



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCC NO. 305 OF 2014**

**PAUL MAINA T/A MWERU GENERAL MERCHANTS..... PLAINTIFF**

**VERSUS**

**NAIROBI BOTTLERS LIMITED..... DEFENDANT**

**JUDGMENT**

1. The dispute herein revolves around a distribution arrangement between the parties.
2. Paul Maina t/a Mweru General Merchants (**Maina or the Plaintiff**) avers that sometime in 2011, he was appointed and contracted by Nairobi Bottlers Limited (**Nairobi Bottlers or the Defendant**) as a distributor for its products within the central business district of Nairobi. His grievance is that Nairobi Bottlers unlawfully terminated the said contract, information of which was communicated to him in a letter of 27<sup>th</sup> March 2014. He contests the termination for the following reasons:-
  - a) **The contract between the parties was open-ended without any limitation on duration. Accordingly there was no requirement for periodic renewal or fresh application for distributorship.**
  - b) **The Plaintiff had observed all the terms and met all the sales targets as set by the Defendant.**
3. The Plaintiff seeks special damages of Kshs.16,000,090.44 and general damages for breach of contract.
4. In a Statement of Defence dated 25<sup>th</sup> September 2014 and filed on 1<sup>st</sup> October 2014, Nairobi Bottlers Limited denies the claim. The gist of the Defence is that no such distributorship contract existed.
5. In his evidence before Court, Mr. Maina testified that in 1992 Nairobi Bottlers appointed him as one of the distributors for their products in the central business district of Nairobi. He showed Court various documents which he alleges is proof of the distributorship (**P. Exhibit Pages 4-11**).
6. Mr. Maina told Court that so as to implement the contract he acquired a lease of a prime location within the CBD upon paying goodwill of Kshs.3,000,000.00 (**P. Exhibit Page 18**) and renewed his lease agreement upto the year 2016 (**P. Exhibit 18**). He was therefore heartbroken when he received a letter dated 27<sup>th</sup> March 2014 (**P. Exhibit Page 27**) purporting to terminate the distribution agreement.
7. On its part, Jude Munywoki testified on behalf of Nairobi Bottlers. It was reiterated that Paul Maina was not a distributor of the Defendant but just like many other customers, was allowed to buy products directly from the Defendant for sale at the retail market.
8. The testimony of the witness is that Nairobi Bottlers decided to appoint distributors of its products and on 8<sup>th</sup> October 2013 placed an advertisement in the Daily Nation inviting anyone who would have wished to be appointed as a distributor to apply but that the Plaintiff did not respond. The case of the Defendant is that it could not terminate a distributorship contract which did not exist in the first place.
9. The Court shall evaluate the evidence of the two witnesses as it attempts to resolve the following issues:-
  - i. Was there a distributorship contract between the Plaintiff and Defendant?
  - ii. If so, did the Defendant breach the contract?

iii. If the answer to (i) and (ii) above are in the affirmative what damages, if any, does the Plaintiff deserve?

iv. What is the appropriate order as to costs?

10. Although the Defendant had in its pleadings denied that the Plaintiff was its duly appointed distributor, the Defendants own witness gave evidence to the contrary. In his evidence Jude Munywoki stated:-

**“The Plaintiff was an MDC allocated an account number 7. He was in division 1. There was a relationship from 2003 to 2013”.**

11. The witness had explained that MDC is the short for Manual Distribution Centre and that an MDC was owned by an officially appointed distributor. I think that the first issue is easily resolved in favour of the Plaintiff. Although no distributorship contract was produced in Court, there was a concession by the Defence witness of the existence of a distributorship relationship between it and the Plaintiff from 2003 and 2013. A period of 10 years.

12. As to why the Plaintiff’s distributorship was terminated, the Defendant’s witness stated:-

**“The only reason for termination is because he did not re-apply”**

13. This re-application is in respect to an advertisement put out in the Daily Nation of 8<sup>th</sup> October 2013. In that advertisement, Nairobi Bottlers invited persons interested in becoming their distributors in various market territories, one of which was the Nairobi CBD, to apply. Although the Plaintiff’s evidence is that he did not see the advertisement, it was his testimony that he would not have responded to it because he was already an existing distributor.

14. As to whether existing distributors needed to re-apply, Munywoki testified:-

**“Advert was actually put up on 8<sup>th</sup> October 2013. We had multiple distributors in CBD. Did not indicate that existing distributors would re-apply”.**

15. Given this testimony, I would agree with the Plaintiff that as an existing distributor there was no obligation on him to re-apply. As this was the only reason given for the termination of his contract, then there was unlawful termination of the contract as there was no due notice given to the Plaintiff. The termination was communicated through a letter of 27<sup>th</sup> March 2014 (**P. Exhibit Page 27**) but which was received by the Plaintiff on 14<sup>th</sup> March 2014. Perhaps there was an error on the date of the letter! And which letter also appeared to terminate the distributorship by 3<sup>rd</sup> March 2014! Anyhow, and whatever the errors, the termination was immediate.

16. Whilst the contract was not placed before the Court, I would think that the Plaintiff’s proposition that the contract was open-ended does not appear viable. The Plaintiff needed to provide evidence that the agreement was not just a long term contract but that it was in fact perpetual. I would rather think, however, that the Plaintiff was entitled to reasonable notice(see for example **Bid Insurance Brokers V British United Provident Fund [2016] eKLR**). What is reasonable notice turns on the facts of each case.

17. None of the parties suggested what reasonable notice would be and I think a 6 months’ notice to be reasonable. In reaching this decision, I have considered that the contract had been in place for over 10 years.

18. So what damages are appropriate? On this our Courts continue to draw inspiration from the old decision in **Hadley –vs- Baxendale[1854]**;

**“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, that is 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”.**

19. I would think that the following heads of losses flow naturally from the unlawful conduct of the Defendant.

i. Business license for 2014 - Kshs.15,000.00

ii. Health permits for 2014 - Kshs.5,000.00

iii. Fire inspection certificate - Kshs.4,500.00

iv. Business inspection certificate- Kshs.1,000.00

20. Expenses on branding and on other assets required to carry out the business would have been incurred irrespective of whether or not a proper termination notice had been issued. The Court makes no award in that regard.

21. A substantial claim is made on goodwill to the premises. The claim is for Kshs.3,000,000.00. However, the evidence that emerges is that the goodwill was not only charged but also paid in the year 1998. Having done so the Plaintiff enjoyed benefit of the premises for about

16 years. No loss could have ensued in this respect because of termination without reasonable notice of 6 months.

22. On loss of expected income. This would be for 6 months. The Books of Accounts for the year 2017 show that the business made an annual profit of Kshs.2,173,214.00. This Court makes an award for half a year. Although the Plaintiff pitches for greater income citing increased sales, no evidence was put forward to support that contention. So half yearly loss on income is Kshs.1,086,607.00.

23. In the end I enter Judgment in favour of the Plaintiff as against the Defendant for Kshs. 1,112,107.00 with interest thereon at Court rates from the date of filing suit until payment in full. Costs, as well, to the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 14<sup>th</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mrs. Nduati holding brief for Njuguna for Plaintiff

Masinde holding brief Wachuka for Defendant

Court Assistant: Nixon