REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

HCCC CASE NO 268 OF 2002

EXPRESS ESCORTS LIMITED.. PLAINTIFF

VERSUS

SECURICOR SECURITY SERVICES (K)...................... DEFENDANT

JUDGMENT

INTRODUCTION

1. In the Plaint dated 1st March 2002, it is stated that by a way of a written agreement dated 30th April 1999 and a Supplementary Agreement dated 19th October 2000, the Plaintiff agreed to sell and the Defendant agreed to purchase and take over certain Motor Vehicles and the business of cash in transit security services that were owned and were being conducted by the Plaintiff for a consideration of Kshs 23,621,351.60. The Defendant paid a sum of Kshs 16,337,842/= leaving a balance of Kshs 7,283,869.40. The Plaintiff's claim against the Defendant was therefore for:-

a. **Kshs 7,283,869.40.**
b. **Costs and interest.**

2. On 30th May 2002 the Defendant filed a Defence dated the same date denying the Plaintiff's claim. It averred that the consideration was an equivalent of Kshs 18,618,324/= being Kshs 16,618,234/= for the price of the business on the basis of contracts actually transferred signed by the Plaintiff's customers taking up the Defendant's services and Kshs 1,800,000/= for the value of four (4) Motor Vehicles to be purchased by the Defendant from the Plaintiff.
3. The Plaintiff's and Defendant's lists of Documents were filed on 7th November 2002 and 4th November 2002 respectively.
4. The Plaintiff's issues dated 14th January 2004 were also filed on the same date. The listed issues were as follows:-

1. **What were the terms of the sale agreement dated 30th April 1999?**
2. **Was there a Supplementary Agreement/letter dated 19th October 2000?**
3. **If yes, did the said agreement/letter form part of the contract?**
4. **What were the terms of supplementary agreement/letter dated 19th October 2000?**

5. **What was the consideration of the contract?**
6. **Was the consideration paid in full?**
7. **Did the Plaintiff perform its obligations under the contract?**
8. **Is the Defendant indebted to the Plaintiff in the sum of Kshs. 7,283,869.40?**
9. **Is the Defendant and/or the Plaintiff entitled to the reliefs sought?**
10. **Who is to bear the costs and interest?**

5. The Plaint was subsequently amended on 9th June 2008 and filed on 2nd July 2008 giving the amount to be paid by the Defendant as Kshs 12,601,286.60. The Plaintiff Further Amended the Plaint on 19th March 2006 reducing the said amount to Kshs 9,711,108.02.
6. The matter was heard by Mutava J on diverse dates and parties directed to file written submissions which they did. Before the said learned Judge could give a judgment date, he was transferred to High Court of Kenya at Kericho.
7. Subsequently, this matter was allocated to this court by Kimondo J Presiding Judge of the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division. When the parties appeared before this court on 25th September 2013, counsel for both the Plaintiff and the Defendant requested the court to give a judgment date.
8. However, this court gave a date of the highlighting of submissions to get a clearer view of the matter but on 19th November 2013, the said counsel informed the court that they wished to take the judgment without highlighting the said submissions. Consequently, on 18th December 2013, this court directed that it would proceed according to the wishes of the parties.
9. The court has carefully considered the proceedings, the pleadings, written submissions and case law and hereby gives its judgment in this matter.

EVIDENCE

10. In his examination -in-chief, Mohan Singh Dhariwal (hereinafter referred to as "PW 1") stated that he was the Plaintiff's Chief Executive Officer and that the business started in 1979. He said that the Plaintiff dealt in transportation of cash for banks, multinational companies and clients and provision of guard services.
11. It was his evidence that the Plaintiff received a Letter of Intent from the Defendant dated 27th October 1998. The same was marked as Exhibit No 1. This was followed by an Agreement for Sale of business to the Defendant by the Plaintiff. The same was dated 30th April 1999 (page 2 of the Plaintiff's Bundle of Documents). He testified that all the Plaintiff's clients were required to enter into fresh contracts with the Defendant and that the clients who refused to do so were not covered in the said agreement. He said that seven (7) to eight (8) clients refused to transfer and the Plaintiff therefore terminated its contracts with them.
12. PW 1 contended that under the said agreement, each contract that was transferred would be paid at the rate of twelve (12) times the monetary value of the contract. He said that the consideration for the business and Motor Vehicles that was handed over to the Defendant was in the sum of Kshs 16,818,324/= and Kshs 1,800,000/= respectively.
13. He tendered in evidence Schedule 1 being a list of the clients who were transferred from the Plaintiff to the Defendant. Under that Schedule, the total value of contracts to be transferred was Kshs 1,527,230/= while under Schedule II, the total value of customers transferred was Kshs 1,716,411.85. Schedule III showed the Motor Vehicles that were to be transferred.
14. He said that on page 1 of the Plaintiff's Bundle of Documents, there was a subsequent agreement dated 19th October 2000 between the Plaintiff and the Defendant. It showed a list of additional customers. It was his evidence that although the actual KPLC contract was Kshs 124,000/=, it was set at Kshs 91,244/=. He said that part 3 of the said agreement showed the consideration of all the contracts was Kshs 11,250,000/= whereat a discount of Kshs 750,000/= had been given.
15. It was his further testimony that Condition 5 of the said agreement provided that the Plaintiff was given upto 31st January 2001 to bring three (3) more contracts while Condition 6 therein showed that the contracts would be paid on successful completion. He pointed out that Condition 7 provided that additional Clients would be taken into account when calculating the total consideration. He averred that the letter was duly executed by him and Simon Grant, the

Defendant's Finance Director.

16. He also said that Schedule IV showed the additional business from 30th April 1999 to 30th April 2001 pursuant to the letter dated 19th October 2000. The details of the transferred business were as follows:-

Name of Client	Contract Value
i. **Uchumi Supermarket**	**Kshs 87,500.00**
ii. **Uchumi Two**	**Kshs 32,585.00**
iii. **Mini Bakeries**	**Kshs 67,266.40**
iv. **Malindi Mini Bakeries**	**Kshs 30,218.00**
v. **Mini Bakeries**	**Kshs 47,050.00**
vi. **Haggers Ltd – Steers**	**Kshs 23,897.70**
	Kshs 288,516.70

17. He told the court that Haggers Ltd and Steers did not transfer. It was his evidence that the total consideration of the twelve (12) customers who did not transfer was Kshs 256,635.10 as was shown in Schedule V. The same were indicated as follows:-

	Client	Shs
(a)	Norfolk Hotel	26,140.00
(b)	Chequered Flag Ltd	17,640.00
(c)	Chequered Flag Ltd	17,640.00
(d)	Mothers Favourite Ltd	28,140.00
(e)	Vin Bakeries Ltd	17,065.10
(f)	Premium Bakers Ltd	20,640.00
(g)	Chase Forex Bureau Ltd	51,320.00
(h)	Brooke Bond (K) Ltd	14,750.00
(i)	Landmark Hotel	3,040.00
(j)	Air France	8,750.00
(k)	Overseas Forex Bureau	33,120.00
(l)	Doughty Ltd	18,390.00
	TOTAL	256,635.10

18. PW 1 therefore averred that the Plaintiff's claim against the Defendant was for Kshs 9,711,108.02 made up as follows:-

a. **Actual business and contracts handed over as per schedule**

II – Kshs 1,716,411.85 X 12 Kshs 20,596.942.00

b. **Additional business indicated in schedule**

IV – Kshs 288,517.10 X 12 Kshs 3,462,205.20

c. **Value of Motor Vehicles Kshs 1,800,000.00**

Kshs 25,859,795.20

Less Paid Kshs 16,148,039.38

Kshs 9,711,755.82

19. During cross-examination, PW 1 said that under the initial agreement, the Plaintiff was under no obligation to procure additional customers and that it could not force customers to transfer to the Defendant. He said that the value of the business was Kshs 16,818,324/= and that Clause 3(b) of the said agreement contemplated that for the customers who refused to transfer, the consideration would be deducted twelve (12) times.
20. PW 1 stated that he was not aware that the vehicles the Plaintiff sold to the Defendant were unroadworthy or that the agreement provided that both the Plaintiff and the Defendant were to share the repair costs. He admitted that the letter of 19th October 2000 did not expressly show any connection with the initial agreement but said that the said letter was necessitated by the need to resolve certain outstanding issues flowing from the initial contract and not by failure by either side to implement the said contract. He said that the disagreement between the parties only arose after the Defendant refused to pay the Plaintiff.
21. In his re-examination, PW 1 said that the letter of 19th October 2000 containing a hand written note showing the Plaintiff had additional business did not state by what date the additional business was to be accepted.
22. The Defence called Erick Manyara Githogo(“hereinafter referred to as DW 1”), an accountant of the Defendant Company to testify on its behalf. He adopted his witness statement dated 14th September 2012 as his evidence –in-chief. He said that the Defendant paid the Plaintiff the sum of Kshs 18,618,324/= as per the agreement and denied that the Defendant owed the Plaintiff any money or that the Plaintiff transferred any additional business to the Defendant. It was his evidence that the contract did not contemplate any new business as the Defendant bought the Plaintiff’s business as a going concern.
23. DW 1 averred that the hand written part on the letter of 19th October 2000 could not be verified as to who authorised the same. He said that the initial contract had a time limit of six (6) months and the handwritten note was written after the said period had expired. It was his testimony that the said note was open in nature and could mean that the Plaintiff could still bring new clients and claim commission which would contradict the initial agreement which only contemplated existing clients. He pointed out that Clause 7 had been altered by adding the word “existing”.
24. He added that at page 26 of the Plaintiff’s bundle, a client known as Geovic had refused to transfer. He also said that any additional customer who was brought by the Plaintiff was to be compensated through payment of the month’s commission. It was his further testimony that the Plaintiff was not entitled to additional commission on contracts it negotiated a higher figure directly with the customers. He gave an example of Ishano Distributors who agreed to transfer a contract that was valued at Kshs 29,000/= that compared to Kshs 28,120/= that it was paying the Plaintiff before the transfer. It was therefore the Defendant’s argument that the Plaintiff’s case ought to be dismissed as the Plaintiff’s claim on additional business was not payable as long as the same was based on existing clients.
25. In his cross-examination, DW 1 agreed that the handwritten paragraph 7 in the letter of 19th October 2000 was in Simon Grants’ handwriting. He admitted that he was not present when the said letter was being signed but was emphatic that the additional clause was signed by Simon Grant, as he was well acquainted with his signature, and PW 1. He agreed that in paragraph 11 of

the Defence, the Defendant had acknowledged that the Supplementary Contract was constituted in the letter of 19th October 2000 while the main agreement was constituted in the Agreement for Sale dated 30th April 19999.

26. DW 1 was categorical that the Supplementary Contract was not binding as the Defendant's Managing Director did not have knowledge of the same. He, however, admitted that he did not know how long customers took to transfer from the Plaintiff to the Defendant. On being shown a letter dated 3rd September 1999 from Colour Print Ltd to the Plaintiff, which was acknowledged on 13th September 1999, he said that the Supplementary Contract was not open ended as it provided for a time span.
27. During re-examination, DW 1 said that the contract for Colour Print was five (5) months after the initial contract and was therefore within the period of six (6) months that had been agreed upon by both the Plaintiff and the Defendant. He was categorical that although the hand written note was written by Simon Grant, the same was not binding as it was not signed by the Defendant's Managing Director.

LEGAL SUBMISSIONS BY THE PLAINTIFF

28. In its written submissions dated 20th November 2012 and filed on 28th November 2012, the Plaintiff submitted that the issue before the court was whether or not the contents of the Supplementary Agreement constituted further terms of the initial contract. It was its submission that the agreements by the parties were negotiated and executed by PW 1 and Simon Grant and that PW 1 had ably demonstrated to the court that it was entitled to the sums claimed. The Plaintiff pointed out that DW 1 was not part of the negotiations and that his witness statement was served upon it on the day he gave evidence, which statement, it argued was tailored to answer the Plaintiff's case.
29. The Plaintiff further submitted that DW 1 confirmed on oath that the handwritten part in the letter of 19th October 2010 belonged to Simon Grant as he was familiar with his handwriting. It averred that the signatures on both the agreements of 30th April 1999 and 19th October 2000 belonged to PW 1 and Simon Grant who had capacity and authority to execute the said agreements on behalf of the Plaintiff and Defendant. It also argued that DW1 was not privy to the contract and that his evidence was speculative and based on hearsay.
30. It was the Plaintiff's submission that the Supplementary Agreement was valid and binding upon the parties.
31. The Plaintiff relied on Section 34 of the Companies Act Cap 486 (laws of Kenya) which provides that:-

a. **Contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the Company in writing signed by any person acting under its authority express or implied.**
b. **A contract made according to this section shall be effectual in law and shall bind the Company and its successors and all other parties thereto**.

32. It also relied on the case of **HCCC 113 of 2007 Kingorani Investments Co Ltd vs KCB and Another** (unreported) to buttress its point that the Supplementary agreement was valid and enforceable and **Palmers Company Law page 329** where it was stated as follows:-

"**Where, however, the words showing that the person who signs is signing on behalf of the company are omitted, it will nevertheless be the Company and not the person so signing who can sue and be sued on the contract if the intention is clear that the signature shall only be that of the Company**".

33. It also referred the court to **Pennington's Company Law 6th Edition** at page 5 and in **Emco Plastica International Ltd vs Freeborn (1971) EA** at page 432 in this regard.
34. On the issue of company seal, the Plaintiff referred the court to the case of **CA 175 of 2000 Nabro Properties Ltd vs Sky Structures Ltd and Others** (unreported) where it was held *inter alia.*

"(K) Section 34 of the Companies Act provides that contracts by Companies need not be under seal and it is an elementary tenant of Company Law that a person dealing with a company is not bound to make enquiries as to how the contract was executed."

35. The Plaintiff further submitted that the sale of the business did not go as was anticipated and the value of the consideration changed. It argued that the client's listed Appendix contained in the Agreement for sale differed in number from those clients who actually transferred business to the Defendant and that the Defendant acknowledged introduction of new business procured to make up for the shortfall.
36. It was the Plaintiff's argument that new business included new contracts from already existing clients and it was not just new clients who were to be considered during calculation of the value of the business as was envisaged in the Supplementary letter of 19th October 2000.

LEGAL SUBMISSIONS BY THE DEFENDANT

37. On its part, the Defendant filed its written submissions dated 12th February 2013 on the same date. It admitted that the Plaintiff and the Defendant entered into a written contract dated 30th April 1999 and that the consideration and terms were all captured in the said agreement. It submitted that it performed its obligations under the contract and paid the sum of Kshs 16,818,324/= representing the value of the contacts that were finally transferred to it but that the Plaintiff had failed to demonstrate how the Defendant breached the contract. It therefore contended that it was not aware of the Plaintiff's claim for Kshs 25,859,147.40 as per the Further Amended Plaint.
38. The Defendant's case was that no extra business was handed to it by the Plaintiff since the business was bought as a going concern. It said that PW 1 was paid a once off commission in respect of new clients in year one (1) and that paying the Plaintiff for extra business would be a violation of the agreement. It said that the commission was to go to the PW 1 and not to the Plaintiff as it would not be in existence for the reason that it was to file a Notice of Cessation of Business.
39. The Defendant denied that the letter of 19th October 2000 was a Supplementary Agreement or a variation agreement and contended that it could not alter the initial contract as it was not properly executed. It was its submission that under cross-examination PW 1 was not able to explain to the court the challenges or difficulties that parties faced in implementing the initial contract that could have led the parties into entering the alleged Supplementary Agreement. It was also the Defendant's further submission that PW 1 was not able to demonstrate that the contracts he allegedly transferred to the Defendant which were not in the Appendix were actually transferred to it.
40. Although, the Defendant further argued that the contract between the parties was not negotiated by PW 1 and Simon Grant but that the Letter of Intent dated 27th October 1998 was signed by Mr P Rees, the then Managing Director of the Defendant, the court will also not attach much weight to this submission as no evidence was led on this point. Such facts cannot be introduced at the submission stage as doing so will essentially have denied the Plaintiff an opportunity to cross-examine the Defendant on the same if it had wished to do so.
41. The Defendant took the view that the Defendant had perpetual status and it was not necessary for DW 1 to have been present at the time of negotiations of the contract or for the Plaintiff to have procured new business to make up a shortfall. It contended that the contract provided that for those customers who refused to transfer to the Defendant, the value of their contracts was to be deducted from the agreed consideration. It was its argument that the Plaintiff did not present to the court any evidence to show that parties agreed to change the purchase price from Kshs 18,618,324/= to Kshs 25,859,147.40. The Defendant submitted that the Plaintiff had also not proved its claim of Kshs 9,711,108.02.
42. It was also the Defendant's contention that paragraph 7 of the letter of 19th October 2000 was expunged from the court record as it did not contain the word "existing". It argued that business from existing clients was expressly excluded by the contract when considering the commission and that under paragraph 7 of the said letter, it was to accept three (3) contracts only from the

Plaintiff at its Securicor Standard Rates as at 31st January 2001. It was categorical that the calculation was based on the number of contracts transferred and not the number of clients. It therefore urged the court to disregard the documents titled "Financials" and "Schedules" and dismiss the Plaintiff's case.

FURTHER LEGAL SUBMISSIONS BY THE PLAINTIFF

43. In response to the Defendant's written submissions, the Plaintiff filed further written submissions on 15th March 2013. It submitted that it procured new contracts which were addressed in the letter of 19th October 2000 as "New or extra business" and that the "Financials" were based on evidence that was adduced in court. It said all its figures were correct.
44. The Plaintiff explained that the use of the word "existing" at paragraph 1 on page 6 of its submissions was purely to draw a distinction of the letter bearing the word "existing" that was not served upon the Defendant or the one in the court file.
45. It emphasised that the calculation of the value of the business was not based on the number of clients but the value of each contract executed by the clients in favour of services it was to render to them. It said that a transfer of clients without contracts was of no value for no consideration would follow.

LEGAL ANALYSIS

a. **AGREEMENT OF SALE DATED 30TH APRIL 1999**

46. This court has carefully perused the Agreement of Sale dated 30th April 1999 Exhibit 2 in the Plaintiff's Bundle of Documents and notes that Schedules II, IV and V attached in PW 1's statement were not annexed to the said agreement.
47. Schedule 1 attached to PW 1's written statement filed on 27th October 2011 shows that the value of the contracts that was to be transferred without any deductions was Kshs 1,527,230/=. According to Schedule II in the said statement, the value of the contracts actually transferred between 30th April 1999 – 31st January 2001 was indicated as Kshs 1,716,411.85. The computation of this amount was detailed in PW 1's written statement filed on 20th April 2012.
48. The said Schedule I was initialled by a Director/Secretary of the Plaintiff's company and a Director of the Defendant. These are the same signatures that appear in the execution page of the Agreement for Sale dated 30th April 1999.
49. While the Plaintiff attempted to introduce a Schedule of clients transferred to the Defendant in PW 1's statement marked as Schedule II, it is evident that the said Schedule was not initialled by the Defendant. It's claim for Kshs 1,716,411.85 shown therein cannot therefore be said to be binding upon the Defendant as the Agreement for Sale dated 30th April 1999 clearly showed that the value of the contracts to be transferred from the Plaintiff to the Defendant was Kshs 1,527,230/=.
50. It is trite law that parties will be bound by the terms and conditions of contracts that they have voluntarily executed. It was evident from the evidence by both the Plaintiff and the Defendant that the terms and conditions of the Agreement of Sale dated 30th April 1999 were not disputed. The same, amongst other terms provided that:-

a. **"The agreed consideration for the purchase of the Business and the Motor Vehicles is Kenya Shillings Eighteen Million Six Hundred and Eighteen Thousand Three Hundred and Twenty-four (Kshs 18,618,324/=) ("the Consideration") broken down as follows:-**

Price for the Business	**Kshs 16,818,324/=**
Price for the Motor Vehicle @	
Kshs 450,000/= per Motor Vehicle	**Kshs 1,800,000/=**

Total: Kshs 18,618,324/=

b. **The Consideration shall be payable as follows:**

i. **Kenya Shillings Four Million Six Hundred and Fifty-four Thousand Five Hundred and Eighty-one (Kshs 4,654,581/=) (25% of the Consideration) being payment for the first 25% of the contracts to be transferred to the Purchaser upon the execution of this Agreement by the last party signing;**
ii. **Kenya Shillings Five Million Five Hundred Eighty-five Thousand Four Hundred and Ninety-seven and Twenty Cents (Kshs 5,585,497.20) (30% of the Consideration) upon the fulfilment of the condition set out in Clause 5 hereof;**
iii. **Kenya Shillings Six Million Five Hundred Seventy-eight Thousand Two Hundred and Forty-five and Eighty Cents (Kshs 6,578,245.80) to be paid at the end of each month as a proportion of the contracts signed by the Customers at that date in accordance with Clause 3 below based on the Contract Value of each Contract as defined in Clause 3(b) below being payment for the rest of the contracts to be transferred to the Purchaser under this Agreement. For the avoidance of doubt it is agreed that the consideration for the first 25% of those contracts is fully covered by the payment set out in Clause 2(b) (i) above.**
iv. **Kenya Shillings One Million Eight Hundred Thousand (Kshs 1,800,000/=) upon the registration of the transfers of the Motor Vehicles in the name of the Purchaser and receipt by the Purchaser of the log books from the Registrar of Motor Vehicles being the Purchaser's name as the owner of the Motor Vehicles".**

51. The court is unable to tell how the consideration for the transfer of the value of Kshs 1,527,230/= came to Kshs 16,818,324/= as seen in Clause 2(a) of the said Agreement if one was to assume that the value would be twelve (12) times the value of the contracts indicated in the letter of 19th October 2000. The court has attempted to calculate the value of contracts of Kshs 1,527,230/= by multiplying the same by twelve (12) to decipher the Plaintiffs' argument that it was entitled to Kshs 20,596,942/= being the actual business and contracts as per Schedule II, the computation which had been shown in paragraph 18 hereinabove, but finds that the total comes to Kshs 18,326,760/= and not Kshs 16,818,324/=. Suffice it to state that that is what the Plaintiff and the Defendant agreed upon. It is also the figure that appears on pp 4,5,9,10,20,21,39,40 and 42 of the Plaintiff's Bundle of Documents.
52. If the court were to compute the value of the actual business and contracts as per Schedule II, the same would create difficulties as there was already in the Agreement of Sale of 30th April 1999 a different formula of calculating the said amount. This is because the contracts in the sum of Kshs 1,527,230/= would also be included in the claim for Kshs 1,716,411.85.
53. The Plaintiff did not also provide any proof to this court that it was required to give additional contracts to make up for a shortfall. Evidently, the Plaintiff and the Defendant were not of the same mind. Consequently in the absence of any documentary evidence, this court is satisfied that the Plaintiff could not compel the Defendant to pay for the value of the contracts showed in Schedule II.
54. Having found that the Defendant was not obligated to accept business in the sum of Kshs 1,716,411.85 contained in Schedule II of the PW 1's statement, the court finds that the Defendant was correct when it paid the Defendant a sum of Kshs 16,818,324/= as stipulated of the Agreement of Sale dated 30th April 1999.
55. The court accepts the sum of Kshs 16,818,324/= as the sum that the Defendant paid as the Plaintiff did not counter the same by providing evidence that it was only paid Kshs 16,148,039.38 as indicated in the Further Amended Plaint dated 19th March 2010 and filed on 10th June 2010 and not Kshs 16,818,324/= as was stated by DW 1. This is the Plaintiff's case and it behoved upon him to present adequate evidence before the court to prove its case.
56. For the reason that the court finds that the Plaintiffs did not properly lay out its claim for Kshs 20,596,942/=, the same cannot be factored in, in the computation of the Plaintiffs' claim.

b. **SUPPLEMENTARY AGREEMENT OF 19TH OCTOBER 2000**

57. It is correct as was submitted by the Plaintiff's counsel that a contract may be made on behalf of the company in writing signed by any person acting under its authority, express or implied. The authorities cited by the Plaintiff spelt out the correct legal position. Both PW 1 and Simon Grant could bind the Plaintiff and the Defendant in their dealings and they did bind the Plaintiff and Defendant herein by their actions.

58. The question herein rather is whether the letter of 19th October 2000 can be deemed to have been Supplementary Agreement to the Agreement of Sale dated 30th April 1999.

59. The letter of 19th October 2000 was written way after the Plaintiff and the Defendant executed the Agreement of Sale of 30th April 1999. It seemed to confirm an agreement that had been arrived at a meeting held on 18th October 2000 between PW 1 and Simon Grant. It refers to several clients contained in the Appendix attached to the Agreement of Sale of 30th April 1999. The Defendant was to calculate the average monthly sales over the first three (3) months of service for each of those customers. There is no other correspondence showing whether the said sales were calculated or what became of them.

60. The said letter also referred to the Defendant accepting three (3) contracts as Securicor's Standard rates upto 31st January 20001. It does not clearly identify the said contracts or the standard rates mentioned therein. Clause 7 of the said letter which is the most contentious provided that "**Any additional business from Express Escort (existing) clients transferred to Securicor shall be taken into account when calculating the total consideration as per items 3 above**". The addition of clause 7 was counter signed by both PW 1 and Simon Grant.

61. From the evidence adduced by PW 1, it did not come out clearly if the Plaintiff and Defendant intended that Clause 3 of the letter of 19th October 2000 was to supersede the contents of Clause 1(a) of the Agreement of Sale dated 30th April 1999. The court says so because Clause 3 of the letter of 19th October 2000 stipulated that "the basis for the calculation **for all contracts** (emphasise mine) which transferred to Securicor is twelve (12) times the monthly turnover less a discount of Kshs 750,000/= (i.e if the value of contracts transferred was Kshs 1,000,000/= the consideration would be Kshs 11,250,000/=)".

62. This is relevant and crucial because if the letter of 19th October 2000 was deemed to be Supplementary Agreement, it would definitely have an implication on the consideration that was agreed upon in the Agreement of Sale dated 30th April 1999.

63. The Plaintiff did not also tell this court whether points (1) and (2) were completed as was envisaged in the said letter as parties had agreed to reimburse or pay any shortfall to each other based on the consideration of giving a discount of Kshs 750,000/=.

64. There are difficulties in establishing whether or not the deductions for the clients who did not transfer were made. Bearing in mind that the total amount of clients who refused to transfer were Kshs 256,635.10 as shown in Schedule V attached to PW 1's witness statement filed on 27th October 2011, the payment would therefore be multiplied by twelve (12) to give a sum of Kshs 3,079,621.20 as was envisaged in Clause 3(b) of the Agreement of Sale of 30th April 1999.

65. PW 1 was emphatic that Clause 3(b) of the said Agreement was not applicable and that the Plaintiff should not be penalised for contracts that were not transferred. He did not explain why the said clause was inapplicable. From where the court stands, the Plaintiff cannot approbate and reprobate at the same time. In the absence of any computation of the business that was not transferred to the Defendant, this court finds itself in difficulties in conclusively coming up with a figure of what the Plaintiff was entitled to in this claim.

66. The letter of 19th October 2000 was also not clear whether the clients in Schedule II were included as additional business. This is because they were existing clients. Clause 7 of the letter of 19th October 2000 came into sharp contention as it had the word "existing" included therein which counsel for the Plaintiff informed the court that the original did not contain the word "existing".

67. The question that arises in the mind of this court is exactly what additional business indicated in Clause 7 of the letter of 19th October 2000 referred to. The court observes that Schedule II has a sum of Kshs 189,181.85 being an additional sum to the sum of Kshs 1,527,230/= indicated in Schedule I and Schedule IV showed additional business of Kshs 288,517.10.

68. This court takes the view that so long as the letter of 19th October 2000 did not make reference to

the Agreement for Sale dated 30th April 1999, it cannot be referred to as a Supplementary Agreement. The said letter was written way after the agreement of 30th April 1999 and it was incumbent upon the Plaintiff to show the nexus between the two (2) documents. The court notes that if it tried to compute the value of the contracts using the figures in the two (2) documents, the final figures would be different. This is because from the evidence adduced in court, it is not clear whether the Plaintiff and Defendant intended to calculate the figures using Clause 3 of the letter of 19th October 2000 or Clause 3(b) of the Agreement of Sale dated 30th April 1999. It is also not clear whether the value of the business that was not taken up was taken into account at the time the Agreement of Sale dated 30th April 1999 was executed. The letter of 19th October 2000 had a different method of calculating the monies due to the Plaintiff.

69. The Plaintiff may have been entitled to its claims pursuant to the meeting whose agreement was reduced in writing as both the Plaintiff and the Defendant were *ad idem*. However, the duty lay on the Plaintiff to lay out its claim in a coherent and clear manner and support the same with concrete documentary evidence.
70. The court has therefore come to the conclusion that the meeting of 18th October 2000 culminating in the contents of Clause 7 therein was a separate contract and was not supplementary to the Agreement of Sale dated 30th April 1999. If the letter of 19th October 2000 was supplementary to the Agreement of Sale of 30th April 1999, it would have clarified issues as opposed to causing more confusion in the computation of the Plaintiff's claim.

MOTOR VEHICLES

71. Schedule III attached to PW 1's witness statement showed the motor vehicles that were to be transferred. No value of the said vehicles was shown. According to the agreement of 30th April 1999, the value was shown as Kshs 1,800,000/=. This fact was not in dispute and the court therefore finds that the value of the said vehicles was Kshs 1,800,000/=.
72. PW 1 told this court that the motor vehicles were sold in an auction. No proof was tendered in respect of this fact. He did not demonstrate how this impacted on its claim for value of motor vehicles. However, from the court proceedings, DW 1 admitted that the Defendant paid the Plaintiff a sum of Kshs 16,818,324/= although the consideration of the business and vehicles to be transferred to the Defendant by the Plaintiff was put at Kshs 18,618,324/=. The Defendant did not address itself at all to the balance of Kshs 1,800,000/= being the value of the motor vehicles.
73. After a careful analysis of the evidence that was tendered, this court finds the sum of Kshs 1,800,000/= is due and owing to the Plaintiff by the Defendant under the agreement of 30th April 1999 for the value of the motor vehicles. The court has come to the conclusion that the Plaintiff was not paid a sum of Kshs 1,800,000/= as DW 1 did state in his own words that the Defendant paid the Plaintiff a sum of Kshs 16,818,324/= and that any sum above the sale agreement was not known to the Defendant.
74. In the circumstances foregoing, having gone through the parties' pleadings, evidence and written submission, this court has come to the conclusion that the Plaintiff is only entitled to a sum of Kshs 1,800,000/= being consideration of the Motor Vehicles agreed upon in the Agreement of Sale dated 30th April 1999.

DISPOSITION

75. Accordingly, the court hereby enters judgment in favour of the Plaintiff against the Defendant for the sum of Kshs 1,800,000/= together with interest thereon at court rates from the date of filing suit till payment and costs of this suit.
76. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 11th day of February 2014

J. KAMAU

JUDGE