**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 862 OF 2010**

**FLORENCE WANJIKU GITAU.....PLAINTIFF**

**-VERSUS-**

**NATU INVESTMENTS LIMITED.....1ST DEFENDANT**

**CHABRIN AGENCIES LIMITED.....2ND DEFENDANT**

**JUDGMENT**

1. Taking center stage in these proceedings is an agreement dated 31st August 2009 entered between Florence Wanjiku Gitau (Mrs Gitau or the Plaintiff) and Natu Investments Limited (Natu or the 1st Defendant).

2. At all times relevant to this suit, Mrs Gitau was and is the registered owner of all that piece of land known as LR. No. 1/121 situated along Ngong Road in Nairobi (the premises). Mrs Gitau leased the premises to Natu Investment for 10 years vide a lease dated 28th March 2000. In the life of that tenancy, and with the permission of the landlord, Natu erected certain buildings (hereinafter called further buildings and improvements) on the premises.

3. At the expiry of the lease, the two parties entered the agreement dated 31st August 2009 in which Natu sold the further buildings and improvements to Mrs. Gitau. Under Clause 5 of the Agreement, the premises and collection of the license fees during the period of the agreement would be managed by a manager or agent appointed by mutual agreement of the parties. Enter Chabrin Agencies Limited (Chabrin or the 2nd Defendant) into the matter. Mrs. Gitau and Natu appointed Chabrin with effect from 1st September 2009 and was to collect and manage the gross license fees for the period September 2009 to 31st March 2011.

4. Mrs Gitau is aggrieved by what she sees as certain breaches of the agreement for which she blames Natu and also implicates Chabrin as colluding and conspiring.

5. In the Plaint amended on 2nd February 2012 and filed on 3rd February 2012 she outlines the breaches. That the Defendants;

> *[10]*
>
> *a) Refused, neglected and or failed to remit to the Kenya Revenue Authority (KRA) Kshs.4,900,770/= being income tax due thereby attracting Kshs.1,920,104/= as penalties and interest thereof as at 9th February 2012 all totaling to Kshs.6,820,774/= part of which sum of Kshs.3,853,416/= the Plaintiff paid herself to KRA but the 2nd Defendant failed/refused to refund to the Plaintiff. And the Plaintiff claims the said sum of Kshs.3,853,416/= from the Defendants.*
>
> *The Plaintiff further avers that she is obliged in law to pay and that the Defendants are obliged to meet or refund to the Plaintiff any part of the balance thereof of Kshs.2,967,458/= together with further penalties and interest that she may subsequently pay in respect thereof.*
>
> *b) Refused, neglected and or failed to remit to KRA Kshs.993,670/= being 16% VAT on license fees and which the Plaintiff is now obliged to pay to KRA together with penalties and interest thereof. The Plaintiff further avers that she is obliged in law to pay and that the Defendants are obliged to meet or refund to the Plaintiff any part thereof that she may pay in respect thereof.*

*c) Refused, neglected and or failed to set aside before the 31st March 2011 before releasing any moneys to the 1st Defendant:-*

*i. The said income tax, VAT, plus interest and penalties thereof mentioned in Paragraphs (a) and (b) above.*

*ii. The said licensees' refundable deposits ascertained as Kshs.3,185,289/=.*

*iii. Sufficient moneys to meet all expenses and outgoings that accrued up to the 31st March 2011.*

*d) Refused, neglected and or failed to supply the Plaintiff with necessary reports and documents as is envisaged in the agreement particularly at Clause 5(ii) thereof.*

*e) Allowed the 1st Defendant and or her directors to directly collect or receive certain licensees' fees alluded to hereinafter.*

*f) Continued to accept unilateral directions contrary to the agreement from the 1st Defendant and or associating with the 1st Defendant and her advocates in a manner in conspiracy with the 1st Defendant and or which conflicts with the terms of agreement which directions and association the Plaintiff avers are null and void.*

6. Mrs Gitau states that the two collected license fees of Kshs.1,155,833/= from licensees occupying two containers and a billboard as well as Kshs.2,024,748/= from other various licensees directly making a total of Kshs.3,180,581/=. In addition, that Natu and Chabrin received Kshs.1,509,719/= being an increase in license fees due to her by virtue of Paragraph 4(b) of the agreement.

7. One other matter features time and again in these proceedings. Pursuant to orders issued by Court on 6th April 2011, a Joint Audit Report was prepared and filed in Court on 19th January 2012. Mrs Gitau seeks to rely on the findings.

8. In the end, the substantive prayer sought by the Plaintiff is for payment of a net sum of Kshs.10,509,394/= upon deducting Kshs.2,000,158/= received by Chabrin pursuant to orders of Court issued on 23rd December 2015. In addition, she seeks further tax penalties and interest.

9. Natu resists the claim through a statement of Defence filed on 21st February 2012. It reiterates that the sale Agreement was an agreement of sale of specific assets, to wit, the further buildings and improvements on LR. No. 1/121. Second, that the purchase price was agreed to be the total net proceeds of license fees as received from the licensees occupying the said premises as indicated in Clause 3 of the agreement.

10. Natu decries what it sees as undue interference on the part of Mrs Gitau in the duties of the Manager or Agent and alleges breach of Clauses 5(a) and (b) of the agreement. It is also asserted that she used third parties to usurp the duties of the agent.

11. Turning to other aspects of the dispute Natu contends that it was not obligated to pay or make provision for Mrs Gitau's personal tax obligations. Natu sees its obligation as only to pay relevant taxes and all outgoings in respect of the further buildings and improvements only pursuant to the Agreement. Natu also asserts that it never directly collected nor received licensees' fees. Lastly it states that containers and the billboard were not part of the agreement.

12. Chabrin filed a lengthy Statement of Defence dated 29th February 2012. For now, the Court highlights what Chabrin saw as its role:-

*[6]*

*i. The 1st Defendant would source and contract with the licensees/tenants directly.*

*ii. The 1st Defendant would receive and keep all refundable deposits paid by the licensees/tenants pursuant to the respective terms of the license/tenancy agreement.*

*iii. The 2nd Defendant and/or its representatives would then collect the license/rents due from each tenant in each month and render a statement to the 1st Defendant in which it accounted for all the monies collected from the licensees/tenants as well as any licenses/rents that a licensee/tenant may have paid directly to the 1st Defendant.*

*iv. The monthly statement by the 2nd Defendant would indicate the following:-*

*a) The total amount collected by the 2nd Defendant.*

*b) The amount paid by a licensee/tenant directly to the 1st Defendant, if any.*

*c) The amount of Value Added Tax payable by the 1st Defendant on the amount collected during the month under consideration.*

*d) The amount commission payable by the 1st Defendant to the 2nd Defendant for the amount collected during the month.*

*e) The amount paid by the 2nd Defendant to third parties out of the monies collected during the month on instructions of the 1st Defendant for utilities, goods and/or services rendered to the 1st Defendant, if any.*

*f) Any advances paid to the 1st Defendant during the month, if any.*

*g) The outstanding amount held by the 2nd Defendant on account of the 1st Defendant.*

*v. The monthly statement would be scrutinized by the 1st Defendant and/or its representatives and signed as correct and true reflection of the entries therein.*

*vi. After the statement is signed, the 2nd Defendant would then draw a cheque payable to the 1st Defendant for the whole amount held and outstanding on account of the 1st Defendant for which the statement related in full and final settlement of the account between the 1st and 2nd Defendant.*

13. Chabrin denies any wrongdoing or conspiracy or collusion with Natu.

14. At hearing five witnesses testified; Catherine Maina and the Plaintiff herself in support of the Plaintiff's case. Daniel Kiaraho and Kenneth Muiru Mwangi for Natu and Reuben Mutinda for Chabrin. The evidence of these witnesses will be highlighted in so far as they assist the Court in resolving the issues that are relevant for determination. Although the parties did not return a joint statement of issues, the Court sees the following as requiring resolution:-

i. Was the 2nd Defendant an agent of the Plaintiff or the 1st Defendant or both for purposes of implementation the sale agreement?

ii. Is the Plaintiff entitled to Kshs.3,853,416/= being refund of income tax, penalties and interest paid by her and if so from whom.

iii. Is the Plaintiff entitled to Kshs.993,670/= on account of VAT together with penalties and interest and if so from whom.

iv. Is the Plaintiff entitled to Kshs.3,185,289/= on account of refundable deposits and if so from whom.

v. Is the Plaintiff entitled to Kshs.1,509,719/= being increase in license fees and if so from whom.

vi. Is the Plaintiff entitled to Kshs2,967,458/=income tax together with further penalties and interest.

15. Clause 5a of the sale agreement provides:-

"The Premises and collection of license fees from the said premises during the said period shall be managed from time to time by a manager or an agent(s) appointed in mutual agreement by the parties herein but otherwise the management shall be at all times be in accordance with this agreement. In the first instance unless otherwise replaced the manager/agent shall be the person stipulated in Schedule III hereinafter."

At schedule III the name of the Manager or Agent is Chabrin Agencies Limited.

16. In the Plaint, Mrs. Gitau states that she and Natu appointed Chabrin to be the manager and agent responsible for collecting and managing the gross licensees' fees for the period September 2009 to 31st March 2011. In answer to that assertion, Natu states that it never formally appointed Chabrin as the agent in respect to the agreement but that it explained to the 2nd Defendant its new obligations as a vendor and asked Chabrin to comply with the relevant provisions of the agreement.

17. Chabrin's position is somewhat ambivalent. On the one hand it takes the position that the agreement imposed new and additional obligations on it different from those existing under the old mandate it had with Natu without any additional consideration and powers to perform them and that it was not obliged to accept them. On the other hand, it states that it has rendered a full account of all the monies received and/or collected by it under the mandate.

18. Counsel for Chabrin makes long submissions disputing the existence of an agency and concludes that the purported appointment was inchoate, legally ineffective and unenforceable against it. Yet this is at odds with the testimony of Chabrin's own witness. He testified as follows:-

"FWG -2a – This was a letter of appointment – letter of 3rd September 2011. Chabrin continued as though in agreement between 1st Defendant and ourselves. Agreement is dated 30th August 2001. We never accepted this appointment."

The letter of 3rd September 2009 was from the lawyer of Mrs Gitau asking Chabrin Agencies to exercise its mandate as per the sale agreement with effect from 1st September 2009.

19. Whilst they may have been need for a formal acceptance of that appointment, by its witness's own admission, Chabrin continued to manage the property until March 2011. In this regard it would deduct its commission from rent received and pay itself. For that reason I accept the submissions by counsel for Natu that an agency relationship could be inferred from the conduct of the parties. The decision of

Gikonyo J in Lucy Nungari Ngigi & 4 Others V National Bank Of Kenya Limited & Another [2015] eKLR is instructive. The Judge held:-

> "[25] Ample judicial authorities were cited by both sides on agent-principal relation arising from the addendum herein. I am content to rely on the literary work in Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, which defines such a relationship to be:-
>
> "... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."
>
> …….
>
> The alleged breach of some or any of the terms of the addendum by the 2nd Defendant is a matter which should be canvassed in a trial, but it should not be used to injure third-party purchasers. See the case of Branwhite versus Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587 where Lord Wilberforce stated thus;-
>
> "While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency."
>
> Even where the consent to create the agent-principal relationship is not express, parties to the contract will be held to have consented if what they have agreed upon amounts in law to such a relationship. Sometimes they may not recognize it themselves and may have even professed to disclaim it but the consent to create the agent-principal relationship may be found to exist by implication from their words and conduct."

20. While at hearing there is a shift in the position of Chabrin when its witness stated that it was only an agent of Natu and not Mrs Gitau. The evidence before Court, not in the least the letter of appointment and the agreement itself, supports the position that, for purposes of the sale agreement, Chabrin was the agent for both Mrs Gitau and Natu. Whether or not the agent carried out its obligations fully and truly to both or the other, is of course, a different matter.

21. Mrs Gitau and Natu submitted to a joint Court ordered audit in respect to the sale agreement for the period starting 1st September 2009 to 31st March 2011. The audit was carried out by Muiru Kandia & Co. & Kangethe & Associate. Some items of the audit were not agreed and are the heart of the dispute. The points of departure shall be discussed as the Court resolves the issues.

22. The context of the agreement is all important. For a term of 10 years expiring on August 2009, Natu had been a tenant of Mrs Gitau. During the tenure of the lease, Natu improved the property and so it was agreed that Mrs Gitau would buy out those improvements, which are referred to in the agreement as "further buildings and improvement."

23. Regarding the purchase price, Clause 2 provides:-

"Price/Consideration:

The price of the said Further Buildings and Improvements or otherwise the consideration to be paid to the seller shall be the Total Net Proceeds of Licensees Fees as is more provided hereinafter that shall be received from licensees occupying the said premises detailed in *Schedule II* hereinafter with effect from and including the 1st September 2009 to 31st March 2011 (hereinafter called the "period")."

24. Clause 3 is on the manner of determining the total net proceeds and reads:-

> "Constitution of Price/Consideration:
>
> The Total Net proceeds of Licensees Fees shall be determined as follows:-
>
> Total Receivable Prevailing Licensees Fees on 31st August 2009 over the premises.
>
> LESS:
>
> a) Kshs.100,000/= payable to the purchaser every month.
>
> b) Fees in respect to unoccupied premises (save as to as a result of wilful fault of the purchaser).
>
> c) Management/agency costs to independent person(s) appointed under this agreement and costs relating to their appointment and any ensuing disputes.
>
> d) Rates payable or apportionable during the period in respect to the premises.
>
> e) Any taxes and impositions of legislative or by any lawful authority on the premises or incomes thereof.

f) Bills for all utility services including water, electricity etc attributable to the premises.

g) Insurance premiums (for policies mentioned herein) and other expenses for reasonable repair and maintenance of the premises.

h) Any penalties that may be levied by any authority for a default not occasioned by the purchaser touching on the premises.

i) Any fees not collected from licensees by virtue of default.

j) Licensees' refundable deposits refunded and unrefunded during the period and which were deposited with the seller deposited with the seller before 31st August 2009. If not exhausted by the licensee upon the licensee vacating the premises."

25. The Court starts by considering the controversy regarding the income tax. The Plaintiff points to Clause 3(e) as the justification for the claim. Counsel for Natu argues that Income Tax was a personal tax and it had to be paid individually. Counsel also points to the evidence of Natu's witness (DW2), an accountant and therefore an expert in that field that:-

i. Income Tax is tax made on profit.

ii. The person who realizes that profit is the one liable to pay Income Tax.

iii. In this particular case no profit was realized by Natu.

26. This has not been an easy question for this Court to determine. But a good place to begin is by emphasizing that the role of a Court in interpreting a contract is to give effect to the intention of the parties. Under the provisions of Clause 2, and as would ordinarily be, consideration moves from the purchaser to the seller. The purchaser was Mrs Gitau while the seller was Natu. In the uniqueness of the transaction, the purchase price or consideration was to come from the total net proceeds of the licensee fees. For the purchase price to come from Mrs Gitau, it would mean that the licensee fees was due to her but because of the agreement it was remitted to the seller (See Clause 5(b) of the agreement) directly.

27. It would seem therefore that the total net proceeds of the licensees fees was income to Mrs Gitau. This would be in tandem with the provisions of Clause 1 which reads:-

"Sale:

"The seller hereby sells and the purchaser buys all the said Further Buildings and Improvements with property and possession passing, accruing and resting with the purchaser with effect from 1st September 2009 for the consideration hereinafter stated."

The express effect of the provisions of this Clause is that the property and possession of the further buildings and improvements would pass and rest with Mrs Gitau with effect from 1st September 2009.

28. In ideal circumstances, the responsibility of paying Income Tax would be on Mrs Gitau. Yet there is evidence that VAT of the period of the agreement was paid by Natu. Does this change the outcome? In this regard DW3 stated:-

"Natu would instruct us on how much to pay KRA. We would make out the cheques and officers of Natu would collect them for payment to KRA."

The VAT returns confirmed that it is Natu who was the payee of the VAT. Give regard to evidence of DW2 in cross-examination.

29. The effect of the arrangement was that VAT would be excluded from what was to be credited to the income that was to go to Mrs Gitau and therefore what was available went towards the consideration. Similarly, were bills for utilities, insurance premises and expenses for reasonable repair and maintenance of premises. The true purport of Clause 3 was that it was the income from the total net proceeds of the licensees' fees that was to be credited in favour of Mrs Gitau but paid to Natu was income that Mrs Gitau would receive less expenses, be they on VAT, rates or management fees, utility bills or any such expense. This arrangement does not reveal an intention of parties to exclude Mrs. Gitau's tax liabilities on income tax from what they christened "Total Net Proceeds''. The claims touching on income tax would have to fail.

30. Mrs Gitau makes a claim of Kshs. 993,670/= being VAT together with penalties and interest. She contends that this was because, Natu refused, neglected and/or failed to remit this sum and the Plaintiff is now obliged to pay it to KRA. That payment of VAT was an obligation hoisted on Mrs Gitau right from 1st September 2009 when she started to earn the license fees is a matter this Court has alluded to earlier. KRA may have been entitled to demand any VAT not paid after 1st September 2009 from Mrs Gitau. As Natu took up the mantle of paying the VAT during the contract period, any default must be recovered from Natu.

31. The evidence that emerged is that payment for VAT was made by Natu though separate cheques made out by Chabrin. Since the joint audit reports that no evidence was availed to support payment of Kshs.808,737/= to the tax collector, then this amount (and not Kshs.993,670/= pleaded) and any interest and penalties therefrom is legitimately due from Natu.

32. The joint audit further reports that during the contract period there was an increase in rent of Kshs.1,507,719/=. Mrs Gitau argues that

this was not part of net proceeds and is due to her directly. For Natu, its auditors argue that it has already been included and factored in the actual receipts and that therefore paying and demanding it again will be double counting.

33. In the submissions, Natu changes course and makes two arguments. First, that the person liable to pay this amount is the Chabrin who was collecting and managing licensee fees. Second, that Mrs Gitau has failed to adduce any evidence that this amount was paid.

34. A complete and quick answer as to who between Natu and Mrs Gitau was entitled to the increase in rent is to be found in Clause 3 read together with Clause 4 of the agreement. Expressed in Clause 3 is that the total receivable prevailing licensees fees is that as on 31st August 2009. Therefore, any increase in rent, or call it licensee fees, is not included in the total receivables to be remitted to Chabrin towards the contribution. And this is made even clearer by Clause 4(b) which reads:-

> "For avoidance of any doubts, the Total Net Proceeds of Licensee Fees shall not include:-
>
> .....
>
> (b) Any amount of licensee fees in respect of any individual license over and above the amount prevailing on 31st August 2009."

35. As Clause 3 had ordained Mrs Gitau as owner of the Further Buildings with effect from 1st September 2009, any increase in license fees would be to her credit.

36. The attempt by Natu to pass blame to Chabrin and to argue that the amount was not proved must similarly fail because its own audit conceded that it had already been included and factored in the actual receipts and payments to Natu. Page 6 of the report indicates that Natu had in fact received this money.

37. Clause 3 (j) provided for the deduction of:-

> "Licensees' refundable deposits refunded and unrefunded during the period and which were deposited with the seller deposited with the seller before 31st August 2009. If not exhausted by the licensee upon the licensee vacating the premises."

I agree with the position proposed by Natu that the Plaintiff's entitlement is the net available deposits and not gross available deposits.

38. It is also true that the joint audit returned an opinion that the gross unrefunded deposits due to Mrs Gitau as at 31st March 2011 was Kshs.3,185,289/=. This was a figure conceded to by Chabrin (Page 2 Clause 1 of the report). However in the same report, the auditors of Natu call for the following deductions:-

| | |
|---|---|
| Deposit available as per schedule ..... | 3,185,289 |
| Less: Unpaid rent as per schedule ..... | (568,748) |
| Unpaid electricity bills as per schedule ..... | (141,724) |
| Deposit held by Mrs Gitau as per original agreement ..... | (140,000) |
| Cash held by Chabrin Agencies ..... | (1,985,488) |
| Other expenses paid by Natu ..... | (247,709) |
| Balance payable by Natu Investment Limited | 101,620 |

39. On its part the auditors for Mrs Gitau decried the lack of documentary evidence to support these deductions. The onus was therefore on Chabrin to prove the net sum refundable. This it failed to do.

40. Still there is a line of defence taken up by Natu that was wrapped around paragraph 8 of its statement:-

"The 1st Defendant in reply to the contents of Paragraph 9 of the Amended Plaint avers that Kshs.3,185,289/= could not be ascertainable on the 31st March 2011 as three months before then, the 2nd Defendant was slapped with injunctive order and as a consequence thereof, all operations stalled including payment of overheads like electricity, water and security and taxes in respect of the 1st Defendant. The 1st Defendant avers that the Plaintiff stopped it from realizing its purchase price pursuant to the Agreement."

41. It is argued that as the agreement was never concluded because on 23rd December 2010, three months to the expiry of the agreement, Mrs Gitau halted the agreement by obtaining injunctive orders against the Defendants. It is therefore argued that the Plaintiff's claim is speculative and unripe for litigation. In this regard counsel cites the decision of Mativo J in Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR in which the Judge explains the doctrine of ripeness of an action;

**"45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by Kriegler J[34] in the following words:-"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."**

**46. Lord Bridge of Harwich put it more succinctly when he stated:- "It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."[35]It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.[36] The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[37] On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.**

**47. Ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[38] The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.**

**48. The U.S. Supreme Court fashioned a two-part test for assessing ripeness challenges in Abbott Laboratories vs. Gardner[39] as follows:-**

**"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[40]"**

42. It is true that by virtue of some interim orders issued in December 2010, Natu was barred from receiving further license fees on account of an application of 14th December 2010. That order was finally confirmed in a Ruling by Mugo J on 8th of April 2011. It is also in that order that an order for taking of accounts which eventually culminated in the joint audit report was first made. In making the order Mugo J observed:-

> "This Court is much alive to the fact that the Agreement has come to an end by virtue of expiration on 31st March 2011. That however does not affect the jurisdiction of this Court to make orders, as are just, in the circumstances."

43. The taking of accounts was done after the expiration of the agreement and covered the period 1st September 2009 to 31st March 2011 (See the Executive Summary of the report Page 1). There was opportunity for both sides, through the audit, to put forward any documents that would prove any sums that were to be deducted from the refundable deposits. Natu does not seem to have taken the opportunity offered by the audit to provide such evidence and this failure persisted upto the hearing. Instead, Natu was happy to provide the listing of deposits it had obtained (See Page 87 of the report). For good measure, the heading of the listing reveals that it is for deposits held as at 31st March 2011. To that extent it is an amount that is legitimately claimable.

44. As the Court approaches the epilogue of this decision, I must observe that in the body of the Plaint, Mrs Gitau seeks payment of Kshs.1,155,833/= allegedly collected from licensees occupying two containers and a billboard as well as Kshs. 2,024,748/= from various licensees who allegedly paid Natu directly. For some reason there are no corresponding prayers for these amounts in relief section of the Plaint. This Court cannot grant an order not prayed for and it would be needless to even discuss these aspects of the case. Indeed, the Plaintiff does not submit on these two claims and the Court takes them to be abandoned.

45. It is common ground that, pursuant to a Court order issued on 6th November 2015, some Kshs.2,000,108/= was deposited by Chabrin into a joint earning interest account in the names of the advocates for the Plaintiff and the 1st Defendant. The Plaintiff lays claim over it in satisfaction of her claim.

46. Natu disagrees and states that it was entitled to Kshs.4,117,779/= being the total sum of what was due to it for the last three months of the contract following the premature end of the agreement through a Court injunction. Natu seeks to be paid the deposit and in addition to payment of a further sum of Kshs.2,117,621/= to make the supposed entitlement of Kshs.4,117,779/=.

47. I am afraid, the Court is unable to make any such order in favour of the 1st Defendant because it neither sets up a counterclaim or set off in its Defence.

48. As I conclude, I have had to ponder whether any wrongdoing has been proved against the 2nd Defendant so as to deserve a condemnation in costs. So as to resolve that question, I have looked at one duty of the agent set out in Clause 5(b) (i). The Agent had the

duty to remit all outgoings mentioned in Paragraph 3 timeously and in any case set aside necessary funds for their payment before remitting any monies to the seller. There is evidence that VAT of Kshs. 808,737 was not remitted to the Tax authority. And although the Agent may have forwarded the payment to Natu, the nonpayment would have been avoided had the agent religiously adhered to his duty. For this small infraction, a small order of cost would have been necessary against the Agent. However, as the bulk of the case crafted by the Plaintiff against it has failed, I will order that the Plaintiff pays the 2nd Defendant a small portion on costs.

49. In the end Judgment is entered for the Plaintiff against the 1st Defendant for:-

49.1.

a) Kshs. 3,185,289/= being ascertained refundable deposits with interest on it at Court rates with effect from 3rd February 2012 (the date the Amended Plaint was filed) until payment in full.

b) Kshs.808,737/= being underpaid VAT together with penalties and interest accruing from failure to pay on the due date.

c) Kshs.1,569,719/= being increase in licensee fees with interest at Court rates from the date the Amended Plaint was filed, being 3rd February 2012, until payment in full.

d) The sum of Kshs.2,000,158/= held in deposit to be paid to the Plaintiff in part satisfaction of orders (a) (b) and (c) above.

e) Any interest earned on the deposit of Kshs.2,000,158/= to be paid to the Plaintiff.

f) Costs to the Plaintiff.

49.2. The Plaintiff's case against the 2nd Defendant is dismissed with ½ costs to the 2nd Defendant.

**Dated, Signed and Delivered in Court at Nairobi this 14th Day of October 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Masinde holding brief for Mungai for the Plaintiff.

Miss Awour for the 1st Defendant.

Miss Asenga holding brief for Mugambi for the 2nd Defendant