Laser Communications Limited & 5 others v Safaricom Limited (Civil Case 196 of 2011) [2021] KEHC 257 (KLR) (Commercial and Tax) (12 November 2021) (Judgment)

Neutral citation: [2021] KEHC 257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 196 OF 2011

A MABEYA, J

NOVEMBER 12, 2021

BETWEEN

LASER COMMUNICATIONS LIMITED ..... 1ST PLAINTIFF

WIRSOFT AGENCIES LIMITED ..... 2ND PLAINTIFF

AYOON COMMUNICATION LIMITED ..... 3RD PLAINTIFF

EMERALD LIMITED ..... 4TH PLAINTIFF

TAICOM LIMITED ..... 5TH PLAINTIFF

SASHAMONEY LIMITED ..... 6TH PLAINTIFF

AND

SAFARICOM LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiffs' claim against the defendant was set out in their joint amended plaint dated 9/3/2012. They claimed that they were registered as dealers with the defendant through standard dealership agreements which entailed dealing in the defendant's services and products.

2. Further, they were registered as MPESA agents with the defendant through MPESA agency agreements pursuant to which they maintained accounts, tills and mobile money deposits from which they could perform transactions for customers and registered sub-agents.

3. Pursuant to the said dealership and agreements, the plaintiffs dealt in the defendant's products and services and followed the system of ordering for the same as directed by the defendant. This entailed the plaintiffs or their customers depositing money into the defendant's designated bank account, taking

the bank deposit slip/voucher to the defendant's retail shops who, upon confirming receipt of money would issue a receipt and credit the plaintiffs' Dealer Portals.

4. At different times, the plaintiffs transacted with one Abdifatah Ali Alio (hereinafter "Abdifatah"), as one of their numerous customers. Abdifatah made various orders through the plaintiffs for the defendant's products and services.

5. On 12/5/2011, the defendant allegedly discovered a shortcoming in its Dealer Portal System which revealed that Abdifatah, in collusion with some of its staff, obtained its receipts for ghost payments which resulted in credit being given to the plaintiffs who then honoured Abdifatah's orders.

6. The defendant held the plaintiffs liable for the aforesaid fraud and proceeded to reverse the ghost payments in their dealer accounts, froze, suspended and terminated the plaintiffs' dealer and MPESA accounts causing them loss and damage.

7. The plaintiffs contended that they were not in breach of the terms of their dealer agreements while dealing with the said Abdifatah. That any loss to the defendant was occasioned by the defendant's employees and the defendant's system failure. That the suspension and termination of the plaintiffs' dealership and MPESA agreements was irregular and had defamed their business reputation.

8. The plaintiffs therefore contended that the defendant's actions led to the collapse of their businesses leading to massive losses. That the defendant well knew that the acts complained of were those of its employees and the aforesaid Abdifatah for which the plaintiffs were not liable. The plaintiffs therefore prayed for various remedies against the defendant.

9. In its defence dated 14/8/2017, the defendant denied the plaintiffs' claim and contended that the plaintiffs were in breach of their contract with itself. That they had failed to comply with the terms and conditions of their respective dealership agreements particularly by allowing Abdifatah direct access to the process of purchase of products and services using their accounts.

10. That the plaintiffs had breached their obligation of confidentiality by exposing their dealer codes to Abdifatah which enabled him to carry out fraudulent activities through the payment process thereby defrauding the defendant. That in the premises, the defendant was entitled to take the action it had taken.

11. The defendant denied having a system where customers make payments into its bank account and obtaining receipts from its cash desk as alleged. It contended that the plaintiffs' actions had led it to incur losses amounting to Kshs. 161,308,883/- between December, 2010 and May, 2011. That in the premises, its actions were justified under clause 18 of the Agreements.

12. At the trial, the plaintiffs called 6 witnesses while the defendant called 1 witness. The 5th plaintiff had withdrawn its case and only the 1st to 4th and 6th plaintiff proceeded with their cases.

13. PW 1 was Mohammed Hassan, a manager with the 4th plaintiff. He told the Court how the 4th plaintiff was incorporated in March, 2010 and subsequently entered into dealership agreement with the defendant in April, 2010 to deal with the latter's services and products. The 4th plaintiff opened 5 outlets at a cost of Kshs. 2,300,000/-.

14. That in terms of the dealership agreement, the 4th plaintiff placed all its orders for the products and services through the prescribed dealer portal. That it was the defendant's obligation to ensure that the dealer portal functioned correctly and that the bank slips issued by its bank retained integrity and would be verified by its staff. That no sums would be credited to the dealer portal until it was confirmed that the monies had actually been received into the defendant's account.

15. He explained in detail how the payment system worked. The dealer would make payment either through direct transfers or cash deposits, where one wrote the name or code of the dealer for which the payment had been made or used the Customized Deposit Vouchers which already contained the dealer codes. A receipt would be obtained from the defendant after the bank deposit receipt had been verified whereby the sums would then be credited to the dealer portal. It is then that an order would be made through the dealer's portal. The 4th plaintiff did not share its ID or passwords with anyone.

16. In December, 2010, PW1 was introduced to Abdifatah who became one of the 4th plaintiff's customers. Because Abdifatah was making huge orders, he was allowed to make direct payments to the defendant using the 4th plaintiff's dealer codes.

17. On 12/5/2011, Pw1 made a transfer of Kshs.1m to the defendant but there followed huge reversals on the dealer portal. He later leant that Abdifatah had been arrested for fraud. The 4th plaintiff would later on 20/5/2011 be suspended by the defendant and its dealership subsequently terminated. It suffered losses totaling Kshs. 42,638,000/- as a result of the closure of its business.

18. Pw2, Shukri Salat Yusuf, a director of the 6th plaintiff, told the Court how the said plaintiff was incorporated and entered into dealership agreement with the defendant. Abdifatah started selling cards for the 6th plaintiff in 2011. The 6th plaintiff allowed Abdifatah to be paying directly into the defendant's account as he was buying in bulk.

19. He explained how he and Abdifatah were arrested by the Police in relation to the fraud. While he was released, Abdifatah and employees of the defendant were charged with defrauding the defendant. As a result of the suspension and termination of the agreements, the 6th plaintiff suffered losses amounting to Kshs. 181,399,000/-.

20. Mohamud Mohamed, a manager with the 2nd plaintiff testified as PW3. He told the Court that the 2nd plaintiff was incorporated in 2006. It also entered into a dealership agreement with the defendant. It established 12 outlets at an initial cost of Kshs.23 million. Which it maintained in good state.

21. Sometimes in 2009, the 2nd plaintiff began dealing with Abdifatah who was then dealing with huge orders. On 12/5/2011, there were huge reversals amounting to Kshs 6,595,000/= on the 2nd plaintiff's dealer portal. It later turned out that Abdifatah had been arrested for presenting fake transfer slips from Barclays Bank. PW3 denied the defendant's contention that the 2nd plaintiff had allowed undue access and confidential information to any 3rd party.

22. The 2nd plaintiffs agreements were suspended on 20/5/2011 and subsequently terminated on 20/7/2011 leading to the closure of the 2nd plaintiff's business. This was despite of the defendant having confirmed that the fraud had been perpetrated by Abdifatah and some of its personnel. The termination of the dealership agreement occassioned the 2nd plaintiff losses amounting to kshs 77,705,891/=.

23. PW4 was Ali Abdi Abdullahi, a manager with the 3rd plaintiff. He testified that the 3rd plaintiff was incorporated on 18/9/2008. It entered into a dealership agreement with the defendant in 2009. It spent a total of Kshs. 10,900,000/= in establishing 8 outlets for that purpose.

24. The 3rd plaintiff started to be involved with Abdifatah in 2010 as he was dealing with large sums of money. On 11/5/2011, reversals amounting to Kshs. 6,682,872/= and Kshs 6,595,000/= were made on the 3rd plaintiff's dealer portal. The 3rd plaintiff later learnt that this was as a result of a fraud perpetrated by Abdifatah on the defendant. The defendant suspended the Dealership Agreement on 20/5/11 and

terminated the same on 20/7/2011. This led to the collapse of the 3rd plaintiff's business leading to losses amounting to Kshs 45,503,872/=.

25. On cross-examination, he admitted that he did not have documents to support his claim for the losses but explained that the same were lost when the landlord auctioned the 3rd plaintiff's goods because of rent arrears.

26. PW5 was Stephen Mathu Ngugu, a Certified Financial Analyst practicing under Invhestia Africa Ltd. He was instructed by the plaintiffs to value the 1st to 4th and 6th plaintiffs during the pendency of the suit. He undertook the exercise and filed his report dated 27/11/2019. In the report, he tabulated the losses that the five plaintiffs lost as a result of the closure of their businesses and gave their respective.

27. Abdullahi Shariff PW6 testified for the 1st plaintiff. The 1st plaintiff was incorporated in 2007. It entered into a dealership agreement with the defendant in 2007. It established 15 outlets for the promotion and distribution of the defendant's products at a cost of Kshs. 24,900,000/=.

28. He explained the process of making payments to and ultimately placing orders with the defendant. In 2007, the 1st plaintiff began trading with Abdifatah. On 12/5/2011, the 1st plaintiff discovered reversals on its dealer portal amounting to Kshs 2,798,000/=. On inquiry, it was discovered the aforesaid Abdifatah had been arrested for fraud. The termination of its dealership agreement led to losses totalling Kshs. 72,761,315/=.

29. In cross examination, he admitted that he had no documents to back up his claims for expenses.

30. DW1 was Daniel Mwenja Ndaba, a Senior Legal Manager with the defendant. He admitted that the defendant did enter into dealership and Mpesa agency agreements with the plaintiffs during the period 2009 and 2011. Under the agreements, the plaintiffs were required to make orders through their dealer portals created by the defendant.

31. He testified that the plaintiffs were not entitled to any residuals or commissions in case of breach of the Agreements. That the defendant was entitled to suspend or terminate the agreements in the event the plaintiffs failed to comply with the dealer operating standards.

32. That on 6/5/2011, the defendant received a report that a dealer's representative had been arrested for presenting a fraudulent bank deposit. Investigations revealed that the plaintiffs had presented fraudulent bank deposit slips totaling Kshs 119,141,000/=. That the defendant terminated the plaintiffs' delearship agreements under clauses 4.2(b) and 19.2(b) upon confirmation that they were involved in the fraudulent activities.

33. In cross examination, he admitted that the responsibility to confirm that funds had been received by the defendant fell with the defendant's treasury team, every day. He further admitted that those charged for the fraud were Abdifatah and one of the defendant's employees.

34. He further admitted that in July, 2007 the defendant had introduced pre-printed customized deposit slips with dealer codes that were to be with the defendant's bankers. That the plaintiffs were required to maintain specific branding and that it was the defendant's system that used to credit the dealers portals. He stated that Abdifatah was the plaintiffs' agent.

35. The court has considered the pleadings, the evidence and the parties' submissions on record. The issues for determination are:

    (a) whether the defendant maliciously damaged and destroyed the plaintiffs reputation;

    (b) whether the dealer and MPESA agreements were unconscionable;

(c) whether the defendant was entitled to suspend and terminate the plaintiffs' delearship agreements;

(d) what losses, if any, the plaintiffs suffered and whether they are entitled to the relief sought.

36. The first issue is whether the defendant defamed the plaintiffs. The plaintiffs' allegation was that in its letters of suspension and termination dated 20/5/2011 and 20/7/2011 respectively, the defendant wrote of and concerning the plaintiffs:-

> " It is our view that this exercise was conducted for the purpose of irregularly obtaining financial gain.."
>
> And;
>
> "..your company used forged banking slips –in our view any practice carried out with an intention to defraud Safaricom has no place in our mission to lead with integrity."

37. The plaintiffs contended that the defendant had damaged their reputations through the aforesaid suspension and termination letters. That the same were widely communicated to the plaintiffs' business customers and partners which negatively affected their businesses.

38. On the other hand, the defendant denied that it had published the said suspension and termination. That the plaintiffs had failed to prove that there had been publication.

39. In the case of *Wycliffe A Swanya v Toyota East Africa Ltd & another [2009] eKLR* it was held:-

> " For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-
>
> (i) That the matter of which the plaintiff complains is defamatory in character.
>
> (ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.
>
> (iii) That it was published maliciously
>
> (iv) In slander, subject to certain exceptions, that the plaintiff has suffered special damage."

40. The Court concurs with the above rendition of the law. In the present case, the plaintiffs did not lead any evidence to show that the letters of suspension and termination were published to third parties other than themselves. In a defamation case, the evidence of the person to whom the defamatory matter is published is crucial. In this case, no such evidence was offered and the court finds that defamation was not proved.

41. The second issue is whether the terms of the dealership and Mpesa agreements were unconscionable. The plaintiffs submitted that although they were party to the aforesaid agreements, the same were unconscionable for having exclusivity and limitation of liability clauses.

42. On the other hand, the defendant submitted that this was a non-issue. That it never arose out of the parties' pleadings. That the parties and the court are bound by the pleadings. That the Court cannot determine an issue which arose for the first time at the submission stage. The cases of *IEBC & Another*

v. Stephen Mutinda Mule & 3 Others [2014] eKLR, *Gandy vs Caspair Air Charters Ltd [1956] 23 EACA 139* among others were relied on for those propositions.

43. The law on pleadings is clear. Parties are bound by their pleadings. A court has no jurisdiction to determine an issue which does not arise from the pleadings of the parties. It is through pleadings that parties crystalize their respective cases for determination before court. A party who raises an issue outside his pleading is bound to ambush his opponent which is unacceptable. It is for this reason that a court will not be permitted to make any findings on unpleaded matter or grant any relief not sought by a party in the pleadings. See *Anthony Francis Wareham t/a A F Wareham & 2 Others vs Kenya Post Office Savings Bank [2004] eKLR*.

44. In the present case, at paragraph 13 of the Amended Plaint, the Plaintiffs pleaded thus:-

> " The plaintiffs will rely on the common law principles of contract law and unfair contract terms, the statutory provisions of the *Kenya Communications Act* (No. 2 of 1998), the Restrictive Trade Practices, Monopolies and Price Control Act (Cap 594) and/or the *Competition Act* and the *law of contract Act* (Cap 23) and the Constitution of Kenya 2010, in the interpretation of the aforesaid dealers agreements and Mpesa agency agreements."

45. At the trial, Learned Counsel for the plaintiffs did ask the plaintiff's witnesses as well as the defendant's witness questions relating to the exclusivity and uncoscionability of the said agreements.

46. In this regard, the Court is satisfied that contrary to the contention by the defendant, the plaintiffs had clearly given notice to the defendant of their intention to challenge the said agreements on the basis of the common law principles and the statutes set out in paragraph 13 of the Amended plaint. That was clearly an issue that was submitted to Court and there is jurisdiction to consider the same.

47. The plaintiffs submitted that the dealership agreements were Standard Form Contracts. That clauses 6.2.1 and 17.1 and 17.2 of the dealership agreements were unfair and unconscionable. That they breached the provisions of the *Competition Act*, Cap 12 of 2010 and the Unfair Contract Terms Act. They relied on the cases of, inter alia, *Consolidated Bank of Kenya Ltd vs Securicor Security Services Kenya Ltd [2013] eKLR* & *Margaret Njeri Muiruri vs Bank of Baroda [K] Ltd [2014] eKLR*.

48. Section 21 of the *Competition Act*, Cap 12 of 2010 expressly prohibits agreements whose object or effect is to prevent, distort or lessen competition in trade or services unless exempted. On the other hand, section 11 (4) of the *Unfair Contract Terms Act* provide that where a party seeks to restrict his/her liability in a contract to a specified sum of money, regard must be had to the resources available to him to meet his liability and the extent he had to cover himself by insurance.

49. This Court has carefully considered the subject agreements. It has also considered the evidence tendered at the trial. The agreements were but in the form of standard form contracts drawn by the defendant. DW1 admitted that the defendant commanded a large share of the telecommunication market. Clauses 6.2.1, 17.1 and 17.2 are in the nature of exclusive and limitation of liability clauses to which section 21 of the *Competition Act*, Cap 12 of 2010 and section 11(4) of the Unfair Contract Terms Act apply.

50. In *LTI Kisii Safari Inns Ltd & 2 others vs Deutsche Investitions Und Enwicklungsgellschaft ("Deg") & Others [2011] eKLR*, Githinji JA (as he then was) observed of unconscionable bargains thus:-

> " This is also an equitable doctrine. There are at least three prerequisites to the application of the doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court. Secondly,

that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behaviour of the stronger party is morally reprehensible."

51. In *Alec hobb vs Total Oil [1983] WLR 173 at 182*, the Court held:-

> "The whole emphasis is on extortion, or undue advantage taken of the weakness, the unconscionable use of power arising out of inequality of the parties circumstances and on unconscientiously use of power which the Court might in certain circumstances be entitled to infer from a particular and in these days notorious relationship unless the contract is proved to have been infact fair, just and reasonable.
>
> ....
>
> The courts will only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and the exercise by the stronger of coercive power are thus brought in....."

52. The court has considered the complained of clauses. They propagate exclusivity, unreasonable limitation of liability, exclude and purport to disclaim liability even for wrongful actions by the defendants' employees. They clearly prick the conscience of the court. The plaintiffs were suffering from bargaining weakness as the defendant powerfully excerted its power of monopoly. The plaintiffs had no alternative but to enter into the said agreements which were in the standard form contracts.

53. In view of the foregoing this court is satisfied that the complained of clauses were unconscionable and are unenforceable in the circumstances of this case.

54. The third issue is whether the defendant was entitled to suspend and terminate the plaintiffs' dealership and MPESA agency agreements. The undisputed facts are that; all the plaintiffs had dealership and MPESA agency agreements with the defendant. Before such agreements were entered into, there was a rigorous exercise undertaken by the defendant on the plaintiffs' ability to undertake the dealership. That the plaintiffs were required to establish a minimum of three outlets and had to brand those outlets in the defendant's colours. That the plaintiff were to deal with the defendants products and services exclusively. That all the plaintiffs incurred substantial costs in establishing the respective outlets which were approved to the defendant's standards.

55. It is further common ground that the suspension and termination of the subject agreements was as a result of the actions of one Abdifatah in conjunction with an employee of the defendant. That upon suspension and termination of the said agreements, the plaintiffs closed shop and folded their businesses.

56. It was the defendant's contention that the said Abdifatah was the plaintiffs' agent and that his fraudulent actions bind the plaintiffs. That by allowing Abdifatah to make direct bankings unto the defendants' accounts on their behalf, the plaintiffs had breached their obligations of confidentiality and not to act fraudulently.

57. On the other hand, the plaintiffs' contention was that the said Abdifatah was both its customer and the defendant's customer. That they had not breached any of their obligations under the Agreements. That their operations were strictly in accordance with the dealership agreements.

58. They further contended that the circumstances that led to the suspension and termination of the dealership agreements was as a result of the defendant's breach of its obligations under those agreements. That the defendant had failed to monitor its systems and flag the anomalies in the dealer portal concerning the fraudulent activities complained of; it failed to confirm receipt of payment of monies before crediting the plaintiffs' dealer portals and failed to ensure that orders were made against actual funds.

59. It was the defendant's contention that it was entitled to suspend and terminate the subject agreements under clauses 4.2(b) and 19.2(g). It accused the plaintiffs of involving themselves in fraudulent acts.

59. Under the agreements, the plaintiffs were obliged to make orders through the dealers portal system that was established and controlled by the defendant (clause 7.1). Delivery of the ordered E-stock products was to be made to the plaintiffs once the E-stock value was credited to the plaintiffs dealer portals by the defendant (Clause 7.3)

60. The plaintiffs were required to make payment to the defendant for the products on or before delivery date. These were to be made by cash, bankers cheques or bank transfers. Time for payment was of the essence and in accordance with clause 7.5 (a) of the said agreements. No payment was deemed to have been received until the defendant had received cleared funds. There were sanctions for default in payment (Clause 7.6).

61. It was the plaintiffs' testimony and was not displaced that payment was being made directly into the defendant's designated account at Barclays Bank of Kenya by use of pre-printed customized Deposit Vouchers (C.DV's). The bank would issue the payee with a system generated deposit slip which the payee presented to any of the defendant's retail shops for authentication. Once the same was authenticated, the defendant would issue a receipt therefor and then credit the plaintiffs' dealer portals with the credit amount on the basis of which orders could be placed in terms of Clause 7.1 of the agreements.

62. The plaintiffs' contended that both the payment system and the order system (through the dealer portals) were in the sole control of the defendant. Indeed, Fawzia Ali Kimanthi, a Senior Manager Reporting Accounts Receivables (Dealers, Interconnection and Roaming) on MPESA confirmed in a statement to the Police dated 17/5/2011 that her treasury team would each morning confirm that orders of the previous day were processed against funds.

63. According to the suspension and termination notices by the defendant, the fraudulent acts were committed between October, 2010 and May, 2011. The same involved a collossal sum of money. The question that arises is, since the defendant was incharge and control of the payment and order systems, why did it take a whooping 8 months to detect the alleged acts of corruption? Who between the defendant and the plaintiff should be liable for the impugned actions? Who was in a position to detect, prevent or stop the said actions?

64. With the procedures established and put in place by the defendant, the only inference to be made is that, the fraudulent acts complained of would not have succeeded or continued for such a long period without the participation and or connivance of the controllers of the systems. Indeed, the consolidated Charge Sheet dated 26/01/2012 shows that 3 people were charged in respect of the fraud. The first accused was Joseph Gogo Ochok an accountant of the defendant.

65. The parties submitted at length as to who was liable for the acts that led to the termination of the contract. It was the defendants contention that Abdifatah was the agent and/or representative of the plaintiffs. That his wrongful acts should therefore be attributed to the plaintiffs. It was submitted on its behalf that the plaintiff were estopped under sections 17 and 120 of the *Evidence Act*, Cap 80 from

asserting that Abdifatah was just a customer in the course of business. That having admitted in their witness statements as such they could not rescile from that position.

66. On the other hand, the plaintiffs submitted that although the plaintiff's witnesses had stated in their witness statements that Abdifatah was their customer they had remained firm in their oral cross-examination and re-examination that he was a common customer for both the plaintiffs and the defendant. They relied on the Indian Case of *Ajodhya Prasad Bhargava vs Bhawani Shanker Bhargava & Anor ALR 1957 ALL 1* on the proposition that they had explained their earlier admission in the witness statements that Abdifatah was their customer making payment on their behalf.

67. The evidence on record is clear, that the defendant allowed the dealers to make direct banking into its Barclays Bank Account with pre-printed Customized Deposit Vouchers (CDV). The plaintiffs permitted Abdifatah to make such payments in the usual course of business. He would then take the deposit slip to the defendant's cashiers who would verify the details before crediting the plaintiffs' dealer portals before orders could be placed.

68. There is nothing on record to show that the payment for products and services could not be made by any customer of either the plaintiffs or the defendant for the defendant's products. All one would do was to use the particular dealer's code and would bank the money. It is the defendant who would actually credit the plaintiffs' dealer portals. All the plaintiffs would do was to wait for the customer to present to them the defendant's receipt, check whether the amount had been credited in their respective portals before placing the requisite orders.

69. I have considered the provisions of sections 17 and 120 of the *Evidence Act* as regards admissions and estoppel. The admissions alluded to are that the plaintiffs referred to Abdifatah as their customer. Save for the 6th plaintiff, all the other plaintiffs only identified Abdifatah as their customer. At the trial, they orally told the court that he was a customer in the usual course of business and therefore a customer for both the plaintiffs and the defendant. Can the plaintiffs be said to be estopped from ascerting that apart from Abdifatah being their customer, he was also that of the defendant under section 120 of the *Evidence Act*? I don't think so.

70. Firstly, estoppel under section 120 of the *Evidence Act* operates when a party has led the other to believe on a state of things and act on the same. The defendant cannot contend that it had been led to believe that the said Abdifatah was a customer of the plaintiffs only. The plaintiffs were entitled to clarify what they meant when they referred to him as their customer at the trial. the defendant had the opportunity to cross examine and shake the plaintiffs' witnesses on that subject. They cross examined them but the witnesses remained firm. Their evidence that "a customer" in the agreements meant a customer of the defendant remained unshaken.

71. Section 120 of the Kenyan *Evidence Act* is in pare material with section 115 of the Indian *Evidence Act*, 1872. Interpreting that provision vis a vis a witnesses contradictory position, the Court in the Indian Case of Ajodya Prasad Bhargave v Bhawani Shanker Bhargava & Another AIR 1957 ALL 1 held:-

> " an admission of the opposite party to the proceeding may be produced for the purpose of proving a party's own case. It is the best evidence which can be produced in proof of the party's case; and although the proof of such admission is not conclusive against the opposite party, nevertheless it is such strong evidence of the facts admitted that the burden of proving the contrary is upon the party making the admission. He can only do this when he gives a satisfactory explanation that the admission was wrong or made under circumstances which render it unfit to be relied upon.
>
> .....

> When a party enters the witness-box and makes a statement inconsistent with the previous statement, his duty of explaining the previous admission ceases and it becomes the duty of the party relying upon the previous admission to confront him with his previous statement and to ask for his explanation."

72. In the present case, all the plaintiffs' witnesses took to the witness box and contended that Abdifatah was a customer in the court of business and therefore a customer for both the plaintiffs and the defendant. The defendant was unable to displace those testimonies. The plaintiffs relied on the defendant's own Standard Form Agreements which defined a customer as any person purchasing the products of or subscribing to use the defendant's services in Clause 1(h).

73. Surely, the defendant cannot be allowed to rescile from that position. Accordingly, I hold that Abdifatah was a customer in the normal course of the plaintiffs' business.

74. The obligation to ensure that payment was received was that of the defendant. That is why under Clause 7.5(a) of the dealership agreements, payment was only deemed to have been received only after the defendant had received cleared funds. By issuing a receipt to Abdifatah and others and crediting the plaintiffs' respective dealer portals, the defendant was clearly representing to the plaintiffs that it had received the funds thereby authorizing the plaintiffs to proceed to place the orders.

75. It was clear at the trial that not only did the plaintiffs co-operate with the police, but that their employees are witnesses in the Criminal Case against Abdifatah and the defendant's employee. From the evidence tendered, I hold that save for the 6th plaintiff who had designated Abdifatah as its representative, Abdifatah was but a common customer to the plaintiffs and the defendant.

76. In the case cited by the defendant of *Alghussein Establishment v Eton College [1988] I WLR 587 at 591*, the court held:-

> " Although the authorities to which I have already referred involve cases of avoidance, the clear theme running through them all was that no man can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid a contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract or account of his breach is just as much taking advantage of his own wrong as a party who relies or his breach to avoid a contract and thereby escape his obligations."

77. Accordingly, I hold that the defendant cannot seek to shift blame for the failure of its systems or for the negligence or criminal acts of its employees to the plaintiffs. That will be unconscionable. With technology, at the time, cash deposits would be reflected in the account in real time. The defendant cannot seek to blame the plaintiffs, whom the Directorate of Criminal Investigations did not implicate, for the alleged fraudulent acts.

78. The third issue is answered in the negative. The defendant having breached its own obligations under the dealership agreements, to provide secure and working systems, could not turn around and take advantage of its own wrong and terminate the agreements. The defendant was in breach of the dealership agreements and was not entitled to terminate the same.

79. The last issue is what reliefs the plaintiffs are entitled to. The plaintiffs case was that they suffered losses as set out in paragraphs 9 and 11B of the Amended Plaint totaling Kshs 304,783,131/90 and Kshs 303,000,000/=, respectively. In this regard, the total claim by the 5 remaining plaintiffs was Kshs

607,783,131/=. They also prayed for a declaration that they were not liable for the acts of Abdifatah, an injunction to restrain the defendant from terminating the agreements and damages for defamation.

80. I have already found that defamation was not proved. The claim for damages fails. As regards the declaration sought, that is merited having found that the defendant was not entitled to terminate the agreements. As for the injunction, due to the time that has already lapsed, it would not be feasible now. What is left is the claim for Kshs. 607,783,131/90 aforesaid.

81. As for the claim for compensation for actual and continuing losses, the plaintiffs submitted that they were entitled to actual losses tabulated at Kshs. 304,783,131/90. These included loss of investments, monthly expenses, frozen and reversed commissions and other dealer income.

82. The defendant submitted that these losses were not specifically proved. It sought to rely on clause 17.1 of the agreements which exonerated it from any consequential damages and loss.

83. In *Capital Fish Kenya Ltd vs The Kenya Power and Lighting Co. Ltd [2016] eKLR* the Court of Appeal reiterated that special damages must not only be pleaded, but they must be strictly proved with as much particularity as circumstances permit.

84. As regards the claim for lost investments including goodwill, monthly expenses and dealer income lost, there was no documentary evidence that was produced to back the plaintiffs' claim. The allegation that the documents got destroyed by the landlord did not hold water, neither was it backed by any satisfactory evidence. Those claims fail.

85. As regards the frozen and reversed commissions, the plaintiffs produced documents to prove the commissions they were earning. These are contained in Pexh1. These were not denied by the defendant. The defendant did not also deny that it froze and reversed the said Commissions. When the plaintiffs pursued the defendant to produce some of the documents before the trial, the defendant resisted the same successfully.

86. The defendant submitted that it was entitled to clawback the commissions and that the plaintiffs were not entitled to the commission as they were in breach of the agreements. Having found that it was the defendant rather than the plaintiffs who was in breach, the Court holds that the defendant was not entitled to clawback or withhold the commissions earned by the plaintiffs.

87. Accordingly, the claim for frozen and reversed commissions and Mpesa deposits claimed in paragraph 9 of the Amended Plaint succeeds as follows:-

    a) 1st Plaintiff – kshs 684,239/-

    b) 2nd Plaintiff – Kshs 375,355/-

    c) 3rd Plaintiff – Kshs 271,872/-

    d) 4th Plaintiff – Kshs 370,000/-

    e) 6th Plaintiff – Kshs 416,000/-

88. As regards the claim in Prayer (ba) of the Amended Plaint, the plaintiffs testified that they had entered into contracts whereby they exclusively dealt with the defendants' products and services. That as a result of the suspension and termination of the said agreements, their businesses were completely destroyed. They suffered total loss. They paraded Mr. Stephen Ciugu PW5 who testified that he valued the plaintiffs' businesses and produced a report Pexh 2 and Pexh 3.

89. On the other hand, the defendant submitted that the valuation was erroneous and could not be relied on. That it did not take into consideration the expenses, the tax returns of the plaintiffs, that it presupposed that the contracts were to subsist beyond the 2 years for which they had been executed and that it had taken comparables of publicly listed companies in arriving at the multiple of 2 of which the plaintiffs were not.

90. I saw PW5 testify. He told the Court that he was a qualified Certified Financial Analyst. He denied ever cooking accounts for the plaintiffs in order to arrive at the valuations that he had returned. His testimony was firm that he did not need to consider either the expenses or the tax returns of the plaintiffs. That the methodology he used was safe and did not require all that the defendants had submitted on. He came out as a honest and genuine witness. I believed him.

91. PW5 gave scenarios one and two for his valuation. He affirmed that the methodology he used was the one most suitable for startup businesses such as those of the plaintiffs.

92. The evidence on record is clear. As a result of the suspension and termination of the said dealership and MPESA agreements, the plaintiffs' businesses were completely destroyed. To this Court's mind, there can be no wrong without a remedy. The plaintiffs have proved that they are entitled to compensation for the complete losses of their entire businesses.

93. There was evidence that the plaintiffs were not only getting commission from the defendant but were also deriving income from selling the defendant's products and services to 3rd parties. The latter is in addition to the Commission earned from the defendant. In this regard, I will take scenario two of the values as there was no evidence to show that the agreements would not have been renewed. To the contrary, there was evidence that the 1st plaintiff then agreement was a renewal from the one of 2007. I was not persuaded on the opportunity cost because of the interest element.

94. Accordingly, the losses suffered by the plaintiffs for which they are entitled to compensation is as set out in PExh2 as follows:-

    a) 1st plaintiff – Kshs 40,011,288/=

    b) 2nd plaintiff – Kshs 30,845,353/=

    c) 3rd plaintiff – Kshs 30, 382,498/=

    d) 4th plaintiff – Kshs 13,745,760/=

    e) 6th plaintiff – Kshs 47,546,452/=

95. The plaintiffs have proved their respective cases on a balance of probability and accordingly, judgment is therefore entered for the plaintiffs as follows:-

    a). A declaration issues in terms of prayer (a) of the Amended Plaint.

    b). Compensation for losses as follows:-

        (i) 1st plaintiff – Kshs 40,695,527/=

        (ii) 2nd plaintiff – Kshs 31,220,708/=

        (iii) 3rd Plaintiff – Kshs 30,854,361/=

        (iv) 4th Plaintiff – Kshs 14,115,760/=

        (v) 6th Plaintiff – Kshs 47,962,452/=

c) Interest at court rate on the said amounts from the date of filing suit until payment in full.

d) Costs

It is so decreed.

DATED and DELIVERED at Nairobi this 12th day of November, 2021.

A. MABEYA, FCI Arb

JUDGE