



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 490 OF 2017

S.B.C KENYA LIMITED.....APPELLANT

-VERSUS-

MAHAMUD SHEIKH OMAR T/A MAPENYA GENERAL STORES.....RESPONDENT

(Being an appeal against the judgment and decree delivered by Honourable E.A. Nyaloti (Mrs.)

(Chief Magistrate) on 17th August, 2017 in CMCC NO. 3586 OF 2013)

JUDGMENT

1. Mahamud Sheikh Omar t/a Mapenya General Stores, the respondent herein, instituted a suit vide the plaint dated 20th June, 2013 in which he prayed for general damages and special damages in the sum of Kshs.4,771,730/ for breach of contract, together with costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that by way of an agreement dated 15th November, 2011 it was agreed between the parties herein that *inter alia*, the respondent would act as the sole distributor of the appellant's products within the Eastleigh A area.
3. The respondent further pleaded that the agreement was originally set to subsist for a period of 12 months renewable at the option of the appellant by giving a written notice of renewal, and that upon expiry of the agreement on 15th November, 2012 the respondent inquired on whether the same could be renewed, to which the appellant through its Area Stocks Manager represented to the respondent that the agreement would be renewed for another three (3) years upon introduction of glass bottles for use in the packaging of its products.
4. It was the respondent's assertion in his plaint that introduction of the glass bottles was made in early January, 2013 and that the parties continued to trade under the terms of the agreement, with the respondent going a step further to apply for a loan in the sum of Kshs.2,000,000/ with a bank guarantee of Kshs.3,000,000/ for the purchase of a lorry registration number KBD 361G ("the subject vehicle") to assist in improving distribution capacity pursuant to the agreement.
5. The respondent pleaded that despite assurances that the agreement would be renewed, the appellant went back on its word and breached the agreement, the particulars of which were set out in the plaint.
6. The appellant entered appearance and put in its statement of defence to deny the respondent's claim.
7. At the hearing, the respondent called six (6) witnesses whereas the appellant relied on the testimony of one (1) defence witness. Thereafter, the parties filed and exchanged written submissions.
8. The trial court finally determined the suit in favour of the respondent as follows:

<i>a) General damages</i>	<i>NIL</i>
<i>b) Special damages</i>	<i>Kshs.4,771,730/</i>
Total	<i>Kshs. 4,771,730/</i>

9. Being aggrieved with the aforesaid judgment, the appellant has preferred an appeal against the same and put forward the following

grounds vide its memorandum of appeal dated 15th September, 2017:

- (i) THAT the learned trial magistrate erred in failing to find that the agreement dated 18th November, 2011 expired automatically on 18th November, 2012.*
- (ii) THAT the learned trial magistrate erred in holding that the continued trading between the appellant and the respondent after the expiry of the agreement dated 18th November, 2011 constituted an implied renewal of the agreement.*
- (iii) THAT the learned trial magistrate erred in holding that the appellant was required to give the respondent a notice before terminating the contract.*
- (iv) THAT the learned trial magistrate erred in failing to consider whether the respondent had provided evidence of the special damages claimed in the plaint.*
- (v) THAT the learned trial magistrate erred in failing to consider whether the respondent had proved that he suffered loss of Kshs.120,000/ on account of expenses incurred when expanding the depot.*
- (vi) THAT the learned trial magistrate erred in failing to consider whether the respondent had proved that he suffered loss of Kshs.150,000/ on account of compensation for alleged unauthorized advertising of the appellant's products.*
- (vii) THAT the learned trial magistrate erred in failing to consider whether the respondent had proved that he suffered loss of Kshs.386,270/ on alleged wasted expenditure in acquiring a loan.*
- (viii) THAT the learned trial magistrate erred in failing to consider whether the respondent had proved that he suffered loss of Kshs.57,500/ on account of expenditures incurred in acquiring a new store and payment of rent for the store for six months from January to June.*
- (ix) THAT the learned trial magistrate erred in failing to consider whether the respondent had proved that he suffered loss of Kshs.2,653,560/ on account of loss of expected income for the term of the agreement.*
- (x) THAT the learned trial magistrate erred in holding that the respondent had proved special damages of Kshs.4,771,730/.*

10. This court invited the parties to file written submissions on the appeal. On its part, the appellant argued that since the agreement was for a fixed period of time, the same automatically lapsed upon expiry of that period and that no steps were taken to ensure its renewal, citing the case of **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR** where the Court of Appeal held that where a contract is for a fixed time period, it would then logically end when such time lapses, otherwise it would no longer amount to a fixed term contract as well as **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR** wherein the Court of Appeal likewise rendered that fixed term contracts do not carry any rights or obligations beyond their expiry.

11. The appellant contended that the trial court fell into error in finding that following the expiry of the contract, further tradings between the parties amounted to a renewal of the original contract.

12. While the appellant admitted that upon expiry of the agreement, the parties continued to trade, it was of the view that such trading was in no way governed by the terms of the earlier agreement and that in any event, it fell upon the appellant to approve any renewals of the agreement.

13. The appellant stood its ground that it did not promise or in any manner offer to renew the agreement with the respondent.

14. On the issue of special damages, it was the appellant's submission that none of the expenses being claimed by the respondent were actually proved and that in any case, the appellant was not liable to recompense the respondent for such expenses. In that regard, the appellant faulted the trial court for awarding the special damages when the respondent was not entitled to the same.

15. The respondent on his part distinguished the case of **Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR** for the reason that in that case the main contention had to do with whether the termination of employment was lawful.

16. According to the respondent, the appellant should be estopped from denying the existence of a contractual relationship in view of the representation given by its employees regarding a renewal of the original agreement.

17. Furthermore, it was the respondent's contention that while it is true that special damages ought to be specifically pleaded and strictly proved, the degree of certainty and particulars of proof are dependent on the circumstances of the matter at hand and the nature of the acts done, as was the holding in **Hahn v Singh [1985] eKLR**.

18. In that respect, the respondent submitted that he adduced the requisite documentation to show the loss incurred, which documents were in fact produced before the trial court by consent of the parties.

19. I have considered the rival submissions and the authorities cited by the parties before me on appeal. I have also re-evaluated the evidence presented before the trial court. It is noted that the appeal revolves around the twin issues of liability in terms of breach of contract and the

award made on special damages.

20. As concerns the first limb, the respondent in his evidence as PW1 stated that he and the appellant executed a stockist agreement which was set to run for one (1) year and that upon its expiry, he was informed that the agreement would be renewed for another three (3) years upon launch of soda bottles.

21. During cross examination, the respondent testified that the appellant never wrote to him regarding renewal of the agreement but that such notice was merely promised by word of mouth through Justus Mulu who was at all material times the appellant's sales manager, further stating that throughout his contractual relationship with the appellant, they never traded in cash.

22. Upon being re-examined, it was the respondent's testimony that there was no written or formal correspondence between him and the sales manager and that any advertisements in respect to the appellant's products were done by way of a door to door exercise.

23. Justus Mutua who was PW2 stated that he at all material times worked for the appellant as a sales manager whose duties entailed managing distributors.

24. The witness stated that he and the respondent undertook marketing and advertisement of the appellant's soda bottles between 2012 and January, 2013 before leaving the appellant's employment. He admitted to having promised the respondent an offer for renewal of the agreement but denied telling the said respondent that the agreement would be renewed for three (3) years.

25. It was also PW2's evidence that he did not advise the respondent to expand his distribution; rather, it is the appellant's head of sales named Kruger who did so. He however pointed out that even after the agreement expired, there was no change in relationship between the parties herein.

26. Mary Alago and Dorah Agumba who testified as PW3 and PW4 respectively both stated that they assisted the respondent in promoting pepsi sodas at the instruction of PW2 and for which they received Kshs.1,000/ from the respondent.

27. PW5 was Elizabeth Adhiambo Okirela, whose evidence supported that of PW3 and PW4 stated that she rounded up about 10 girls including herself to assist in the promotion of the pepsi sodas for two (2) days and that they were paid Kshs.1,000/ for the two days, though she admitted to having no knowledge of any contract between the appellant and the respondent.

28. Omar Mohamed who was PW6 testified that he was an employee of the respondent in charge of sales and distribution of sodas and that they would sell between 2,000 and 3,000 crates of soda in a month on behalf of the appellant, only for the appellant to later engage the services of another distributor.

29. On a different note, Naftali Munyao who was DW1 while confirming the existence of an agreement between the parties herein, asserted that following the expiry of the said agreement, the appellant opted to appoint a new distributor but that the respondent continued marketing the goods on behalf of the appellant, save to mention that he was not aware of the arrangement made between the parties subsequently.

30. The witness also stated that in order to close a distributor or stockist, the appellant was required to give three warnings within a period of three (3) months and that in the present instance, such procedure was not followed.

31. During re-examination, it was DW1's evidence that the procedure of the three warnings was not provided for in the written agreement.

32. The learned trial magistrate finally reasoned that the continuation in trading between the parties upon expiry of the original agreement amounted to an implied renewal of the said agreement which is to say that the appellant ought to have given the respondent a notice to terminate the agreement.

33. From the foregoing, it is not controverted that the parties entered into a stockist agreement dated 18th November, 2011. According to clause 2 of the agreement, the agreement was for a fixed term of 12 months with the option of renewal by the appellant through giving written notice of at least 14 days prior to the date of expiry of the agreement.

34. In close reference to the above, clause 10(2) of the agreement stipulates that upon expiry of the original agreement term, the same shall automatically terminate unless renewed in line with the aforementioned clause 2.

35. It is not in dispute that the term of the agreement lapsed on 17th November, 2012. There is no indication that the appellant ever issued a written notice of renewal in the manner stipulated in the contract.

36. From my comprehension of the above, I take the view that a renewal was not intended to apply automatically but required a specific procedure. In the absence of such renewal in the above manner, I find that the said contract automatically terminated on the abovementioned date since the agreement had a start and end date. I am supported by the analysis by the Court of Appeal in **Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho- Kariuki [2017] eKLR** which I have already set out hereinabove and find applicable notwithstanding the fact that the contract in that case was of an employer-employee nature.

37. It is apparent from the circumstances of this matter that the parties continued trading even after the original agreement expired. This, to my mind, gave rise to a distinct and verbal agreement by implication of the conduct of the parties and could not have been associated with the earlier agreement which terminated by effluxion of time.

38. It therefore follows that the learned trial magistrate erred in finding that the oral agreement constituted a renewal of the original agreement.

39. Having determined the above, I now turn to address the issue to do with whether the appellant was required to give notice of termination of the verbal contract.

40. Upon my re-evaluation of the evidence on record, I noted that the parties did not come up with any express or implied terms for termination of the agreement or for the duration of the agreement for that matter. In any event, PW2 who worked for the appellant at the material time stated that he did not mention to the respondent that the contract would be renewed for 3 years as claimed.

41. Moreover, DW1 did not adduce any evidence to demonstrate that the procedure for terminating the contract involved the appellant giving the respondent three (3) months' warning/notice of termination.

42. In view of the foregoing and in the absence of any tangible evidence to show the specific terms of the agreement settled between the parties, I am convinced that the respondent did not establish the particulars of breach of contract against the appellant.

43. Consequently, I respectfully disagree with the learned trial magistrate's analysis and finding on this issue.

44. I am left with the second issue on the award made in respect to special damages. Whereas I have already found that the respondent did not prove his case on a balance of probabilities, I am still required to consider whether I would have upheld the award under different circumstances.

45. Going by the pleadings, the respondent urged the trial court to award the following sums:

<i>a) Expenses in expanding the respondent's depot</i>	<i>Kshs.120,000/</i>
<i>b) Compensation for unauthorized advertising</i>	<i>Kshs.1,500,000/</i>
<i>c) Wasted expenditure in acquiring a loan</i>	<i>Kshs.386,270/</i>
<i>d) Wasted expenditure in acquiring</i>	
<i>a trading license</i>	<i>Kshs.15,400/</i>
<i>e) Wasted expenditure in acquiring</i>	
<i>a new store</i>	<i>Kshs.57,500/</i>
<i>f) Wasted expenditure in implementing</i>	
<i>door to door marketing strategy</i>	<i>Kshs.39,000/</i>
<i>g) Loss of expected income for the term</i>	
<i>of the agreement</i>	<i>Kshs.2,653,560/</i>
<i>Total</i>	<i>Kshs.4,771,730/</i>

46. The learned trial magistrate awarded the sum of Kshs.4,771,730/.

47. I have re-examined the evidence on record and I am of the view that whereas PW3, PW4 and PW5 testified that they received payment in the sum of Kshs.1,000/ for assisting the respondent promoting the appellant's sodas, no disclosure was made as to the mode of payment, neither were receipts for the same tendered before the trial court.

48. Furthermore, the respondent did not adduce any evidence to show that the appellant had specifically required the respondent to incur the expenses laid out hereinabove in the distribution of its products, neither do the documents produced before the trial court reflect the expenses incurred from 15th March, 2013 onwards, which is the date on which the respondent claims he was informed of the substitution of distributors.

49. In the premises and in consideration of the law that special damages ought to be specifically pleaded and strictly proved, I would have been hesitant to award any of the sums claimed under that head.

50. Suffice it to say that for the reasons given above, I will allow the appeal and set aside the judgment delivered on 17th August, 2017. The said judgment is substituted with an order dismissing the respondent's suit with costs to the appellant. The appellant shall also have the costs of the appeal.

Dated, Signed and Delivered at Nairobi this 13th day of December, 2019.

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent