REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 673 OF 2005

FREDA STORES LIMITED…….....PLAINTIFF

VERSUS

NATIONAL OIL CORPORATION OF KENYA LIMITED….....DEFENDANT

JUDGMENT

1. The plaintiff, **FREDA STORES LIMITED,** is a limited liability company.

2. On 28th April 1999 the plaintiff executed a Service Station Dealer Licence Agreement with the defendant, **NATIONAL OIL CORPORATION OF KENYA LIMITED.**

3. Pursuant to the said Agreement, the defendant granted to the plaintiff the right and authority to operate a petrol service station known as **EMBAKASI SERVICE STATION.** The said service station was situate at plot L.R. NO. 9042/162, Embakasi, Nairobi.

4. Whilst operating the service station, the plaintiff also entered into another Agreement with the defendant, pursuant to which the plaintiff operated a restaurant which was located on the same plot of land.

5. In April 2005 the parties agreed that the plaintiff would stop operating the service station. However, the plaintiff was to be allowed to continue operating the restaurant thereafter.

6. According to the plaintiff, although there had been an agreement between the two parties;

> *"5. The defendant in fragrant breach of the said agreement, entered into the plaintiff's restaurant Freda Corner Club, and forcefully evicted plaintiff, ejecting and removing some of the plaintiff's property from restaurant.*
>
> ***PARTICULARS OF BREACH***
>
> *i) Failing to ascertain and address delivery product losses claimed by plaintiff.*
>
> *ii) Failing to ascertain the double banking claims by the plaintiff relating to supplies by defendant.*

iii) Failing to determine the plaintiff level of investment.

iv) Failing to remit buy-out goodwill.

v) Failing to advance agreed sum of Kshs. 2,000,000/-.

And the plaintiff claims the sum of Kshs. 17,020,298/- relating to the above and tabulated in their letter dated 27th April 2005 and Kshs. 959,751/-being products".

7. It was the contention of the plaintiff that it gave a Demand Notice to the defendant, by way of a letter dated 18th June 2005. However, the defendant was said to have declined to restore the plaintiff to the restaurant or to comply with the terms of the letter dated 18th June 2005.

8. In the circumstances, the plaintiff prayed for the following reliefs;

"a) A permanent injunction to restrain the defendants from taking over the business of the plaintiff at Embakasi petrol station plot No. 9042/162.

b) A permanent injunction to restrain the defendant from attaching and/or removing any of the plaintiff's goods situate at Embakasi petrol station.

c) A permanent injunction to restrain the defendant from interfering and/or evicting the plaintiff from Freda Corner Club, situated in LR Number 9042/162.

d) An order that defendants comply with terms of agreement dated 18/04/2005.

(e) An order that defendant do pay to the plaintiff sum of Kshs. 17,979,052.60."

9. In its Defence, the defendant stated that there had been an agremeent between the parties, pursuant to which the defendant was to take over the petrol station on 1st May 2005.

10. Therefore, I understand the defendant to be saying that the act of taking over the petrol station was not adversarial but consensual.

11. Meanwhile, as regards the other issues, such as;

i) An advance to the plaintiff of Kshs. 2,000,000/-.

ii) Investigations as to the delivery losses claimed

by the plaintiff;

(iii) Determination of the amount of money which the plaintiff invested in the restaurant;

iv) Buy out or goodwill to be paid by the defendant to the plaintiff;

the defendant's position was that the audit established that it was the plaintiff who owed the defendant. Meanwhile, the Board of Directors of the defendant did not give its approval to the proposed advance of Kshs. 2,000,000/-, which approval was a pre-condition to the proposed advance.

12. Meanwhile, after the defendant took over the petrol station, it appointed a new dealer.

13. The defendant denied the plaintiff's claim for Kshs. 17,020,298.00, pointing out that the said claim was defective and bad in law, because the plaintiff failed to specifically plead the particulars of that special damage.

14. Meanwhile, the defendant lodged a counterclaim against the plaintiff, for Kshs. 2,857,552.00. The said claim is said to have arisen after the defendant had conducted a reconciliation of the plaintiff's account.

15. When the plaintiff filed its Reply to the Defence, it said that it was only after this case had been filed that the plaintiff became aware of the refusal by the defendant's Board of Directors, to approve the proposed advance of Kshs. 2,000,000/- to the plaintiff.

16. However, the plaintiff insisted that the defendant would only have become entitled to take over the petrol station after compliance with the terms of the letter dated 18th April 2005.

17. The court was invited to interprete the contents of that letter in its entirety, as opposed to a piece-meal interpretation. If such a composite interpretation was adopted, the plaintiff reasoned that the breach of any of the terms of that letter would render void, the entire agreement.

18. On its part, the plaintiff asserted that it did not breach any of the terms of the letter dated 18th April 2005.

19. Finally, the plaintiff denied the defendant's claim for Kshs. 2,857,552/-. As far as the plaintiff was concerned, the defendant's only reason for putting forward that claim was malice and an attempt to frustrate the plaintiff.

20. During the trial the plaintiff called two witnesses whilst the defendant called one witness.

> 21. **PW1, DIOMEDES KARUIRU THEURI,** was the Managing Director of the plaintiff, **FREDA STORES LIMITED.** He testified that the plaintiff started running the petrol station after signing the Service Station Dealer Licence dated 28th April 1999.

22. Initially, Theuri used to write *"cash cheques"* for the fuel which the defendant was selling to the plaintiff. However, that system was later modified so that Theuri would write cheques which he gave to the defendant. After selling the supplies, the plaintiff would collect fresh supplies. Whilst collecting the fresh supplies, the plaintiff would write fresh cheques, and the defendant would bank the earlier cheques.

23. Theuri testified that the said new system of conducting business was called *"Load to Load"*.

24. Apart from paying the defendant for the fuel and other petroleum products, the plaintiff did not pay rent for the petrol station.

25. Theuri also testified that he used to operate a restaurant business which was located on the same plot where the petrol station was. In respect to that restaurant, Theuri said that the plaintiff used to pay rent of Kshs. 40,000/- monthly.

26. However, Theuri noted that the petrol business was making losses. He attributed the said losses to the defendant. His reason for holding the defendant responsible for the losses was that independent investigations had revealed that there had been leakages from the petrol station.

27. By the time that the relationship between the plaintiff and the defendnat ended, Theuri says that the total value of the losses which he ascribed to the faults or negligence of the defendant was Kshs. 5,192,025/-.

28. Meanwhile, because the defendant had refused to accept the responsibility for the losses which the plaintiff attributed to leakages, Theuri testified that he initiated steps towards the termination of the Dealer's Agreement in 2004. Theuri had concluded that the plaintiff could not continue to operate the petrol station when the said operations consistently led to losses.

29. However, as the restaurant did not appear to suffer similar losses, Theuri was desirous of continuing

to operate it *"for a short time"*.

30. The two parties held meetings, pursuant to which the plaintiff agreed to hand over the petrol station on 1st May 2005.

31. According to Theuri, he did honour his part of the agreement. However, the defendant was faulted for failing to advance to the plaintiff the sum of Kshs. 2,000,000/-. The failure by the defendant, to make that advance is said to constitute a breach of the agreement. The plaintiff wished to have the court hold the defendant liable for the consequences of that breach.

32. Another aspect of the plaintiff's claim was said to be in respect to the goods for which the plaintiff made payment, but which the defendant failed to supply. That claim was in the sum of Kshs. 1,784,610/-.

33. The third aspect of the plaintiff's claim was for Kshs. 1,264,920/60, which was for the over-payment between 1999 and 2001.

34. The plaintiff testified that it spent Kshs. 2,900,000/- to complete the construction of the roof for restaurant; the grills at the station and at the restaurant; and counters.

35. Meanwhile, when the plaintiff was handing over the petrol station to the defendant, the stock at the station was worth Kshs. 959,751/-.

36. A sum of Kshs. 2,240,000/- was claimed on account of Goodwill. And Theuri testified that that sum was agreed upon during the meeting held on 18th April 2005.

37. During cross-examination, Theuri confirmed that it is the plaintiff who offered to terminate the agreement for running the petrol station. He said that the station was handed over to the defendant pursuant to that agreement.

38. Meanwhile, as regards the restaurant, Theuri said that the plaintiff was not physically evicted. He explained that the plaintiff moved out of the restaurant pursuant to an order of the court.

39. Before moving out of the restaurant, in 2006, Theuri said that the plaintiff did not pay rent. His explanation was that he was waiting for the defendant to sort out the plaintiff's matter.

40. Theuri also said the following, concerning the *"load over load"* system which the parties used for the plaintiff to pay for petroleum products;

> *"The load over load allowed me to take fuel over 2 million on credit. The cheques I gave needed to be honoured. The cheques would not be banked until I went for a further loading. I was not paying in advance"*.

41. Meanwhile, Theuri said that the defendant should be liable for the losses attributed to the leakages because it was the obligation of the defendant to maintain the station's storage tank.

42. But Theuri also confirmed that investigations were conducted about losses, not the leakages. In his considered view, it was the responsibility of the defendant to investigate the leakages.

43. As regards the Buy-out or the Goodwill, Theuri confirmed that the same was to be approved by the Board of Directors. As it was not his duty to get the said approval, Theuri said that he did not know whether or not the Board gave its approval.

44. **PW2, EVANS OBUYA,** had worked as the Marketing Manager for the defendant between 2004 and 2006. As at the time he was testifying he was the Managing Director of **FALCON OIL LIMITED.**

45. As at 2005, when the plaintiff expressed a desire to exit the Embakasi Petrol Station, the two parties

(i.e. the plaintiff and the defendant) held prolonged discussions.

46. According to PW2, the station was taken over forcibly, by the defendant. The said forcible takeover was said to have happened after the defendant's Managing Director authorised it.

47. However, during cross-examination, Obuya conceded that the Buy-out or Goodwill; and the advance of Kshs. 2,200,000/- to the plaintiff were subject to approval by the Board of Directors of the Defendant. He also confirmed that the approval by the Board of Directors was not automatic.

48. Evans Obuya was responsible for preparing the Board Paper to seek the Board's approval.

49. When confronted with the evidence of Theuri (PW1) who had said that the plaintiff had voluntarily handed over the station to the Defendant, Obuya still insisted that there had been a forcible takeover of the station, by the defendant.

50. And whilst Obuya had testified that the defendant also took over the restaurant forcibly, he later acknowledged that the take-over of the restaurant was done on the strenth of a court order.

51. In the process of re-examination, Obuya explained that the Board of Directors of **NOCK** did not give approval because Obuya never did the **proposed Board Paper, to seek the approval.**

52. **PW3, ENGINEER STEPHEN MWAURA,** was an Environmental Specialist. He was working at the World Bank. He was also a part-time lecturer at the University of Nairobi and a Director at ETTS MANAGEMENT.

53. PW3 made it clear that **ETTS MANAGEMENT** was on Nock's Panel of consultants. Therefore, Engineer Mwaura felt that there might be a conflict of interest between him and the defendant, if he were to proceed with his testimony on behalf of the plaintiff.

54. However, the defendant, through their advocate, Mr. Munyu, indicated that the consultancy report in issue was not new to Nock; and that therefore there would be no prejudice to Nock.

55. Engineer Mwaura made it clear that the report was compiled as a requirement under the ENVIRONMENTAL ACT. It was an Environmental Impact Report.

56. Therefore the report did not assign the reasons for the wet losses. If anything, the report concluded that there was an urgent need for further investigations, to ascertain if the product was percolating to the borehole.

57. According to Engineer Mwaura;

> *"If there are losses of wet stock, there could be leaks, under-deliveries of loads; overthrowing pumps; theft by staff; and inaccuracies in record keeping. The report does not say the losses were the result of leakages. We were not involved in finding out that".*

57. After the testimony of PW3, the plaintiff closed its case. Thereafter, the defendant called one witness, **ANTHONY GATEHI (DW1).**

58. Gatehi testified that it was the plaintiff that had volunteered to stop running the petrol station.

59. The defendant allowed the plaintiff to continue running the restaurant after the plaintiff had handed-over the station. According to Anthony, the plaintiff was to continue operating the restaurant until the defendant got another operator.

60. However, the plaintiff later refused to hand-over the restaurant until it was compelled to do so, by way of a Court order.

61. Finally, the defendant asked for judgment against the plaintiff, for *Kshs. 1,897,800.90, which was made up as follows;*

a)	*Rent Due*	*Kshs. 677,553.00*
b)	*Electricity & Water*	*Kshs. 172,675.45*
c)	*Product Invoices*	*Kshs. 2,857,551,50*
	SUB-TOTAL	*Kshs. 2,857,551.90*
	LESS unsold product	*Kshs. 959,751.00*
	BALANCE DUE	*Kshs.1,897,500.90*

62. During cross-examination, Anthony confirmed that the whole of his evidence was based upon the defendant's records. The reason for that was that, whereas the matters in issue took place in 2005, Anthony did not join Nock until 2010.

63. In the circumstances, Anthony did not know whether or not the plaintiff had carried out some improvements at the petrol station or at the restaurant.

64. In relation to rent, Anthony, said that the plaintiff's rent for the restaurant was Kshs. 60,000/- monthly. The rental sum that was being claimed from the plaintiff was said to cover the period between April 2005 and April 2006.

65. In respect to the amounts for water and electricity, Anthony was unaware of the exact period for which the claim was made by the defendant. Anthony was also unaware about whether or not the petrol station and the restaurant shared the metres for water and electricity. Consequently, the defendant did not specify how the claim for water and electricity was computed.

66. As regards the invoices for products, Anthony testified that the whole claim of Kshs. 2,857,551.50 was supported by Invoices. The said invoices also doubled-up as Delivery Notes, and each bore a signature of the person who acknowledged receipt of the products. But Anthony did not identify the signatories of each such invoice.

67. After Anthony testified, the defendant closed its case.

68. Mr. Nzavi, the learned advocate for the plaintiff, thereafter submitted that the plaintiff was entitled to the sum of Kshs. 5,192,025/- on account of;

> *"reported and professionally analysed unrecovered cumulative losses for the duration it operated the fuel station between 1999 and May 2005".*

69. As far as the plaintiff was concerned, the NEMA Report had confirmed that the product was lost through leakage from the fuel tanks.

70. However, from the evidence tendered by the plaintiff' and its witnesses, it is clear that the NEMA Environmental Audit Report did not make the conclusion which the plaintiff has attributed to it.

71. Engineer Mwaura (PW3) had expressly recommended further investigations. The reason why the engineer recommended the said further investigations is that there are several possible ways through which wet stock could be lost. He enumerated them as follows;

a) Leaks;

b) under-deliveries of loads;

c) overthrowing pumps;

d) theft by staff; and

e) inaccurancies in record keeping.

72. In the light of that evidence, it was incumbent upon the plaintiff to establish the exact means through which it lost its wet stock. After establishing the said means, the plaintiff should have demonstrated to the court that the defendant was responsible for the losses in issue.

73. However, the plaintiff did not prove the means through which it lost wet stock. And in the absence of conclusive evidence concerning how the losses were incurred, the court cannot hold the defendnat liable for such losses.

Undelivered Products.

74. The plaintiff claimed Kshs. 3,049,530/-. That sum is said to comprise three (3) cheques for goods which were not delivered and Kshs. 1,264,920/- in respect to overpayments.

75. The 3 cheques were as follows;

	Cheque No.	**Amount**
i)	**374**	**Kshs.620,870.00**
ii)	**435**	**Kshs. 570,540.00**
iii)	**161**	**Kshs.593,200.00**

TOTAL Kshs.1 784,610.00

76. From the evidence tendered by the plaintiff, the particulars of the alleged overpayment were not provided.

77. In civil cases, it is not enough for a party who was laying claim to a judgment, to do so on the strength of the defendant's failure to answer to the claim.

78. The party seeking a remedy from the court is obliged to prove his said claim. If proof is made available to the court, but the defendant fails to offer a sufficient answer to the evidence tendered, the court would grant judgment in favour of the plaintiff.

79. On the other hand, if the plaintiff does not provide sufficient evidence to prove his case, then the defendant is under no obligation to offer any answer. In effect, when the plaintiff does not prove his claim, he would not be entitled to judgment just because the defendant did not respond to the claim.

80. The converse is equally true: when a plaintiff makes available sufficient evidence to prove his claim, the court will grant him judgment unless the defendant provides an answer which is adequate to defeat the claim.

81. A defendant who fails to give an admissible and plansible answer to the evidence tendered by the plaintiff cannot expect anything less than a judgment against him.

82. All these goes to show that any party who sets out his claim or defence must threafter provide

evidence to back their respective assertions. When an assertion is not supported by evidence, it remains an allegation; and the court cannot grant judgment in favour of a party who has simply put forward an allegation.

83. Therfore, as the plaintiff did not provide evidence to prove the claims of overpayment, I hold that that claim was not proved. It must therefore fail.

84. Meanwhile, as regards the 3 cheques which were allegedly not given consideration, through the supply of product by the defendant, I note as follows;

a) Cheque No. 374 for Kshs. 620,870/-

85. The cheque exhibited by the plaintiff is No. 376, and it is dated 7th January 2000.

86. From the plaintiff's statement of account, cheque No. 374 was banked on 11th January 2000, and it was for Kshs. 19,079/-.

87. In effect, the particulars of the cheque No. 374, as provided in the plaintiff's testimony and submissions, do not correspond with the details of the plaintiff's bank account.

b) Cheque No. 435 for Kshs. 570,540/-

88. That cheque is dated 27th January 2000, and it is shown in the plaintiff's bank statement as having been paid out on 28th January 2000.

c) Cheque No. 161 for Kshs. 593,200/-

89. The cheque was received at the Kenya Commercial Bank on 18th October 1999.

90. As the plaintiff did not provide the court with its bank statement for that period, the court was not able to verify whether or not that cheque was debitted against the plaintiff's account.

91. However, the more vital consideration is about the manner in which the plaintiff used to pay for the product sold to it by the defendant. Theuri told the court that the parties conducted business through a system called *"Load to Load"*. Under that system, the plaintiff gave cheques to the defendant. After the plaintiff had sold the supplies, it would collect fresh supplies from the defendant. At the time of collecting the fresh supplies, the plaintiff would write out fresh cheques; whilst the defendant would bank the earlier cheques.

92. In real terms, the plaintiff was paying for product after he had sold the same.

93. In those circumstances, it is the court's understanding that the plaintiff has failed to demonstrate how, in relation to the 3 cheques, the plaintiff did not get value from the defendant.

Restaurant Development

94. The plaintiff claimed Kshs. 2,900,000/- on account of the developments to the restaurant.

95. However, the plaintiff failed to provide documents to prove the actual expenses it incurred when it developed the restaurant. But there was no doubt at all that the plaintiff did some work on the building that constituted the restaurant. I so find because the defendant did not deny the plaintiff's assertion in that respect.

96. As there were no documents made available by the plaintiffs, the court was unable to ascertain the actual expenses on;

i) Maintenance;

ii) purchase of new submerged water pump;

iii) repairs to leaking roofs; or

iv) installation of music system.

97. Indeed, it is noteworthy that in its letter dated 27th April 2005, the plaintiff described the claim for Kshs. 2,900,000/- as being an approximate figure, which was intended to cover the various expenses it incurred.

98. Considering that expenses are Special Damages, the law requires the person laying claim to expenses, to specifically plead such claim and to therefter prove the claim.

99. Regrettably, the plaintiff has neither pleaded the claims specifically, nor did it offer evidence to prove the same.

100. If anything, the evidence tendered by Theuri appeared to be inconsistent with the information contained in the plaintiff's letter dated 27th April 2005.

101. For instance, in relation to the roof, the letter talked about maintenance. However, the witness said that the plaintiff completed the construction of the roof. It is thus not clear whether the plaintiff spent money in the construction of the remaining portion of the roof, or if the plaintiff simply carried out routine maintenance to the roof.

102. The wintess (Theuri) did not testify about the purchase of any submerged water pump or the installation of a music system. Instead, he talked about the point; grilles at the station and at the restaurant; and counters.

103. That implies that the plaintiff did not lead evidence to prove the particulars set out in the letter dated 27th April 2005.

Goodwill

104. In its submissions, the plaintiff claimed the sum of Kshs. 2,200,000/-, which it described as;

"an approximate value for goodwill for the subject petrol station and restaurant".

105. When Theuri testified, he told the court that the quantum of the goodwill had been agreed upon at a meeting held on 18th April 2005.

106. But during cross-examination, Theuri said that the sum of Kshs. 2,200,000/- was an approximate figure. He did not have any documents to support the said claim. He also said that there were no workings (or calculations that would support) the claim for goodwill.

107. Surely, if there had been an agreement on the quantum of the goodwill, the plaintiff would not have needed to thereafter testify about an approximate sum. I find that the reason why Theuri testified about an approximate amount is that the parties had never reached any agreement on that claim. Therefore, the plaintiff ought to have led evidence to prove the claim.

108. However, no such proof was forthwcoming.

109. In the final analysis therefore, the plaintiff failed to prove its claim or any part thereof.

110. Meanwhile, the defendant called it Credit Controller, ANTHONY GATEHI, as its only witness.

111. Gatehi was employed on 1st October 2010. Therefore, as the matters in issue had taken place five (5) years before he joined the defendant, Gatehi did not have any first-hand information concerning the matters in contention.

112. His testimony was based on the records kept by the defendant.

113. According to Gatehi, the plaintiff owed Kshs. 677,553/- in respect to unpaid rent for the period betwen April 2005 and April 2006.

114. However, during cross-examination, Gatehi indicated that whereas he thought that the plaintiff used to pay rents through cheques, he was not sure if the rents were paid through standing orders.

115. Gatehi also said that the plaintiff owed to the defendant, the sum of Kshs. 170,000/- on account of water and electricity. However, Gatehi did not know the period when that alleged debt was accumulated. He was also not aware as to whether or not the petrol station shared electricity and water meters with the restaurant.

116. During re-examination, Gatehi pointed out that the petrol station and the restaurant shared one account. Therefore, the defendant apportioned to the plaintiff one-half of the amounts shown on the account. However, there was no justification tendered by the defendant for having decided to split the account in equal share, between the petrol station and the restaurant.

117. In effect, neither the witness statement nor his oral testimony offered proof of the defendant's counter-claim.

118. In the result, I find that both parties placed figures in the face of the court, but did not thereafter advance evidence to prove their respective claims. Accordingly, the court now dismisses both the plaint and the counter-claim.

119. Each party will bear its own costs of the suit.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4th day** of **March** 2015.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

..... for the Plaintiff.

..... for the Defendant.

Collins Odhiambo – Court clerk.