



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO 1149 OF 2001**

**THE STANDARD LIMITED.....PLAINTIFF**

**VERSUS**

**H M NG'ANG'A.....DEFENDANT**

**JUDGMENT**

**Brief Facts**

[1] The Defendant applied to be appointed the distributor of newspapers for the Plaintiff. Pursuant thereto, the Defendant was appointed a distributor and a letter dated 10<sup>th</sup> February 1981 was issued. Thereafter, the Plaintiff and the Defendant entered into a distributorship agreement dated on 8<sup>th</sup> December 1981. The parties engaged under the terms of the agreement until sometime in 30<sup>th</sup> January 2001 when the Plaintiff terminated the contract on what it termed as failure by the Defendant to remit and clear its outstanding debt owed in the amount of Kshs. 8,906,586.60. The Plaintiff countermanded against the Defendant, and made a claim for Kshs. 38,242,930/-. It is from these facts that this claim and counterclaim arose. This suit was filed by the Plaintiff on 19<sup>th</sup> July 2001.

**Plaintiff's Case**

[2] In the Plaintiff's Complaint dated 19<sup>th</sup> July 2001 and filed on 25<sup>th</sup> July 2001, the Plaintiff reiterated that they had entered into an agreement with the Defendant on 8<sup>th</sup> December 1981. By virtue of the agreement, the Defendant was appointed as the sole distributor of the Plaintiff's newspapers and magazines in the then Rift Valley Province. Pursuant to the said agreement, the Defendant distributed the newspapers and magazines as supplied by the Plaintiff. Thereafter, it was alleged that the Defendant, on diverse dates between 1998 and 2001, breached the terms of the agreement by failing and/or neglecting to settle his account in full within thirty (30) days, thereby falling into arrears in the sum of Kshs. 8,906,596.90. This was as set out in the particulars. The Plaintiff averred that, despite demand and notice of the default, the Defendant has neglected and/or failed to settle the amount outstanding.

[3] During the hearing of the matter on 18<sup>th</sup> March 2014, the Plaintiff's witness, PW1, Dickson Changwony testified that the only dispute that arose between the Plaintiff and the Defendant was the disputed amount that had accumulated between the years 1998-2001. The witness stated that there was no dispute with the distributorship agreement, and that therefore the statement by the Defendant on the counter-claim was unsupported. He stated that, indeed the debt was admitted. He stated further that the agreement provided for reimbursement based on the sales returns as remitted by the Defendant, and that the Defendant had failed to submit its accounts or receipts for reimbursement. Despite that failure,

however, the accounts were reconciled by the Defendant's accountants. The witness spoke to and denied allegations by the Defendant that the Plaintiff unlawfully, by coercion and intimidation obtained two (2) motor vehicles owned by the Defendant. He stated that the vehicles were submitted to the Plaintiff by the Defendant voluntarily on the understanding that they were a goodwill gesture and a sign of commitment to settlement of the outstanding debt.

[4] In cross examination, it came out that there were several letters that had been written to the Defendant outlining his indebtedness to the Plaintiff, and that the Defendant also made several offers or proposals of repayment. But none of the promises made by the Defendant to settle the debt was kept despite the Plaintiff's acceptance of the proposals. The witness also stated that the Plaintiff did not act maliciously in terminating the contract; it was simply acting in accordance with the terms of the agreement following default by the Defendant to pay as he had proposed. Even the payments which the Defendant made were quite irregular and fell short of reducing the debt. The witness averred that the agents/vendors who were distributing the newspapers were employed by the Defendant, and that the Plaintiff could not interfere in their operations with the Defendant.

[5] In its submissions dated 27<sup>th</sup> November 2014, the Plaintiff argued that the agreement dated 8<sup>th</sup> December 1981 between the Plaintiff and the Defendant, was terminated on 1<sup>st</sup> February 2001 due to breach of the agreement by the Defendant. The breach is in the fact that the Defendant failed to settle in accounts as provided in the agreement between the years 1998-2001; thus, fell into arrears of Kshs. 8,906,596.60. They submitted that there was only one contract that had been terminated, i.e. the one dated 8<sup>th</sup> December, 1981. The alleged transport contract purportedly terminated on 15<sup>th</sup> February 2001 was non-existent and it was encumbered upon the Defendant to prove his allegations. Reliance was placed on the case of **Salem Ahmed Hassan Zaidi v Faud Hussein Humeidan [1960] EA 92**. It was submitted that the Defendant was at all times aware of the consequences of failing to fulfil his obligations under the agreement, and that notice of termination had been issued to the Defendant through the various correspondences prior to the termination. They submitted further that the logbooks of the two (2) motor vehicles held by the Plaintiff, were submitted and delivered voluntarily to the Plaintiff as security for the money owed, and that there was no coercion or undue influence on its part to have the same put in its possession. They prayed for judgment as prayed.

### **Defendant's Case**

[6] The Defendant filed his Statement of Defence dated 7<sup>th</sup> September 2001 on 10<sup>th</sup> September 2001. He contended that he had settled his accounts with the Plaintiff in full. He averred that, the Plaintiff, without due notice as provided in the agreement or any lawful excuse and in breach of terms of the contract, terminated the distributorship agreement on 1<sup>st</sup> February 2001 as well as the transport contract on 15<sup>th</sup> February 2001. Further, the Defendant alleged that the Plaintiff failed to pay and settle the Defendant's collection charges despite demand made and notices issued. The Defendant made further claim; that the Plaintiff had, through coercion and undue influence, taken possession of the Defendant's two (2) motor vehicles thereby depriving him the use and control of the aforesaid motor vehicles.

[7] At the hearing of the matter, the Defendant called three (3) witnesses. DW1, the Defendant, stated that he had been a vendor in Nairobi before he got into the distributorship agreement with the Plaintiff through the agreement dated 8<sup>th</sup> December 1981. He reiterated that, in the normal course and the nature of business of distributorship of newspapers, he was always to be and was indebted to the Plaintiff because the magazines and newspapers were given on credit and the amount of total credit given is reflected in his account. Then, the Defendant was to make monthly returns to the Plaintiff for both sold and unsold merchandise. He stated that after receiving the letter dated 22<sup>nd</sup> January 2001 informing him of his indebtedness to the Plaintiff, they entered into an agreement to repay the debt. Although he stated he was not sure of the amount, but nonetheless the Plaintiff continued receiving instalments towards repayment of the debt. The contract was later terminated vide letter dated 30<sup>th</sup> January 2001, which letter did not indicate the amount owed.

[8] The Defendant further stated that they had entered into a transportation contract which was

contained in the letter dated 30<sup>th</sup> December 1999. He said that the said contract was terminated by the Plaintiff on 15<sup>th</sup> February 2001, without due notice and payment of accumulated reimbursement. He said that, although he had voluntarily deposited the logbooks to the two (2) motor vehicles as security for the debt, the Plaintiff had, however, registered one of the vehicles KAG 216Y jointly in their names without the Defendant's consent.

[9] The Defendant called DW2, an auditor who had audited the Defendant's accounts vis-à-vis the Plaintiff on the distributorship agreement. He testified that, he had been instructed by the Defendant in August 2006 to prepare an audit report, which he submitted on 6<sup>th</sup> September 2006. The report was prepared and submitted after the institution of the suit. The report shows that there were several anomalies on the transactions between the Plaintiff and the Defendant; the anomalies and differences could have been reconciled without necessarily reverting to court. The report, DW2 stated, was based on information given by the Defendant and documents that had been collected from the Defendant's offices. He said that he did not have bank statements to back up his findings in the report. Nonetheless, he stated that in making of the report, he examined the entire circumstances without restricting himself to the contract, and so he included incidental costs such as emoluments, redundancy claims, loss adjustments, outstanding loans and interest thereto. Although he admitted that there was no connection between the vendors and the Plaintiff, it was stated that the termination of the contract caused the abrupt lay-off of the vendors, which was further compounded by the lack of sufficient notice of termination of the contract by the Plaintiff.

[10] DW3, was the then Circulation Manager in the Plaintiff company before he went on early retirement in 2001. He stated that as the Circulation Manager his role was to oversee the circulation of the Plaintiff's newspapers and magazines country wide, and that it was in this capacity that he met the Defendant sometime in 1980. He further stated that he became a personal friend to the Defendant, and came to know of the termination of his contract with the Plaintiff around February 2001 over an alleged debt. With regards to freight and transport charges, he said that, the former was paid to the Defendant for using his vehicles to distribute the Plaintiff's newspapers and magazines whilst the latter was paid to other commercial transporters who transported papers to low demand areas. During cross examination, however, he stated that he was not involved with any of the issues regarding this case.

[11] In the submissions filed on behalf of the Defendant dated 4<sup>th</sup> February 2015, reference was made to Clauses 4, 5, 7, 8, 10 and 14(b) of the distributorship agreement as being instructive in the matter. It was submitted that the Plaintiff breached Clauses 5 and 14(b) of the agreement. First; the Plaintiff failed to intervene when the agents disappeared and ran away with copies of newspapers and magazines when the contract was cancelled. Second; the unilateral termination of the contract ensured that the Defendant could not comply with Clause 8 of the agreement. Third; the termination of the contract was a malicious scheme by the Plaintiff to ensure that the Defendant was out of business, On this disposition they relied upon the case of **Bungoma HCCC No 99 of 2000 P K Bhatia Ltd v Nation Media Group Ltd**. They submitted that the Plaintiff failed to explain the contents of the letter dated 30<sup>th</sup> December 1999 on transportation, and that therefore the counterclaim as filed had merit and judgment should be entered against the Plaintiff.

## **DETERMINATION**

[12] From the outset, let it be known that issues on the presence of arbitration agreement in the agreement of distributorship were dealt with conclusively by Kasango, J in her ruling dated 6<sup>th</sup> July 2004. I will not revisit them at all. The only substantive issues to consider are, therefore, as deduced below. The validity and existence of the distributorship agreement between the Plaintiff and the Defendant dated 8<sup>th</sup> December 1981 is not in dispute. The only major controversies are;

- (1) Whether there was a separate transportation contract from the distributorship contract;**
- (2) Whether the contract of distributorship and or of transportation were**

*properly terminated in accordance with the contract;and*

**(3) *Liability of the parties, if any; Whether the Defendant and the Plaintiff are liable as claimed in the Plaint and Counter-claim, respectively.***

### **Transportation contract**

[13] It is not in dispute that the agreement dated 8<sup>th</sup> December was valid contract between the parties. It was accordingly signed and executed by both parties. It was preceded by the letter dated 10<sup>th</sup> February 1981 which stated at para. 1 as follows;

***“I am very pleased to advice you, that we have approved your application to become our distributor for Daily and Sunday Standard, for the Nakuru Area, effective the 1<sup>st</sup> March 1981.”***

Trouble is found in the following submissions. The Plaintiff claims that the distributorship agreement was the only contract they had with the Defendant. The Defendant on the other hand, differed sharply with the position taken by the Plaintiff and asserted that, there was a separate transportation agreement, which was initiated by the letter dated 30<sup>th</sup> December 1999. The Plaintiff maintained that the transportation component was integrated in the distributorship contract. At this point, I should consider the letter signed by the Circulation Manager, Mr Nelson Mukuria(DW3), which was addressed to the Defendant. The letter stated as follows;

***“I refer to our discussion on the above subject and now wish to confirm that the management have consented to your transporting our newspapers from Nakuru to Kericho with effect from 1<sup>st</sup> January 2000.***

***This is an additional 210 Kms (Nakuru-Kericho) return payable at the rate of Kshs 15/= per Km.”***

[14] The letter is not clear whether transportation of newspapers was a part of the distributorship agreement, or whether it was a separate arrangement between the Defendant and the Plaintiff. The letters dated 13<sup>th</sup> and 15<sup>th</sup> February 2001 seemed to be terminating an agreement that had been entered into by the parties for transportation. In the letter dated 13<sup>th</sup> February 2001 at paras. 1 and 2 it was stated thus;

***“Please be advised that we have made alternative arrangements to transport the newspaper within the Rift Valley region with effect from the night of Thursday 15<sup>th</sup> February 2001.***

***We therefore request that you terminate all further operations and arrangements with third parties to carry the newspapers on our behalf.”***

The letter dated 15<sup>th</sup> February 2001 addressed to Newspapers Transporters Ltd, it was reiterated at para. 2 as follows;

***“This is to confirm that starting from tonight (15<sup>th</sup> February 2001) H M Ng’ang’a is no longer our transporter within Central Rift Valley.”***

[15] A careful analysis of these letters shows that the Defendant was given express permission to transport the Plaintiff’s newspapers ‘‘*from Nakuru to Kericho with effect from 1<sup>st</sup> January 2000*’’. But the letter added a small twist to this the foregoing declaration when it stated...

***’’This is an additional 210 Kms (Nakuru-Kericho) return payable at the rate of Kshs 15/= per Km.”***

However, reconciliation thereto is easily attained by looking at the distributorship agreement and the termination letters. The distributorship agreement did not provide for transportation of newspapers by the distributor. It provided only for reimbursement of onward freight expenses in accordance with SCHEDULE IV. The onward freight expenses referred to “*Actual costs incurred as evidenced by carrier’s receipts*”. Subsequent termination letters dated 13<sup>th</sup> and 15<sup>th</sup> February 2011 are useful here. The former terminated all further operations and arrangements with third parties to transport the newspaper on behalf of the Plaintiff. It reads in part:

***“We...request that you (defendant) terminate all further operations and arrangements with third parties to carry the newspapers on our behalf”.***

But in the latter letter, they specifically stated that they have terminated the Defendant’s contract of transportation within Central Rift Valley.’ It reads in part:

***“This is to confirm that starting from tonight (15<sup>th</sup> February 2001) H M Ng’ang’a is no longer our transporter within Central Rift Valley.”***

In accordance with the distributorship agreement, onward freight related to third party carriers of newspapers from the distribution point, i.e. the distributor’s premises to the designated areas as per the schedules in the agreement. The onward freight expenses were the ‘*Actual costs incurred as evidenced by carrier’s receipts*’. Essentially, these expenses were mere reimbursement on the basis of the carrier’s receipts. Therefore, if the parties intended an arrangement where the distributor will transport the newspapers under the distributorship agreement, nothing would have been easier than for the agreement to so provide or make express auxiliary provision in the letter dated 30<sup>th</sup> December 1999. If that were the case-which is not the case here-the letter would be construed as an addendum to the distributorship agreement, and the argument by the Plaintiff that the transportation component was integrated in the distributorship agreement would also make legal sense. The letter dated 30<sup>th</sup> December 1999 specifically appointed the Defendant as a transporter of newspapers at a specified rate of Kshs 15 per kilometer. It constituted a separate contract of transportation of newspapers from Nakuru to Kericho.

[16] But there are two hurdles the Defendant must surmount; a) proof of unlawful termination of the contract of transportation; and b) proof of costs incurred on transportation of newspapers apart from the third party onward freight.

### **Termination of transportation contract**

[17] The Defendant alleged that he had done transportation of newspapers for 13 years. But when he was asked to produce evidence of the said long-standing contract, he produced none. The Defendant’s own evidence, oral testimony and documentary, made clear distinction between onward freight charges and transportation of newspapers contained in the letter dated 30<sup>th</sup> December 1999. This finding will bear on the Defendant’s claim of underpayment of transport charges for 13 years. For avoidance of doubt, I too, following the decision of the court in paragraph 14, find that the transportation agreement is the one contained in the letter dated 30<sup>th</sup> December 1999. Was it terminated unlawfully as alleged?

[18] There was no specific notice terminating the transportation contract except the letter dated 15<sup>th</sup> February 2001 addressed to Newspapers Transporters Ltd which stated in para. 2 as follows;

***“This is to confirm that starting from tonight (15<sup>th</sup> February 2001) H M Ng’ang’a is no longer our transporter within Central Rift Valley.”***

The letter then gave specific instructions to Newspaper Transporters Ltd on the dropping stations and for take-over of the service from the Defendant. The Plaintiff was in breach of the transportation agreement. Even if the Plaintiff was relying on the terms of the distributorship agreement, there was a requirement of notice in writing which they did not give. Therefore, the said contract of transportation was not terminated as per the law. I will revisit this issue later when I will be pronouncing myself on whether

damages are payable. Meanwhile, I will move on to the next question: has the Defendant proved the loss he claims to have incurred as a result of the termination?

[19] The Defendant referred to freight charges of the sum of Kshs. 480,000 which he said were recovered towards repayment of the alleged debt herein. He did not provide evidence to show how much money was owed to him on the transportation contract other than the normal onward freight reimbursements under the distribution agreement. He only talked of underpayment on transportation charges for 13 years. The only evidence he has produced for his loss is the report by his Accountants but it does not give any definite figure on transportation charges. I will revisit this issue when I will be making my final orders on the matter. Let me then determine the other allegation of termination of distributorship agreement.

### **Termination of distributorship agreement**

[20] The Plaintiff contended that the Defendant had breached the provisions of the agreement particularly when he failed to settle his accounts in full as was provided under Clause 7 of the agreement. It was further posited that the Defendant was always aware of the amounts due; he was given repeated reminders given and statements of account found at pages 24-29 of the bundle of documents. They stated that there was therefore sufficient notice of the termination of the agreement on 1<sup>st</sup> February 2001. It was further stated that the Defendant did not raise a dispute as to the amount of the debt within seven (7) days of receiving the outstanding amounts as required under Clause 5. They claimed that the Defendant, therefore, breached the terms of the distributorship agreement, hence, its termination pursuant to Clause 13(a) of the said agreement. Accordingly, the Defendant was duly and truly indebted to the Plaintiff to the amount of Kshs 8,906,596.60 as claimed in the Plaint. Under Clause 13(a) of the agreement it was provided that;

**13. The Company shall have the right at any time by giving notice on writing to the Distributor to terminate the agreement forthwith in any of the following events:-**

**a. If the distributor commits a breach of any of the terms or conditions of this agreement.**

According to the Plaintiff, the Defendant was in breach of Clause 7 of the agreement, and therefore, in the absence of a dispute arising under Clause 14(b), Clause 14(a) becomes inoperable. In the given circumstances, only Clause 13(a) would apply.

[21] The Defendant argued the termination was improper and oppressive. He stated that he was not given notice and the debt had not accrued as there were disputes on the amount. Let me examine the documents herein. The letter at page 9 of the Agreed Bundle of Documents is dated 18<sup>th</sup> October 2000 and addressed to the Plaintiff. In the latter, the Defendant raised issue with the outstanding debt that was claimed and asked the Plaintiff to go through their computations and revert. Further, in the letter dated 19<sup>th</sup> October 2000, the Defendant reiterated the contents of the letter dated 18<sup>th</sup> October 2000, and stated that the delay in the repayment of the outstanding debts was attributable to the dispute as to the amount outstanding. See paragraph 2 of the said letter at page 12 of the Agreed Bundle of Documents which reads as follows;

***“I would also like to put it clear to you that I have not caused any delay in payment due to the disputes that have been there concerning my outstanding debts. I have been making efforts to continue paying according to my ability notwithstanding the hard economic times we are all facing.”***

[22] The Defendant acknowledged that there was indeed an outstanding debt that was to be repaid, and which he was in the process of repaying when the agreement was terminated on 1<sup>st</sup> February 2001. But the actual amount payable was in dispute. The provisions of Clause 14(b) of the agreement should have guided the parties in ascertaining the amounts due and payable from the Defendant to the Plaintiff. Accordingly, a certificate as to the signed by the auditors for the time being of the Company should have

been conclusive and binding on both parties. On receipt of these letters, it seems from the letter dated 23<sup>rd</sup> November, 2000 reconciliation may have been done by Johnson Maina and the Defendant's accountants. The letter by all means cannot be the certificate by the auditors of the company. The author was Accounts Receivable Supervisor. Other letters followed especially written by D. J. DAVIES, Group Managing Director, enclosing statements and internal memo and also giving the Defendant seven days to pay or he will face legal action including personal bankruptcy proceedings against him. The Defendant replied and found those letters to be too harsh and a manifestation of threats. But despite all these correspondences, the Plaintiff totally ignored to resolve the dispute as to the amounts owing in accordance with clause 14(b) of the distributorship agreement. The pain of being owed should never clog a litigant's eye to the point of not seeing and adhering to the terms they bound themselves to obey. It seems this debt-rage consumed the Plaintiff until it forgot the terms of its own agreement. Even during the hearing of the case, the Plaintiff did not produce a certificate signed by its auditors as to the amount truly and duly owed by the Defendant. I find, therefore, that the Plaintiff was in breach of the provisions of Clause 14(b) of the agreement, and that Clause 14(a) became operative and applicable in the circumstances.

[23] The only audit report presented before the Court was issued on the instructions of the Defendant to his auditors on 25<sup>th</sup> August 2006. But even this audit report is not the certificate envisaged under Clause 14(b) of the agreement. Therefore, the agreement was no due for termination in accordance with clause 13(a) of the agreement. The default declared by the Plaintiff was premature given the provisions of clause 14(b) of the agreement. Accordingly, the notice issued on 16<sup>th</sup> January 2001 giving the Defendant a seven (7) day notice to clear the overdue amount was not proper. This suit was also prematurely instituted. Similarly, the suspension or termination thereof was also improper. I have issues with the letter dated 30<sup>th</sup> January 2001. It talked of suspension and not termination. The termination was in breach of the agreement, thus, unfair, unjust, un-procedural and wrongful. The Plaintiff is culpable of terminating the agreement contrary to the terms and conditions of the agreement. I therefore, dismiss the plaintiff's case for being prematurely filed. Costs are awarded to the Defendant.

#### **What about the motor vehicles taken as security?**

[23] The Defendant argued that he gave the two motor vehicles as security for the debt. But, the Plaintiff registered itself as a joint owner without his consent. He also claimed that, they kept the logbooks and denied him use of the vehicles. He said that the vehicles could not be insured or licensed without the logbooks. The Plaintiff conceded that the two (2) motor vehicles were voluntarily given to it as security of repayment of the outstanding debt. Therefore, they did not deprive the Defendant the use of the same. In any event, it was only the logbooks that were in its possession which the Defendant had not at any time requested to be given back to him. He asserted that the vehicles were taken unlawfully, through coercion and intimidation. Consider the following testimony as contained in the Defendant's statement on the matter;

***“The Plaintiff also retained two logbooks for motor vehicles registration numbers KAE 134Q and KAG 216Y and I lost their economic use as I could no longer renew their licenses without the logbooks.”***

And also his testimony before the court where he gave this account of events leading to the possession of the aforesaid motor vehicles when he stated;

***“I deposited two logbooks for (Peugeot) KAE 134Q and KAG 216Y. Those logbooks were to stand in for me as security. It was voluntary deposit. They still have my logbooks to date. I have the vehicles but I cannot use them for the lack of insurance and road license. I have never asked for them because we have a case with them.”***

From the above evidence, it is not possible, even using the most generous interpretation to find coercion or intimidation of undue influence in the obtainance and retention of the logbooks in question. It is evident that the said motor vehicle are in the possession of the Defendant, and for reasons known to him, has neglected the use of them. At the time, the law required that every vehicle being used on the road should have an insurance cover as well as a road licence. These legal and essential documents were only

obtainable upon production of the logbook to the relevant authority thereto. And so, although the Defendant stated that he could not have asked for the logbooks because they had this case with the Plaintiff, there is absolutely nothing in law which prevented them from requesting for the logbooks for purposes of obtaining insurance and road licence. And had such request been made and declined, again that would have been a good ground to file for a precipitate action in that behalf, even in this suit. However, despite that inaction by the Defendant, the Plaintiff acted improperly in respect of the vehicles because; a) they had taken the vehicles as security for debt, and they ought to have known that the vehicles needed to be insured and licensed for them to constitute good security; and b) the Plaintiff were also registered as joint owners of the vehicles and they were under obligation of the law to insure and license the said vehicles. Here, both parties are to blame on the logbooks. Given the fact that both parties are to blame, I will leave parties where I find them except I will order immediate release of the logbooks to the Defendant and any removal of the name of the plaintiff from the logbooks shall be at the cost of the Plaintiff. I will also not make an order for loss of user because; other than the report by the Defendant's accountants, there was no evidence which was adduced to show the daily income or use of the vehicles before they were grounded for lack of insurance and road licence. And in the absence of concrete evidence, special damages will never be awarded. The counter-claim on the loss of user of the vehicles fails. The claim for coercion and undue influence in the obtainance and retention of the logbooks herein is also declined.

### **Debts by newspapers agents**

[24] Before, I venture into the question of quantum of damages for breach of contract, I should settle one issue; debt owed to newspapers agents. The Defendant claims that the Plaintiff did nothing when it cancelled the contract for distributorship to recover the debts owed to the Defendant by the agents. The agreement is clear that the agents appointed by the Defendant were the Defendant's and not the Plaintiff's. Therefore, any debt owed by the agents is owed to the Defendant and not the Plaintiff. Accordingly, the Plaintiff had no obligation to intervene on behalf of the Defendant to recover those debts owed by the agents. The Defendant retains the right to sue the said agents for recovery of the sum due and owing by them. The argument fails.

### **Quantum of damages for breach of contract**

[25] I am left with the issue of quantum of damages for breach of contract. The guide here is the case of **Hadley & Another v Baxendale & Others (1843-1860) LTR 461** at pg. 465 which held *inter alia* that;

***“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 as either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may be 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.”***

[26] The Defendant called their accountants to testify on damages suffered as a result of the breach of contract herein. DW2 tendered a report in court on the damages the Defendant suffered as a result of the termination of the contracts herein. Three aspects of the report deal with damages, i.e. employees' emoluments, bank loans' interest and loss of business. The accountants did not give a summary of loss of business except they gave a sum of Kshs.834,000 and 1,736,948.10, for employees' emoluments respectively. They also gave another figure of Kshs. 768,000 as cost incidental to the termination. The Defendant had legitimate expectations that he would do business of distribution and transportation until the contract is lawfully terminated. Of course, in the ordinary course of things, the employees who handled distributorship and transportation of newspapers would be affected and even laid off. These are results of breach of contract. And based on the figures given in the statements by the Plaintiff and the Defendant, the net supply for every month was Kshs. 1.75 Million. Therefore, taking into account the employees emoluments he paid as a result of the termination of the agreement herein as well as the loss of business of the supply indicated above, a global sum of Kshs. 3,000,000 is a fair compensation on general damages. I hereby award the sum of Kshs. 3,000,000 as general damages. The award represents what

parties may be reasonably supposed to have contemplated at the time they made the contract as the probable result of the breach thereof. Costs of the counterclaim to the extent of the sum awarded goes to the Defendant. All the other items in the counter-claim were not proved and are declined. It is so ordered.

[27] In view of the result of this decision, parties are still at liberty to utilize clause 14(b) of the distributorship agreement and settle the outstanding accounts and sum owed between them.

### **Final findings and orders**

[28] In the premises, I make the following findings and orders:-

a) *The Plaintiff suit was filed prematurely and before ascertainment of sum owing in accordance with clause 14(b) of the distributorship contract. The termination of the distributorship agreement was also premature and contrary to the agreement of the parties. Therefore, the Plaintiff was in breach of the distributorship agreement. The upshot is that the Plaintiff's suit is dismissed with costs to the Defendant.*

b) *The transportation contract was separate from the distributorship agreement. The transportation agreement was also terminated unfairly and unlawfully.*

c) *The Defendant is awarded a sum of Kshs. 3,000,000 for breach of contract of distributorship and transportation. Costs thereof are awarded to the Defendant.*

d) *Except the claim for damages and return of the logbooks for motor vehicles registration numbers KAE 134Q and KAG 216Y, all the other claims in the counter-claim fail with costs to the Plaintiff. The logbooks shall be returned forthwith and any removal of the name of the Plaintiff from the logbook shall be at the cost of the Plaintiff.*

e) *In view of the result of this decision, parties are still at liberty to utilize clause 14(b) of the distributorship agreement and settle the outstanding accounts and sum owed between them.*

f) *It is so ordered.*

**Dated, signed and delivered in open court at Nairobi this 12<sup>th</sup> day of May 2015.**

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**F. GIKONYO**

**JUDGE**