Plaintiff proved that he earned Kshs. 5,000,000 per month and whether the claim for loss of business is justified. My finding is that, as I had already noted in the earlier judgement, the Plaintiff proved that his distributorship business was robust going by the various accolades, awards and recognitions that he received from the Defendant during the period in question. In the said judgment, I found that the manner in which the contract was terminated was irregular and therefore not justified.

56. A perusal of the Plaintiff's statement of accounts held by the defendant reveals that his average earnings for the period immediately preceding the termination of his contract with the Defendant was about Kshs. 5 Million. I therefore find that the Plaintiff established, on a balance of probabilities, that his average monthly earnings from the business was to the tune of Kshs. 5 million. This court had in its initial judgment found that there was no justification for the termination of the contract. Going by the adage that there is no wrong without a remedy, I find that the Plaintiff established that he is entitled to compensation for the irregular termination of the contract.

57. I however note that the claim for payment for loss of business for the period of 1 year is slightly on the higher side. What then is the reasonable period that the court can use in tabulating damages for loss of business? The answer to this question can be found in the decision by the Court of Appeal in *Caltex Oil (Kenya) Limited vs Evanson Njiiri Wanjihia* [2017] eKLR where, under similar circumstances, the Court held: -

> " We have held that there was no evidence of breach by the respondent and there was therefore no reason for the termination of the contract without notice.
>
> In calculating damages in such circumstances, the court must take a reasonable approach. Unjust enrichment is always frowned upon by the court. There is also the expectation by the law that the aggrieved party must mitigate its loss and not fold its hands and expect to reap a windfall by way of award of damages by the court. The position adopted by the courts is that where there is no termination clause the court must determine what amounts to reasonable notice taking into consideration the peculiar circumstances of each case. What then was reasonable notice in this case?
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> It was not disputed that the respondent had a loan facility which he was servicing; he also had a bank guarantee which he needed to discharge; he had a source of income which was going to be taken away from him; he needed time to scout for alternative business or job. In our view, bearing this in mind the minimum amount of time he would have needed to get back firmly on his feet was fifteen months. This would have enabled him clear his liabilities and pursue other options."

58. Taking a cue from the above decision and having regard to the fact that the Plaintiff's distributorship business was spread in different towns, namely; Nairobi (Westlands and Eastleigh), Malindi, Voi and Mtito Andei, the inconvenience of the abrupt termination of his contract must have had long term consequences. I am of the view that a period of 6 months is adequate time for the Plaintiff to gain his footing in a different business venture so as to mitigate the loss arising from the irregular termination of their contract. I will therefore award the Plaintiff the sum of Kshs. 30,000,000/= for loss of business being the equivalent of three (6) months' earnings from the business.

Counter-Claim

59. The Defendant claimed that the Plaintiff took goods from it on credit upon the security of a Bank Guarantee and his own promise to pay. It was the Defendant's case that as at the time of termination of the Distributorship Agreement on 10th December 2007, the Plaintiff's account with the Defendant stood at Kshs. 21,972,954/=. It was the Defendant's case that whereas it would have recovered a substantial amount then outstanding on the Plaintiff's account from the security of the Bank Guarantee, the Plaintiff obtained an injunction barring the Defendant from the benefit of the Bank Guarantee thereby making the counterclaim necessary.

60. The Defendant however conceded, on cross examination, that the Plaintiff continued to earn commissions on activated SIM cards already sold even after the termination of the distributorship contract and that such earnings would be credited on the Plaintiff's account. The Defendant's witness, DW1, confirmed that as at 8th May 2008, about 5 months from the date of the said termination, the Plaintiff's account balance which initially stood at Kshs. 21,972,954.23 on 15th December 2007 had reduced to Kshs. 17,897,046.23.

61. From the above uncontested facts regarding the status of the Plaintiff's account, it is clear that the amount due to the Defendant was not a static figure but was subject to changes depending on the

amount that would be credited to the said account from commissions earned on the activated SIM cards sold by the Plaintiff.

62. It did not escape the attention of this court that by a consent order issued on 25th June 2015, parties agreed to appoint a referee to examine the accounts between them and make a report to court. In that regard, the Defendant was to file and serve its accounts within 14 days. The examination of the accounts would have enabled the court to establish the Plaintiff's dues in respect to commissions from the sim kits sold. It turns out that the attempts to reconcile the accounts did not materialize as the Defendant did not furnish the referee with the statements of his dealings with the Plaintiff. It did not therefore come as a surprise to this court when its orders, in the earlier judgment, for an audit of the Defendant's dealings with the Plaintiff did not bear any fruits. What then is this court supposed to make of a party who fails to avail material evidence that could have assisted it to arrive at a fair determination of a case?

63. Courts have taken the position that if material non-disclosure is established the court will be astute to ensure that the party guilty of such non-disclosure is deprived of any advantage by that breach of duty. (See *Halima Haji Sarah v Multiple Haurliers (E.A) Limited & another* [2022] eKLR).

64. In the instant case, it is clear that the Defendant tightly held to the key that would have unlocked the case by frustrating the audit that was meant to establish the truth about the Plaintiff's account. Under the above circumstances, I find that the Defendant cannot benefit from such non-disclosure by maintaining that the Plaintiff still owes it Kshs. 21,972,954.23 in the face of its own witness' admission that the said amount had reduced considerably within a period of 5 months.

65. It is therefore my finding that going by the uncontested facts of this case, the Plaintiff's outstanding balance could have reduced to the bear minimum if not fully paid with a credit balance as at the time of the initial judgment.

66. Needless to say, the claim for Kshs. 21,972,954.23 is a special claim which the Defendant was required to specifically prove, more so in the face of his admission that the amount owing from the Plaintiff had as at 15th December 2007 reduced to Kshs. 17,897,046.23.

67. The Defendant did not produce any documents/statements of accounts to show the amount due to it as at the time of hearing the case or at all.

68. Having found that it was not contested that the Plaintiff continued to earn commissions on activated SIM cards already sold even after the termination of the distributorship contract and that such earnings would be credited on the Plaintiff's account, I find that in all fairness and in the circumstances of this case, a finding that the Defendant is entitled to benefit from the security of the Bank Guarantee would amount to double compensation. I find that the Defendant's claim under this heading was not proved to the required standards.

Return of all Assets

69. The Defendant claimed that the Plaintiff did not, at the end of their contract, return its assets, namely; Kiosks, Light Boxes, Computer, Printer, UPS and Link Antennae at the end of their contract as was envisaged under the terms of their agreement.

70. The Defendant further contended that the Plaintiff leased its 5 Celtel Kiosk Containers which he continues to occupy. The Defendant argued that the Plaintiff's continued occupation of the said Containers was not in dispute as shown in the Plaintiff's application filed on 20th December 2007 wherein he sought an order to restrain the Defendant from recalling the Guarantee or interfering with the container shops and other assets. The Defendant added that in the said application, the Plaintiff admitted having leased five containers from the Defendant. It was the Defendant's case that

the Plaintiff did not return the said containers despite the court orders issued on 5th March 2008 and the subsequent orders for their return and delivery.

71. The Defendant therefore claimed for the return of the said assets or the payment of their equivalent monetary value.

72. I have perused the Plaintiff's application filed on 20th December 2007 and I note that the main prayer sought was for orders of injunction to restrain the Defendant from interfering with the Plaintiff's business, business assets, shops, containers or other assets, or from recalling the Bank Guarantees issued in favour of the applicant pending the hearing and determination of the suit. I further note even though a temporary order of injunction was issued on 5th March 2008, in a further ruling delivered on 27th May 2008, this court, differently constituted, dismissed the said application for lack of merit. I note that at no point did the court order for the return of the Defendants assets as has been alleged and neither did the court restrain the Defendant from recovering the said assets from the Plaintiff.

73. On his part, the Plaintiff denied the claim for the return of the assets and counterclaimed that the Defendant owed him Kshs. 2 million in respect to the said assets which he had allegedly returned following the termination of the contract. I note that both parties did not present proof of the value of the said containers so as to justify the claim of the sum of Kshs. 2 Million attached to them.

74. Having found that nothing stopped the Defendant from repossessing its assets, I find that this limb of the counterclaim was not proved to the required standards. Moreover, the Plaintiff alleged that he had returned the said assets and the issue of their return is neither here nor there.

Rent Arrears on the Kiosks

75. The Defendant claimed rent arrears on the kiosks that it had given to the Plaintiff. The defendant referred to the Licence Agreements between them and various Licensors. It was submitted that owing to the Plaintiff's refusal to return the 5 Celtel Kiosks to them they now claim rent arrears from 1st December 2007 as follows;

    i. Container at Westlands attracting monthly rent of Kshs. 15,000 per month from 1st December 2007 to June 2020 making a total of Kshs. 2,250,000;

    ii. Container at Eastleigh at Kshs. 10,000/= per month from 1st December, 2007 to June 2020 making a total of Kshs. 1,500,000;

    iii. Container at Voi at Kshs. 8,800/= per month from 1st December, 2007 to June 2020 making a total sum of Kshs. 1,320,000;

    iv. Container at Malindi at Kshs. 8,000/= per month from 1st December 2007 to June 2020 making a total of Kshs. 1,200,000; and

    v. Container at Mtito Andei at Kshs. 4,000/= per month from 1st December 2007 to June 2020 making a total of Kshs. 600,000.

76. I have perused the Licence Agreement exhibited by the Defendant as exhibits in its List and Bundle of Documents dated 8th July, 2015. I note that the said licenses were between the Defendant and a thirty

party licensor in which case, any rent would be due to the licensor from the Defendant and not the Plaintiff. On cross-examination, the Defendant's witness testified as follows: -

> " All the licenses have expired but the rents continue to accrue as the containers are still on the site. I have no proof of the demand for the rents. The Plaintiff did not pay deposits for all the containers. I do not have the demand for the deposits."

77. My finding is that in view of the admission, by the Defendant that the rents were due to the licensor and that there was no proof of demand for rent by the said licensors, I find that the claim for the alleged outstanding rents was not proved to the required standards or at all.

Disposition

78. In sum, I find that the Defendant's Counter-Claim was not proved to the required standards and I therefore dismiss it with costs.

79. Having regard to my above findings in respect to the Plaintiff's claim, I find that the same was proved to the required standards in respect to the claim for loss of business. I therefore allow the Plaintiff's claim in the following terms: -

    a. Loss of business Kshs. 30,000,000

    b. Since the Plaintiff is the successful party in this matter, and having found that the Defendant cannot, in the circumstances of this case, benefit from the bank guarantee, I direct that the sum of Kshs. 10 Million deposited in a joint interest earning account held at HFCK and operated by the advocates for both parties, together with interests accruing therefrom, be released to the Plaintiff forthwith in line with the order issued by Kimaru J. in the ruling of 7th May 2010.

    c. Interest on a) above at court rates from the date of this judgment till payment in full.

    d. I award the Plaintiff the costs of this case and interest thereon from the date of this judgment till payment in full.

80. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE