Njane t/a Argwings Twin Service Station & another v Total Kenya Limited & another (Civil Case 433 of 2010) [2025] KEHC 14898 (KLR) (Commercial and Tax) (24 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14898 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 433 OF 2010

A MABEYA, J

OCTOBER 24, 2025

BETWEEN

DAVID NJANE T/A ARGWINGS TWIN SERVICE STATION ..... 1ST PLAINTIFF

TWIN BUFFALOS SAFARIS LIMITED ..... 2ND PLAINTIFF

AND

TOTAL KENYA LIMITED ..... 1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. This suit was tried on the Re-amended plaint dated 13/11/2012. The plaintiffs sought judgment against the defendants for various reliefs some of which were overtaken during the pendency of the suit. In the main, they claimed Kshs. 83,041,133.51 and Kshs. 61,460,012/- respectively for loss of business and other related claims, interest at commercial rates from due dates and costs.

2. It was their case that, on or about 31/7/2007, the 1st plaintiff entered into an agreement with the 1st defendant whereby the latter appointed the 1st plaintiff as its distributor of petroleum products including motor fuels, kerosene, lubricants, greases and LPG. The agreement required the 1st plaintiff to operate his business of a petrol station at the 1st defendant's premises on L.R. No. 209/6409, Hurlingham, Nairobi, as a licensee ("the Station").

3. On 1/2/2008, the 1st plaintiff took possession of the station and commenced operations. He operated the station under the terms of the agreement whereby he was granted the right to use the 1st defendant's equipment, trade name, trademarks and goodwill. He was required to maintain a working capital of Kshs. 12,500,000/- and provide a bank guarantee.

4. At the 1st plaintiff's request, the 2nd plaintiff procured the required guarantee from the 2nd defendant. The last guarantee issued was No. TFBG09699 dated 16/7/2009 in the sum of Kshs. 3,500,000/-, valid until 30/6/2010.

5. The 1st plaintiff was to pay to the 1st defendant, monthly royalties of Kshs. 950,000/- in advance for the use of the station, the trademarks and goodwill and access to facilities such as the tyre center, car wash, garage and convenience store. He was also to purchase all petroleum products exclusively from the 1st defendant and to maintain minimum monthly stock levels of Unleaded Petrol (UPMS) 250,000 litres, Diesel (AGO) 90,000 litres, Kerosene (IK): 10,000 litres and LPG (cylinders) 1,000 litres.

6. It was contended that consistent supply of products from the 1st defendant was crucial to the operations of the station. However, that the 1st defendant persistently failed to meet its supply obligations despite numerous complaints. As a result, the 1st plaintiff suffered product outages and customer dissatisfaction, leading to various losses particularized in the re-amended plaint. That the 1st defendant revised pump prices downwards without the required 30-day notice, despite having already received payment at higher wholesale prices resulting in loss of Kshs. 995,249.46.

7. That despite the 1st plaintiff paying Kshs. 0.23 per litre as a maintenance fee, the 1st defendant failed to maintain the station equipment, causing breakdowns and downtime. These led to various losses totaling Kshs. 104,298,144/- which he claimed.

8. It was further claimed that the 1st defendant, who had administrative control of the store's computer system, negligently allowed unauthorized access to sales staff, resulting in manipulation of stock, pricing and sales data leading to loss of Kshs. 1,649,704.97.

9. For alleged delayed remittance of funds received through Bon Voyage Card transactions, the 1st plaintiff claimed interest losses of Kshs. 874,727.41 at 18% p.a. Short-landed fuel while he was billed for full quantities, he claimed a loss of Kshs. 2,302,575.47.

10. Following ongoing disputes, the 1st plaintiff yielded up the station on 20/3/2010 and handed over fuel stock, store items, and accrued credits to the 1st defendant amounting to Kshs. 3,333,592.72 which he claimed.

11. That on 17/6/2010, the 1st defendant issued a demand for Kshs. 1,970,131.35, after conducting a unilateral reconciliation without involving the 1st plaintiff. The 1st defendant threatened to call in the Bank Guarantee No. TFBG09699, despite no proven default. The 1st plaintiff contended that the value of his business as at 20/3/2010 was Kshs.61,460,012/- which he claimed as a loss resultant from the alleged breaches by the 1st defendant.

12. He alleged that the closure of the station was due to the 1st defendant's breaches of failure to supply fuel, maintain equipment, safeguard system access and credit card payments. That he had been unable to enter into any similar distributorship due to lack of capital and a new guarantor.

13. In opposition to the suit, the 1st defendant filed a statement of defence dated 4/12/2012. It acknowledged the agreement dated 31/7/2007 appointing the 1st plaintiff as a dealer and confirmed that the business was to be carried out at Argwings Kodhek Total Service Station on L.R. No. 209/6409. It admitted the issuance of Bank Guarantee No. TFBG09699 by the 2nd defendant for Kshs. 3,500,000/- but that the same allowed it to demand payment thereon unconditionally, without requiring proof of default or notice to the plaintiffs.

14. That royalties were payable but did not cover technical and management assistance. That the 1st plaintiff had the responsibility to follow proper ordering, delivery and product receipt procedures

under the agreement and that the stock-outs were as a result of the 1st plaintiff's mismanagement, including bounced cheques and late payments.

15. It denied responsibility for price losses or maintenance failures and stated that any equipment issues arose from the 1st plaintiff's negligent handling thereof for which it was not liable. It denied negligence in the computer system and stated that the 1st plaintiff controlled passwords and was responsible for staff conduct. The allegation of data manipulation or failure to credit Bon Voyage card sales were denied. That shortages on delivery were subject to a laid-down complaint procedure which the 1st plaintiff failed to follow.

16. It refuted the claimed value of surrendered stock and credit notes and stated that the correct amount was Kshs. 2,298,009.61 which had been credited to the 1st plaintiff's account and maintained that the 1st plaintiff still owed Kshs. 1,970,131.35. That this justified the demand on the Bank Guarantee on 28/6/2010.

17. It dismissed the claim of Kshs. 61,460,012/- for loss of business as speculative and unsupported and denied that the 1st plaintiff was prevented from entering into similar agreements thereafter. Finally, it contended that disputes under the agreement were subject to arbitration.

18. At the trial, Pw1, David Njane, adopted his witness statement dated 12/4/2011 as his evidence-in-chief and produced his bundles of documents dated 20/6/2020 and 19/3/2020 as PExh1, 2 and 3, respectively. He testified that he signed an offer letter dated 26/7/2007 but declined to sign a Marketing Licence, as negotiations were still ongoing before the agreement was terminated. His evidence rehearsed the contents of the plaint as set out above.

19. In cross-examination, he testified that the bouncing of cheques was only in isolated incidents. That the 1st defendant would not supply fuel unless payment was actually made. Some of the cheques that bounced were from late 2009 and 2010, a period when the business had already collapsed. That the fuel had mixed with water due to damaged underground fuel tanks, a matter he had reported to the 1st defendant on several occasions.

20. That while he made fuel orders, the 1st defendant delayed in supplying the same. Despite invoking the standard procedure for ordering fuel, delays persisted. That even when the fuel industry faced shortages, the 1st defendant continued to collect royalties from him regardless the absence of products. That sometimes, the 1st defendant would have stock but decline to release it, to him, presumably to avoid incurring losses.

21. That the 1st defendant set sales targets it knew could not be met, and that although it had the discretion to review those targets downwards, it failed to do so. He testified that neighboring stations, such as Shell and former Caltex, could have fuel during the alleged shortage periods when the 1st defendant would still fail to supply him with the same. That although the 1st defendant had the required bank guarantees in place, it lacked the capacity to deliver the full quantities ordered. For instance, he would order a 28,000-litre tanker but receive only 10,000 litres. He maintained that there was no signed Marketing Licence and that his claim was based on the offer letter.

22. That he reported engineering issues and maintenance problems to the 1st defendant, but received no support. He admitted that there was no written contract with respect to the car bay and convenience store save for a verbal agreement between the parties. That all maintenance issues were reported as directed by the 1st defendant.

23. He claimed that the 1st defendant advised him not to purchase any equipment. That the target earnings, which form part of his claim, were based on expected profits over two years. That the Kshs. 37 million

figure in the claim represented the 1st defendant's projected sales figures less what was actually earned over a 24-month period.

24. On fraud, he testified that the 1st defendant did not allow him to use external POS systems. The station was handed over to him with existing POS systems and PDQ machines, which were susceptible to double entries. Fraud occurred when cashiers ran fraudulent card transactions, pretended to sell products and then took the equivalent amount in cash. That if the system had proper controls preventing double entries, such fraud would not have occurred.

25. He complained that the 1st defendant acted with impunity by failing to respond to emails and failing to secure the system. That while he had a password, it was being leaked to his employees. That on the Bon Voyage program, he would sell to the 1st defendant's customers products but payments would be received after one to two weeks. This delay significantly impacted cash flow amounting to unfair business practices.

26. Regarding the loss and delivery claim of Kshs. 2,302,575/-, he testified that he consistently received less products than ordered. As documented in the Supplementary Bundle at page 32, delivery documents were signed by the driver and supervisor and discrepancies were reported to the 1st defendant.

27. In re-examination, he confirmed that he paid Kshs. 15.7 million as working capital and procured a bank guarantee of Kshs. 3.5 million. He underwent a one-month training as required and inherited the 1st defendant's existing workforce. That he never signed the Marketing Licence as it was one-sided and was not mutually agreeable.

28. That reconciliation of stocks was not conducted before the 1st defendant recalled the guarantee and this was unjustified. He acknowledged that four cheques bounced during the final stages of operation, but stated that even after paying the amounts, there would still be a positive balance on the guarantee. He raised complaints about stock shortages, specifically citing page 74 of PExh1. That documents supporting the claim of Kshs. 18 million in losses due to lack of stock appeared at pages 260 to 350 of PExh1. That the 1st defendant made him incur losses by asking him to reduce fuel prices after delivery, thereby affecting profitability and planning.

29. PW2, Edward Mugo, an accountant by profession, testified that he prepared a business valuation report for the plaintiff. In conducting the valuation, he took into account the contents of the offer letter issued to the plaintiffs. He explained that the valuation methodology applied was based on discounted cash flow analysis, which is a standard method for assessing the value of a business based on projected future earnings. That the plaintiffs had incurred a loss during the relevant period. In the absence of audited financial statements, he relied on internal documents generated by the service station to assess the business's performance and to estimate its value. In his testimony, he told the Court that the plaintiff's business was worth Kshs. 61,460,012/- as at March, 2010. He also detailed the plaintiffs' various claims using the data supplied and quantified the same. He produced the said report as an exhibit in P. Exh1.

30. The 1st defendant called five (5) witnesses in support of its defence. D1w1, Caleb Apungu, adopted his witness statement dated 23/2/2012 as part of his evidence-in-chief. He produced the 1st defendant's bundles of documents dated 22/6/2015 and 4/7/2022 as DExh1 & 2, respectively.

31. He testified that he was the 1st defendant's Network Sales Manager at the material time. That the letter of offer was a preliminary document, intended only to show intent. That the Licence Agreement was the document that provided detailed terms and conditions governing how the station was to be operated.

32. He confirmed that the 1st defendant set up the station's infrastructure, including computers and hardware, but the software operations and system use were managed by the dealers and their staff. The passwords and system access were the sole responsibility of the dealers and their employees.

33. Regarding product targets, he told the Court that the monthly fuel target was 350,000 litres, constituting 250,000 litres super petrol, 90,000 litres diesel and 10,000 litres kerosene. There were also monthly targets for auxiliary products: 3,000 litres of lubricants and 15,000 litres of liquefied petroleum gas (LPG).

34. On non-delivery of fuel, he confirmed that there were instances when oil was ordered but not delivered, the reason being non-payment therefor or bounced cheques. He also acknowledged that fuel shortages could have been a contributing factor to delayed or failed deliveries. That there was no contract with the plaintiff requiring 1st defendant to supply six million shillings worth of products per month regardless of circumstances as contended by the plaintiffs. That there were no documented targets for the car wash business and that he had not seen any document showing actual sales or earnings of Kshs. 250,000/- per month for the Tyre Centre.

35. He stated that the 1st defendant provided the software through a contractor but the dealer was responsible for operating the system at the station. He recalled a discussion in which the 1st plaintiff requested to implement his own system, but this was declined because the 1st defendant required uniformity and visibility across its more than 100 service stations. That allowing each dealer to use a different system would have been unmanageable. He stated that the plaintiff's claim of Kshs. 61 million was not payable because it was based on projected or targeted sales rather than actual performance.

36. In Cross-examination, D1w1 stated that his assistant, Mr. Kombe, dealt directly with the plaintiffs. He admitted that there was no evidence to show that he himself visited the petrol station. He confirmed that all records and business operations were maintained in the system and that the station was fully computerized, with transactions being entered manually.

37. That the offer letters dated 7/6/2007 and 26/7/2007 had lapsed after 30 days. That the 1st defendant commenced trading with the plaintiff on 1/2/2008. He acknowledged receiving bankers' cheques totaling Kshs. 10 million as working capital and not Kshs. 15 million. A bank guarantee of Kshs. 3.5 million was also provided. He admitted not having produced an agreement dated 31/7/2007 referred to in his witness statement.

38. He admitted there having been issues of supply failure. He stated that as at the time of trial, the 1st defendant was owed Kshs. 1.7 million and that the bank guarantee had been recalled. He disagreed with the performance report of September 2009 and maintained that any such reports could not be discussed after the termination of the business relationship. According to him, any losses were attributable to the plaintiff's failure to operate the station in accordance with the terms of the Management Licence.

39. In re-examination, D1w1 stated that the business between the parties officially commenced on 1/7/2008. He reiterated that the plaintiff's bounced cheques affected the supply of products. That no complaints had been raised regarding tank calibration or pressure testing.

40. D1w2, Wycliffe Nyongesa, adopted his witness statement dated 4/6/2012 as part of his evidence-in-chief. He testified that he was a computer specialist by profession, holding a Bachelor of Commerce degree in Accounting. In addition, he run a Petrol Service Station known as Webuye Total Energies Service Station, which he had operated for five years.

41. That the primary purpose of the computer system used at Total Stations was to assist dealers in closing shifts. Each station may have one or more shifts per day, and at the end of each shift, the dealer is required to perform reconciliation and balance the books.

42. He explained that all data was manually entered into the system, including purchases such as fuel deliveries. That at the end of each shift, the dealer must read the pump meter readings and record them in a meter book. These readings were then entered into the system, which automatically calculated the total white product sales for that period. That the system captured various forms of credit sales, including those made through credit invoices and multiple card platforms such as Bon Voyage (BV) cards, Visa, ABSA (formerly Barclays), KCB and Equity cards. That reconciliation was expected to be done at the end of each shift.

43. That he personally installed the system at the Argwings Service Station. At the time of installation, he designated the dealer as the system's super user, or dealer-level access (level 3), which enabled the dealer to create accounts for other users, such as employees. That supervisors were typically given access level 7. That there was no remote or central connection and that the dealer received prior training at Airport View Total Service Station from another dealer. In his view therefore, the 1st defendant had no role in the day-to-day system management at the station.

44. In Cross-examination, he confirmed that he was contracted by the 1st defendant in 2006 to install the system. When asked how many times he carried out maintenance on the system at Argwings Station from the time of installation to the closure of the business, he could recall none. That during the dealer's training at Airport View Petrol Station, there was no representative from Kenserve present.

45. D1w3 – Lucy Gakuru, adopted her witness statement dated 18/4/2013 as her evidence-in-chief. She testified that her company was contracted by oil companies to maintain fuel dispensers. That although she did not personally attend to the maintenance complaints at the Argwings Service Station, she dispatched technicians to handle the reported issues. However, she confirmed that she did not have any documentation or evidence to demonstrate that maintenance was actually conducted at the Argwings Station.

46. D1w4 – Josephat Koech, adopted his witness statement dated 4/6/2012 as his evidence-in-chief and told the Court that he held a diploma in Information Technology. He denied any claim of system manipulation. He stated that the dealer was the sole custodian of the system password which was never shared with the 1st defendant. He confirmed that while the system was built with security features, it could potentially be manipulated by individuals with access.

47. In cross-examination, he testified that he installed the RMS system at Argwings in 2007. He trained the dealer's personnel and provided them with system passwords. That the 1st defendant did not contact him regarding any complaints about the system. He had no evidence that the 1st defendant had paid him for system maintenance.

48. D1w5 – Fredrick Odhiambo Ochieng adopted his witness statement dated 19/2/2015 as part of his evidence in chief and testified that he prepared a financial report using the Capital Asset Pricing Model (CAPM), which was also referenced by Mr. Mugo (Pw2). That in his opinion, the report by Pw2 should not have relied on expected or projected figures in the manner it did. That he should have used actual performance.

49. In cross-examination, he testified that he based his report on the loss figure reported in the Mashimba Associates account, after deducting depreciation. He did not include the 2009 loss figure of Kshs. 2,294,881/- specifically, but instead relied on the figure as at 31/12/2009.

50. He admitted that he did not take into account the parties' obligations under the contract. He also did not include an analysis of the company's net assets. According to him, the valuation report was negative due to the losses incurred by the plaintiff in 2008 and 2009.

Submissions

51. Parties filed their respective submissions which I have duly considered. It was submitted for the plaintiffs that the 1st plaintiff took possession of the Station and operated the business in accordance with the terms of the agreement, as outlined in the offer letter dated 31/7/2007. That the 1st defendant failed to meet its contractual obligations to supply the minimum product quantities agreed upon. This failure disrupted the plaintiff's ability to maintain consistent sales and revenue.

52. The plaintiff engaged a qualified accountant to analyze the various heads of claim and prepared a comprehensive financial report. It was submitted that the figures contained in the report were not challenged or rebutted by the 1st defendant and, therefore, should be deemed as admitted.

53. Regarding the losses arising from lack of stock, it was submitted that this was persistent from the inception of the business relationship. The shortage of stock was attributed solely to the 1st defendant's failure to deliver the products and not to any inability on the part of the plaintiff to pay. It was submitted that the plaintiff had provided a guarantee of Kshs 3,500,000/- to secure product supply in case the working capital fell below the agreed threshold. Thus, at no point did the 1st defendant face any actual credit risk that would justify withholding deliveries.

54. On unilateral price changes, the plaintiff submitted that the agreement required either party to give at least 30 days' written notice prior to any revision of retail margins. That the 1st defendant unilaterally revised prices without the requisite notice, thereby inflicting financial losses on the 1st plaintiff. That on the bon voyage card payments, the 1st defendant delayed reimbursement by up to two weeks which adversely affected the plaintiff's cash flow.

55. On the losses related to maintenance and servicing of equipment, it was submitted that the plaintiff was contractually obligated to pay the 1st defendant 0.23% per litre as a maintenance fee. Despite receiving this payment, the 1st defendant failed to fulfill its obligations to service or maintain the equipment in working order. Pw2, who testified on this aspect, was not cross-examined on the stated figures.

56. Lastly, it was submitted that the 1st defendant consistently delivered less fuel than indicated in the delivery notes but billed the plaintiff the full quantities stated. This discrepancy resulted in losses amounting to Kshs 2,302,575.47.

57. On its part the 1st defendant submitted that there was no valid or enforceable contract between it and the 1st plaintiff. While several offer letters were exchanged in 2007 regarding a proposed Marketing Licence for operating a service station on the 1st defendant's premises, only one offer letter dated 26/7/2007 was signed on 31/7/2007 and that too by Twin Buffalos Safaris Ltd, not the 1st plaintiff personally. That the offer letter was expressly subject to the signing of a formal Marketing License Agreement, which the 1st plaintiff never executed. Consequently, no binding contract was formed as the preconditions for contract formation were not met. That an unsigned or lapsed offer, particularly one contingent on further formal agreement, could not give rise to a claim for breach. That therefore, the 1st plaintiff's claim failed for lack of a valid contractual foundation.

58. That while the 1st plaintiff had sued in his personal capacity under the business name "Twin Service Station," no proof was provided showing that the business was registered or that the 1st defendant was its proprietor. That the involvement of Twin Buffalos Safaris Ltd, which signed one of the documents,

was not clarified. That the offer letter of 26/7/2007 on which the 1st plaintiff based his claim was time bound, signed by a 3rd party and was subject to execution of a Marketing Licence Agreement which was never executed.

59. The cases of East African Fine Spinners Ltd v Bedi Investments (1994) eKLR and Keppel v Wheeler (1927) 1KB 577 were cited in support of the contention that an offer "subject to contract" does not give rise to legal obligations unless a formal contract is signed. That therefore, reliance on the offer letter alone was misplaced and the 1st plaintiff could not sue for breach where no enforceable agreement existed.

60. Without prejudice, the 1st defendant submitted that, the forgoing notwithstanding the claim for special damages must be specifically pleaded and strictly proven. The cases of Stephen Wasike Wakho vs Security Express Ltd (2006) eKLR and Hahn vs Singh (1985) eKLR were cited in support of that submission. That in the present case, no such prove had been established.

61. That for loss of profits to be recoverable, the 1st plaintiff should have provided both the certainty of loss and that the loss was proximately caused by the 1st defendant's breach. Since it had not been proved that any alleged lost profits resulted directly from the 1st defendant's action, the claim failed both in substance and evidentiary standard. That even if a contract were found to exist, the 1st plaintiff's claim for special damages was unsupported by evidence and should be dismissed.

62. That the plaintiff's claim for Kshs. 4,892,674.97 for alleged lack of stock, was unfounded, speculative, and stemmed out of the plaintiff's own operational failures. Reliance was placed on Article IV and Appendix 4 of the unsigned Marketing Licence. That the plaintiff was contractually expected to maintain minimum stock levels and ensure timely payments. The force Majeure clause, under Article IX(ii) of the Marketing Licence was invoked. That the national and international supply disruptions was beyond the 1st defendant.

63. That the 1st plaintiff presented emails complaining about stockouts but failed to produce proof of up-to-date payments or valid orders that would have entitled him to deliveries. That many of the complaints fell during periods there was default. That the stock issues was due to financial difficulties admitted by 1st plaintiff in his letter of 4/11/2009, internal conflict between 1st plaintiff's family members, use of a fake bank guarantee acknowledged via an email dated 25/2/2010 and failure to provide working capital as required by the letter of offer.

64. That the Kshs. 65 million equipment breakdown claim was unsupported by any binding contractual terms and was based on speculative sales targets rather than actual loss. That the claim for Kshs. 4,628,975/- allegedly lost through manipulation of the convenience store system by his own employees was unsubstantiated. The plaintiff operated as an independent contractor, as expressly stated under Article II(iv) of the Marketing Licence, page 34 of P. Exhibit 1. That the 1st defendant had no access codes as stated by D1w2 and D1w4 respectively. That the alleged manipulation and theft were criminal acts committed by own staff and the claim wrongly sought to impute liability on the 1st defendant. Additionally, that no different system could be installed because of standardization.

Analysis

65. I Have considered the pleadings, the evidence on record as well as the detailed submissions filed by Learned Counsel. I am grateful to counsel for their industry. That I have not referred to all the authorities referred to is not out of disrespect. I have considered the same. The issues that arise for determination are: -

    a. Whether the 1st plaintiff is non-suited.

b. Whether there existed a valid and enforceable contract between the plaintiffs and the 1st defendant.

c. Whether there was a breach of the contract, if any.

d. Whether the plaintiffs are entitled to the orders sought.

e. Whether the 1st defendant is entitled to the counterclaim.

f. What orders as to costs.

66. The 1st issue is whether the 1st plaintiff was non-suited. This is an issue that was raised by the 1st defendant in its submissions. It was submitted that the 1st plaintiff had no locus standi to bring the suit. That there was no evidence to show that there was an entity by the name Argwins Twin Service Station and that he was its proprietor. The Court did not see the plaintiffs' response to this submission understandably because the filing of submissions was time bound and probably for what the Court will observe.

67. Firstly, the Court observes that this was an issue that was first raised by the 1st defendant at the submission level. It is expected that parties are to raise their objections to the others' claim, if any, at the earliest, and in any, case in the pleadings themselves and not otherwise. To the extent that this issue was never raised at any stage before submissions, it is not a proper objection for consideration as the 1st plaintiff was never given any notice of the same for him to prove whether or not he was trading in the name and style of Argwins Twin Service Station or not. Had it been raised earlier, he would have been expected to respond by producing the Certificate of Registration, if any or tender evidence towards the issue.

68. Secondly, parties are bound by their pleadings. See Githaiga vs Mwangi (Civil Appeal No. E064 OF 2022) [2024] KEHC 13449 (KLR) (30th October, 2024). In this regard, a party cannot be permitted to tender any evidence that is at variance with its pleadings.

69. In the present case, when faced with the 1st plaintiff's description as well as his appointment as the 1st defendant's distributor in paragraph 5 of the Re-amended Plaint, the 1st defendant replied in its Further Amended defence dated 4/12/2012 thus: -

> " 2. The Defendant admits paragraphs 1, 2, 3 and 4 of the Re-Amended Plaint save that the Defendants' address for the purposes of this suit is care of...
>
> 3. Paragraph 5 of the defence statement Re-Amended Plaint is admitted save that it was the 1st plaintiff through the 2nd plaintiff who was appointed as a Dealer."

70. With such a clear admission in its statement of defence as to the status of the 1st plaintiff and his appointment as dealer, the 1st defendant cannot be permitted to blow both hot and cold. The answer is that the suit by the 1st plaintiff is properly before Court and he had locus standi in the suit. Raising the issue at submission level was in the circumstances untenable.

71. The 2nd issue is whether there existed a valid and enforceable contract between the parties. The plaintiffs' case was primarily founded on the alleged breach of obligations set out in the offer letter dated 31/7/2007 and claims of unfair trade practices. On a background of the pleadings before Court, the parties' interactions revolved around three key documents; offer letters dated 7/6/2007, 31/7/2007 and 29/10/2007, respectively.

72. The plaintiffs contended that these offer letters, specifically the one dated (or executed on) 31/7/2007, formed the contractual basis upon which the 1st plaintiff was appointed as distributor. The 1st defendant challenged the existence of a binding contract in its submissions and contended that, only the 26/7/2007 offer letter was signed and that it was signed by Twin Buffalos Safaris Ltd, a third party unrelated to the 1st plaintiff. It maintained that the signing of a formal Marketing Licence Agreement was a necessary precondition to the formation of a binding contract which condition was never fulfilled by the plaintiffs.

73. The question therefore is, was there a contract or not? If not, on what basis did the parties operate and relate with each other for the period August, 2007 and March, 2010? The Halsbury's Laws of England Vol 9(1) at page 23 defines a contract implied by law as: an obligation imposed by law independently of an actual agreement between the parties. That thi may be imposed notwithstanding an expressed intention by one of the parties to the contrary.

74. It is trite that for a contract to be implied in fact, the following conditions must be met: One offer and acceptance. The actions of the parties must show that an offer was made by one party and accepted by the other. Two consideration, meaning that there must be a benefit to the promisor or a detriment to the promisee, which was bargained for. And three, the intention to create legal relations and the key terms of the contract must be sufficiently certain.

75. In G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyds Rep 25, Lord Steyn said;

> " ...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice, our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead, the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance." (Emphasis provided).

76. The Supreme Court of the United Kingdom later stated as follows in the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]: -

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated

between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement." (Emphasis provided).

77. This Court adopts the said sentiments in full. In the present case, the plaintiffs contended that pursuant to the offer letter dated 31/7/2007, the 1st plaintiff was appointed by the 1st defendant as the latter's distributor. It is uncontroverted that following the said 31/7/2007 offer letter, the 1st plaintiff took possession of the station, commenced operations thereon and was continuously supplied with fuel and other products by the 1st defendant in terms of the said letter.

78. The 1st plaintiff also remitted working capital and maintenance fees as required by the agreement in the offer letter. On its part, the 1st defendant provided point-of-sale systems (Kenserve), oversaw branding of the station and integrated the 1st plaintiff into its Bon Voyage Card system. The parties continued in the commercial relationship that they had envisaged in the offer letter, for a sustained period of time each performing the different obligations set out under the terms of the offer letter.

79. While the Court notes that the offer letter was time bound and subject to the signing of a formal Marketing Licence, the subsequent failure to execute that formal agreement, due in part to the 1st plaintiff's reservations regarding certain terms, does not in and of itself, nullify the legal efficacy of the offer letter or the relationship that emanated therefrom. The parties acted on the agreement they had entered into under that offer letter, performed their respective obligations, and each derived mutual benefit therefrom. The absence of a subsequently intended formal contract (Marketing Licence) does not in the view of this Court automatically vitiate the binding nature of the initial agreement.

80. The Court's view is that, the fact that the parties envisaged a more detailed contract to guide operations like the technical know-how, retail margins, credit terms and equipment use does not render the existing agreement unenforceable. Rather, it speaks to their desire for clarity and structure in an already subsisting relationship. Throughout the trial, there was no evidence that any of the parties sought for or insisted on the execution of the Marketing Licence. That means that, the parties were comfortable with the arrangement they were in.

81. In this case, the parties operated for a period of two years under the terms of the offer letter. The 1st plaintiff took possession of the station, sold the 1st defendant's products, was supplied with fuel and remitted payments in accordance with the agreed terms. The 1st defendant, on its part, integrated the plaintiff into its systems, provided branded materials and equipment, received payments including maintenance levies and issued operational directives. These are not acts of mere negotiation or preliminary dealings. They are acts consistent with the existence of a contractual relationship one that was partly executed and continuously reaffirmed through mutual performance. The 1st defendant's own conduct of supplying fuel and other products, accepting payment, engaging in product reimbursements and overseeing operational matters pointed objectively to an intention to be bound by the relationship as structured.

82. Accordingly, the Court finds that the failure to sign the Marketing Licence Agreement did not negate the enforceability of the terms of the earlier offer letter dated 31/7/2007, under which the 1st plaintiff commenced and sustained operations for over two years. While that letter may have been labeled "subject to contract" and was time bound, the parties' conduct demonstrates that they treated it as

binding and continued to act on it. That it formed the operative basis of their commercial relationship and the commercial transactions that they undertook inter-se.

83. The 1st defendant argued that that letter was signed by Twin Buffalos Safaris Ltd, not the plaintiff personally. However, Pw1 explained that the business, Twin Service Station, was a registered sole proprietorship under his name, and that Twin Buffalos Safaris Ltd was involved only as a financing vehicle or nominee. The 1st plaintiff was in actual possession of the premises, conducted all operations in his personal capacity, dealt directly with and remitted payments to the 1st defendant and was the point of contact in all material communication. In any event, although it was shown to be signed on behalf of the 2nd plaintiff, it was signed by the 1st plaintiff himself. No seal of the plaintiff was affixed thereon.

84. In its letter dated 29/10/2007 (page 60 of D.Exh 1), the 1st defendant addressed the 1st plaintiff personally thus:-

> " Further to your letter dated October, 26th 2007, please find attached our revised offer for dealership at Argwins Total Service Station effective 1st December, 2007 subject to fulfilling the following conditions."...

The 1st plaintiff never executed that letter but as already observed above, in paragraph 5 of its defence, the 1st defendant admitted that it had appointed the 1st plaintiff as its dealer. Further, it proceeded to hand over the station to the 1st plaintiff, dealt with him as dealer for a duration of over two (2) years on the terms and conditions set out in the offer letter.

85. This Court appreciates the cases cited by the 1st defendant on the effect of agreements that are subject to contract. However, as already stated above, the parties herein went beyond negotiations. They actually established legal relations on which they bound themselves to. They operated as entities in a contractual relationship for over 2 years. Non questioned that status until the same was dissolved in March, 2010.

86. Accordingly, the Court finds that there was a legally binding contract between the parties. The parties had carried themselves as being in a mutual contract and business relationship for 2 years. They cannot seek to rescile from that state. The terms of the relationship was clearly set out in the subject letter offer. The parties never operated in a vacuum.

87. Having found that there was a legally binding agreement between the parties, the next issue for consideration is whether there was a breach of contract. The plaintiffs' contention was that there was failure on the part of the 1st defendant to supply agreed minimum product quantities resulting in persistent stock shortages, unilateral revision of pricing and margins without the requisite notice, delayed reimbursement of Bon Voyage card payments, failure to maintain or service equipment despite collection of maintenance fees and under-delivery of fuel relative to delivery notes but billing for full quantities.

88. On the first ground of the failure to provide minimum product quantities, the plaintiffs contended that the 1st defendant failed to supply the agreed minimum quantities of fuel and related products as set out in their contractual arrangement. That this directly affected the plaintiff's ability to conduct business, fulfill customer demand and generate revenue.

89. Pw1 testified that despite the plaintiff's efforts to ensure readiness to receive and pay for the products, including the provision of a bank guarantee for Kshs 3,500,000/-, the 1st defendant repeatedly failed to deliver the minimum product quantities as required under the contract. He narrated the frequent stockouts at the station which led to customer dissatisfaction and loss of business. The plaintiff produced emails and correspondence highlighting numerous complaints to the 1st defendant about the

shortages. A comprehensive financial report prepared by Pw2, a qualified accountant, was produced which detailed losses attributed to the failure of the 1st defendant to supply agreed minimum quantities.

90. In response, the 1st defendant maintained that the plaintiff was frequently in default of payment obligations. It produced bounced cheques issued by the plaintiff and referenced letters warning the plaintiff about payment defaults. It argued that, such financial breaches justified delays or withholding of deliveries on commercial grounds.

91. On the other hand, however, the plaintiffs contended that they had consistently endeavored to meet their payment obligations, and that where delays occurred, the same was not communicated in a manner that justified withholding stock. They further asserted that the 1st defendant did not formally suspend supply or terminate the contract, nor did it provide any legitimate excuse for the persistent stock shortages.

92. I have perused the record and considered the documentary and oral testimonies of the witnesses. From the offer letter for dealership, it is evident that the plaintiff's expected monthly sales targets were clearly outlined as follows: Super petrol 250,000 litres, Diesel 90,000 litres, and Kerosene 10,000 litres, amounting to a total of 350,000 litres. It was the plaintiff's position, through the testimony of Pw1 and documentation, that the 1st defendant consistently failed to meet its supply obligations. For instance, in the email dated 5/5/2008, the plaintiff categorically informed the 1st defendant that he had not been supplied with fuel and had completely run dry of products over the weekend. The was no response nor any explanation that came from the 1st defendant.

93. The tone of the email highlighted the urgency of the matter and referred to a growing concern that this pattern had become routine. This email was not an isolated piece of communication as it reflected a trend evident across several correspondences in 2008 that extended to 2009, all of which echoed the same concern, the recurring fuel (product) shortages that severely undermined the plaintiff's ability to operate the station effectively.

94. Further, the plaintiffs pointed out that these shortages were not due to any delay or failure on their part to make payments. That they had provided a bank guarantee for Kshs 3,500,000/- to secure working capital and cushion the 1st defendant against default. The 1st defendant did not produce any evidence to counter the plaintiffs' allegations.

95. The 1st defendant argued that the plaintiffs had issued bounced cheques and had financial instability. This contention alone cannot absolve the 1st defendant of its supply obligations. There was no condition in the offer letter that products would be withheld for non-payment notwithstanding the currency of the guarantee. No explanation was given why a sum of Kshs.3.5 million would be tied perpetually in a guarantee, if not to safeguard the 1st defendant from default.

96. Further, the documentary evidence shows that even when deliveries were made, they were often less than the quantities reflected on delivery notes, an allegation which the 1st defendant did not effectively rebut. In light of the above, I am persuaded that the plaintiffs established, on a balance of probabilities, that the 1st defendant breached its obligation to supply fuel in accordance with the agreed minimum quantities.

97. On the second ground, the plaintiff contended that there was unilateral revision of pricing and margins without requisite notice. According to the plaintiffs, the 1st defendant engaged in a practice of unilaterally revising fuel pricing and altering the retail margins without giving the requisite notice, thereby violating the terms of the agreement and causing financial losses. It was the plaintiffs' case that the agreement contemplated a structured commercial relationship in which price revisions were to be communicated with reasonable prior notice.

98. Pw1 testified that, he was caught off-guard on numerous occasions by abrupt changes in fuel prices and reduction of dealer margins. This, he asserted, disrupted the station's financial planning and cash flow. He contended that had proper notice been given, he would have restructured his procurement, pricing and sales strategies to mitigate loss.

99. This position was not seriously disputed by the 1st defendant and it did not deny that on many occasions, changes were implemented with short or no notice at all. Instead, it maintained that it operated within a commercial environment governed by market forces, and was within its rights to adjust prices in response to shifts in global and local supply dynamics.

100. On this issue, it is undeniable that fuel pricing is to some extent influenced by external factors including taxation, global oil prices and also fuel shortage globally. The Court notes that this is not a case where the plaintiffs dispute that the 1st defendant retained that right, rather that there was an expectation that the 1st defendant will trade fairly and in this regard give adequate notice to the dealers where possible, to find ways of cushioning the impact of price fluctuations. While the Court notes that this would amount to a breach of good faith and commercial practice for predictable business environment, it cannot be termed as breach of contract as there was no such express condition in the offer letter.

101. There was an issue raised with respect to delayed reimbursement of Bon Voyage Card payments. The plaintiffs claimed that the 1st defendant persistently delayed in reimbursing payments made by customers using the Bon Voyage fuel card. According to the plaintiffs, these delays extended up to two weeks, which adversely affected their operational cash flow, given that fuel sales constituted their primary source of revenue.

102. In support of this claim, Pw1 testified that although customers made payments to the service station using the Bon Voyage Card, a system wholly controlled and managed by the 1st defendant, the funds would not be credited to the plaintiffs' account in real time. Instead, there were material delays, sometimes of up to 14 days, despite the fact that the plaintiffs had already incurred the cost of the product and associated overheads. Pw1 further testified that these delays hindered restocking, affected cash liquidity and contributed to operational instability.

103. From the evidence adduced, including the plaintiffs' business records and correspondence, it is clear that the Bon Voyage reimbursements were critical to the plaintiffs' cash flow model and it cannot be denied that delays in processing the reimbursement thereof materially affected the plaintiffs' ability to maintain business continuity.

104. Although the 1st defendant attempted to contextualize these delays within the broader issue of the plaintiff's indebtedness, this did not displace the obligation to process legitimate reimbursements within a reasonable period. The plaintiffs, as a downstream distributor, relied on prompt remittance of proceeds from fuel card transactions to maintain their working capital. The Court notes that no clear evidence was adduced to show that the plaintiffs had agreed to such extended settlement periods, nor was any contractual justification given to treat the plaintiffs' receivables under the Bon Voyage scheme as collateral for any outstanding debts.

105. The Court finds that the unexplained and repeated delays in Bon Voyage reimbursements so much adversely affected the plaintiffs. This is but because of the business environment in which the parties operated in, the 1st defendant calling the shots! Be there as it may, there was no evidence to show the timelines that was agreed between the parties for the re-imbursement to take place.

106. Failure to maintain or service equipment despite collection of maintenance fees. Under the agreement, the plaintiffs contended that they were contractually obligated to pay a maintenance fee of 0.23% per

litre of fuel sold, which they did diligently throughout the subsistence of their relationship with the 1st defendant. That despite this, the 1st defendant allegedly failed to fulfill its responsibility to maintain and service the station's equipment, leading to operational inefficiencies and financial loss.

107. In support of this claim, Pw2, testified that the equipment at the service station frequently broke down and was not attended to in a timely manner. The plaintiffs further provided documentary evidence, including service requests and correspondences with the 1st defendant requesting repairs of dispensers, fuel meters and other key infrastructure. The 1st defendant submitted that there was no contractual target earnings for the carwash, the convenience shop, tyre center lubes, LPG and Pit shop. Notably, the 1st defendant did not materially contest the accuracy of the maintenance fee deductions or the fact that it had received such payments but failed to undertake effective, dedicated and sufficient maintenance.

108. In Transnational Computer Technology (Kenya) Ltd v Principal Secretary, the National Treasury & Planning & 2 others (Civil Suit E321 of 2022) [2024] KEHC 2472 (KLR) (Commercial and Tax) (8 March 2024) (Judgment), the court held:-

> " An implied contract is distinguished from an express contract by its formation, which is through the behavior and interactions of the involved parties rather than explicit written agreements. An implied-in-fact contract is inferred from the situation, conduct, activities, or established relationship between the parties, demonstrating a collective intent to form a contract. Conversely, implied-in-law contracts, or quasi-contracts, are not genuine contracts per se but are duties enforced by law to rectify instances of unjust enrichment. The Halsbury's Laws of England Vol 9(1) at pg 23 defines a contract implied by law as: an obligation imposed by law independently of an actual agreement between the parties and may be imposed notwithstanding an expressed intention by one of the parties to the contrary.
>
> In other words, if the plaintiff performed work under the reasonable belief that they were acting within the scope of a contract, and the defendants benefited from this work without an intention to compensate, the principles of reliance and unjust enrichment could support the existence of an implied contract. This was echoed in Lamb V Evans, (1893) 1 Ch 218 where the Court stated that: '... What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile'."

109. In this case, there was an obligation to pay a service charge of 0.23 cents per litre under the letter of offer that triggered off the commercial relationship between these parties. That payment of maintenance fees was religiously made during the currency of the commercial relationship between the parties. That fact was neither denied nor challenged at the trial.

110. It is clear that the payment of maintenance fees by the plaintiffs created a legitimate expectation of reciprocal maintenance services by the 1st defendant. Whether this is interpreted as an express contractual term or an implied obligation grounded on principles of reliance and fairness, the legal outcome remains the same, that the 1st defendant had a duty to ensure the functionality of the essential business equipment. Both equity and law will frown upon a party in a commercial transaction who derives a benefit from another out of its representation and while on its part it intends to unjustly enrich itself without paying therefor.

111. Additionally, it came out clear that the 1st plaintiff was not at liberty to engage independent technicians or service providers to maintain the equipment. There was no autonomy in the maintenance of the

equipment and this, combined with the 1st defendant's inaction, despite continued collection of fees, created a scenario where the plaintiffs suffered unjust loss while the 1st defendant was unjustly enriched, in direct violation of fair commercial practice. Neither equity nor the law will countenance that. The Court finds that the 1st defendant breached its contractual and implied obligations by failing to maintain and service the dealership's equipment, despite receiving specific fees earmarked for that very purpose.

112. The plaintiffs further questioned the efficacy and security of the Kenserve system a point-of-sale and inventory management software mandated by the 1st defendant to be used at the service station. According to the plaintiffs, this system was vulnerable and allowed manipulation by rogue employees, leading to substantial theft and financial loss. The plaintiffs maintained that despite repeated complaints, the 1st defendant refused to permit the installation of an alternative or customized system that could have provided better safeguards and user-level controls.

113. In his testimony, Pw1 stated that although he was designated as the "super-user" of the Kenserve system, the 1st defendant still retained operational control over configuration, updates and user credential allocation. He attributed a loss of Kshs. 4,628,975/- to internal theft, facilitated through the manipulation of the Kenserve system by dishonest staff who colluded to underreport sales, misappropriate stock and manipulate cash collections.

114. He contended that had the 1st defendant allowed the installation of an alternative system with improved audit trails and access logs, these losses could have been mitigated. In support, he produced internal audit reports, employee disciplinary letters and correspondence with the 1st defendant seeking system updates and stronger controls.

115. On its part, the 1st defendant denied liability submitting that, the system had been standardized across its network for uniformity. It further contended that the plaintiffs were solely responsible for managing their staff and internal controls and had retained full administrative rights over the system and failed to implement adequate safeguards. It also denied having access to passwords, daily operations or the internal cash management processes of the plaintiffs. The 1st defendant's witnesses, Wycliffe Nyongesa (Dw2) and Josphat Koech (Dw4), testified that the system was functioning as designed and that training had been provided. They maintained that the theft was purely an internal matter and the 1st defendant could not be held accountable for criminal actions of the plaintiffs' staff.

116. From the outset, it is not in dispute that the plaintiff's dealership suffered substantial losses due to internal theft. However, the central legal issue is whether the 1st defendant owed a duty of care or contractual obligation in relation to the performance and suitability of the Kenserve system and whether the refusal to permit an alternative system amounted to a breach.

117. The Court is guided by the principle set out in Donoghue v Stevenson [1932] AC 562, and extended in contractual contexts under Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465. These two establish that where a party voluntarily assumes responsibility and the other party relies on that assumption, a duty of care may arise.

118. In the present case, while the 1st defendant may not have operated the system on a daily basis, it mandated the use of Kenserve and denied requests for alternate systems, thereby assuming responsibility for the system's baseline integrity and suitability. The refusal to permit alternatives, especially when specific vulnerabilities were highlighted and communicated by the plaintiffs to it, suggests a degree of control inconsistent with the position that the dealer operated independently in this regard.

119. Applying these principles, the Court finds that an implied duty existed on the part of the 1st defendant to ensure that the mandated system was reasonably secure and fit for purpose. That the 1st defendant's refusal to accommodate modifications, replacement or an alternative, despite repeated complaints, contributed to the plaintiffs sustained losses.

120. Having found that a valid and enforceable contract existed between the parties and that there had been breaches as set out above, namely; failure to supply minimum product quantities, failure to service or maintain equipment despite collection of maintenance fees, delayed reimbursement of Bon Voyage Card payments and liability in the manipulation-related losses tied to the mandated Kenserve system, the Court must now determine whether the plaintiffs are entitled to the reliefs sought in the Re-Amended plaint.

121. The plaintiffs sought a total sums of Kshs 83,041,133.51 and Kshs 61,460,012/- being losses suffered as a result of the breaches and the value of loss of business suffered by the plaintiffs as pleaded. In support of the claims, Pw2, a professional accountant, prepared a comprehensive financial report quantifying the alleged losses. This report itemized damages under various heads including under-delivery of product, fuel shortages, lost profits from the convenience store and service bays, losses due to maintenance failures and system-related losses.

122. On its part, the 1st defendant disputed the figures and methodology, contending that the data was self-generated, unverifiable and based on projections rather than audited results. Nevertheless, two competing financial analyses were presented: one by the plaintiffs and another assessment by the 1st defendant's witness. However, for the latter, it was on one item only, value of lost business. None was presented on the rest of the claims.

123. The plaintiffs claimed various sums under various heads. It is our law that special damages ought to be specifically pleaded and strictly proved. See Han vs Singh [1985] KECA 129 (KLR). In the present case, the claims were specifically pleaded and therefore required to be strictly proved.

124. At the same time, the burden of proof lies on whom who seeks aid of the law. In Ann Wambui Ndiritu vs Joseph Kiprono Ropkoi [2005] 1 EA, the Court of Appeal held: -

> "As a general proposition under section 107(1) of the *Evidence Act*, Cap 80 the burden of proof lies upon the party who invokes the aid of the law and substantially assets the affirmative of the issue. There is however, the evidential burden that in case upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in section 109 and 112 of the Act."

125. In this regard, while the legal burden of proof at all time lies on the claimant, the evidential burden keeps on shifting and swinging like a pendulum. That is, if a plaintiff establishes some factual circumstances, the evidential burden shifts to the defendant to displace the same. If the defendant discharges the same, the evidential burden shifts back to plaintiff. Liability finally lies where the evidential burden lies and it not discharged.

a. Claim of loss of profit upon Business Valuation.

126. In support of their claim for special damages, the plaintiff called Pw2, an accountant who testified as an expert witness. In rebuttal, the 1st defendant also called D1w5, also an accountant, who also testified as an expert witness.

127. In Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR, it was held: -

> " While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.
>
> Four consequences flow from this. Firstly, expert evidence does not 'trump all other evidence.' It is axiomatic that Judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. Secondly, a Judge must not consider expert evidence in a vacuum. It should not therefore be 'artificially separated' from the rest of the evidence. To do so is a structural failing.
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> A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its view on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence. Thirdly, where there is conflicting expert opinion, a judge should rest it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred. Fourthly, a Judge should consider all the evidence in the case, including that of the expert, before making any findings of fact, even provisional ones.
>
> A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd vs Minories Finance Ltd & Another. Jacob J. observed that what really mattered in most cases was the reason given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence set out both the opinion and the reasons for it. The Judge pithily commented "If the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning."

128. It is clear from the foregoing that an experts evidence is just an opinion. It must be based on material facts that are verifiable. That expert evidence must be juxtaposed with or must be considered alongside other evidence on record. For it to be relied on, it must have a basis and must give reasons therefor. It cannot be considered in a vacuum.

129. In the present case, Pw2 did a comprehensive report on all the claims by the plaintiffs. His report was produced at pages 257 to 501 of P. Exh1. It was dated 16/10/2012. He reviewed all the claims set forth by the plaintiffs before he returned his opinion. He stated that before preparing his report, he examined the records kept by the plaintiffs and set them out specifically in his report against each claim. He also reviewed the offer letter of 31/7/2007 amongst other documents.

130. As already stated, the 1st defendant did not leave that testimony unchallenged. It paraded D1w5 in rebuttal. He produced his Business Valuation and Audit Report Analysis as evidence. The same was

produced at pages 298 to 478 of D.Exh1. However, the same was only limited to the claim for loss of profits on the business valuation and did not extend to the other claims.

131. In his testimony, Pw2 stated that his instructions were to carry out an assessment and to a valuation of the plaintiff's business as of 2008 to enable them lodge a claim of business loss and other damages as a result of breach of contract between the plaintiffs and the 1st defendant. He was to do a fair and a reasonable value of business of the plaintiffs and determine the likely loss after the collapse of the business in 2010.

132. He told the Court that he used Capitalization Rate and Capital Asset Pricing Model method in his valuation. After considering the documentation availed to him by the plaintiffs, he assessed both the valuations for expected performance had the contract been executed as agreed in the agreement of July, 2007 and one based on actual performance (pages 311 and 312 P.Exh1). In his conclusion (page 481 P.Exh1), he assessed the loss suffered by the plaintiffs as a result of the failed venture to be Kshs.61,460,012/-.

133. It should be recalled that this loss was arrived at on the basis of what the Court has already found that the 1st defendant was in breach of its obligations i.e failure to properly undertake, carry out and execute its obligations as expected under the agreement between itself and the plaintiffs.

134. As stated, D1w5 produced his undated reports at pages 298 to 478 D.Exh1. A look at the said report shows that, D1w5 agreed with the method used by Pw2. However, the point of departure is that in arriving at the loss suffered, D1w5 opined that Pw2 should not have used the expected performance but the actual performance. D1w5 used documents that showed how the plaintiff's business had performed poorly. He used the statements prepared by Mashimba & Associates for 2008 and 2009 to arrive at his negative value for the business.

135. The view that this Court takes is that, D1w5 was mistaken. He did not get out to assess the plaintiff's claim. He went out to value what the plaintiff's value was in the prevailing circumstances. The case before Court by the plaintiffs as understood by the Court was that; "there was a set of conditions, environment and business arrangements we had agreed and arrived at with the 1st defendant. While we performed our part of the bargain, the 1st defendant reneged and/or failed to act as required under that arrangement as a result of which we have suffered loss. Some of the breaches committed by the 1st defendant are failure to supply the minimum agreed products, supplying less products than those ordered and paid for, failure to service or maintain the equipment although we paid and the 1st defendant received cents 0.23 per litre therefor, delayed disbursement of Bon Voyage Card payments, insisting on a manipulable Kenserve system which led us to suffer loss. These breaches made it impossible for us to attain what was the expected returns for our investment. As a result of these failure and breaches, we closed down our business whose value would have been Kshs.61,460,012/- were it not for the breaches complained of." That then was the plaintiff's case.

136. The report/valuation by D1w5 did not focus on the dispute before Court. It sought to critique Pw2's valuation based on wrong assumptions. The assumption was that, the prevailing circumstances is what the parties had agreed upon and dealt at with each other. That was a misdirection which led to a wrong conclusion.

137. Accordingly, the evidence of D1w5 was wrong and that of Pw2 is preferable as far as the plaintiffs' case and the claim before Court is concerned. The latter focused on the claim before Court and is therefore supportable by evidence, the Court having found that the 1st defendant was in breach of various aspects of the contract between it and the plaintiffs. It was upon the plaintiffs to prove, which they did, that the loss suffered on this claim was attributed to nothing else but the 1st defendant's acts.

138. In this regard, the Court finds that the plaintiffs were able to prove this claim of the value of the business that collapsed as a result of the breaches to Kshs.61,460,012/- and awards the same.

139. As already stated, Pw2 produced a report on all the claims made by the plaintiffs. D1w5 only challenged the claim on business valuation. He did not challenge the other claims. Neither did he comment on them. Those claims were only challenged and/or commented on by the other defence witnesses.

140. From the outset, the Court observes that to the extent that the 1st defendant sought to challenge the plaintiffs' claims based on the unsigned Marketing License, that challenge cannot stand. This is so because, not only was it unsigned but Pw1 was categorical that he refused to sign it because he objected to its one sidedness. Further, it came out clear during the trial that, the commercial transactions between the parties was not based on the Marketing Licence but on the offer letters. At no point did the 1st defendant refer to the said Marketing Licence during the currency of the business relationship between the parties.

b) Claim on losses due to lack of stocks – Kshs.18,736,211.48.

141. Both Pw1 and Pw2 gave detailed explanation on how this claim was arrived at. The offer letter clearly set out the minimum product sales for the plaintiffs. The plaintiffs deposited a working capital of between Kshs.10 and 15 million. They gave a guarantee (that was recallable without notice or prove of default) of Kshs.3.5 million. The latter was supposed to caution the 1st defendant from any default on the part of the plaintiffs. That was money that was tied in the bank, Cooperative Bank, for the comfort of the 1st defendant that, in the event that there was any default on the part of the 1st plaintiff, the 1st defendant would recover the same from the guarantee by recalling the same.

142. There was prove that severally, the plaintiffs complained to the 1st defendant of the lack of products or for short landed products. The answer by the 1st defendant was that the plaintiffs had not paid for the products due to bounced cheques. The Court finds that there was no sufficient evidence that when the plaintiffs complained of these ills the 1st defendant wrote back and cited lack of payment or bounced cheques at that time at the reason. This reason was only raised at the trial without any evidence to back it. There were bounced cheques but the lack of supply of products and short landing of products was so frequent even when no cheques had bounced.

143. In any event, there was no evidence that the bounced cheques at any time exceeded the sum of Kshs.3.5 million guaranteed. That was an amount that was already out of pocket of the plaintiffs to give comfort to the 1st defendant that it would recover its money in case of any default. The testimony of Pw2 on this was not challenged or rebutted. The loss was assessed by Pw2 as being Kshs.18,736,211.48.

144. Accordingly, the Court finds that this claim was proved to the required standard. The sum of Kshs.18,736,211.48 assessed by Pw2 is payable.

c) Claim on losses due to change in retail prices Kshs.995,249.46.

145. The plaintiffs case was that the 1st defendant gave no notice when there was change in retail prices leading to losses in the sum of Kshs.995,249,46. As already found hereinabove, the Court agreed with the 1st defendant that due to other forces outside its control, of the 1st defendant the prices of the fuel is volatile. That the evidence tendered by the 1st defendant through D1w1 was compelling that it was not the making of the 1st defendant, but the nature of the business that there is volatility on oil pricing. In any event, the plaintiffs could not prove that there was an agreement on notice before change in prices. The clam fails.

d) Claim on interest on sales through Bon Voyage Cards – Kshs.874,727.41.

146. It was Pw1's testimony that payments made through the 1st defendant's Bon Voyage Cards took up to 14 days to be reimbursed. That this affected his cash flow. The 1st defendant's answer was that sometimes these monies were withheld to offset past debts like the bounced cheques.

147. For this Court, there was no evidence that was tendered by the plaintiffs to show that there were timelines set or agreed for the refund of these payments. That the 1st defendant breached those timelines. The offer letters relied on for the commercial relationship that ensued and was pursued by the parties during the time in question, had no provision about timelines on Bon Voyage Card payments. This claim therefore fails.

e) Claim of losses due to equipment downtime – Kshs.52,149,072/-.

148. The plaintiff's contention was that all the equipment at the Station remained the property of the 1st defendant. That the 1st defendant was solely responsible for their repairs and maintenance. That the plaintiffs could not replace or maintain them. That for such maintenance, the plaintiffs were liable to pay and indeed paid the 1st defendant 0.23 cents of each litre of fuel supplied. This was not denied or contested by the 1st defendant.

149. At page 107 of P. Exh1, the plaintiff produced the 1st defendant's Service Stations Quality Procedures. The same provided that it was the 1st defendant's Maintenance Engineers who were responsible for maintenance service of the equipment at the service station. This fact was also not denied.

150. The plaintiffs then produced from pages 108 to 208 P.Exh1 evidence of communication evidencing various breakdowns at the Station that required maintenance. They also produced evidence through emails, date entries amongst others as testified by Pw2's report to show the resulting losses.

151. To this, the 1st defendant, while admitting that it was responsible for the maintenance of equipment, contended that it diligently undertook the maintenance as and when called upon. It produced at pages 147 to 266 – D.Exh1 Service/Repair Call list for Argwins Service Station, the subject Station. The call logs showed the details when the calls were made and the duration taken to respond to the same.

152. Attached to the said Call logs were the Maintenance Reports for the Station. The Court considered all the said reports and concluded that while the 1st defendant's technicians attended to the maintenance needs at the Station, the breakdowns were so frequent to sustain any predictable business for a properly maintained Station. They were too frequent for a smooth running of a business.

153. Further, in most of the reports, it was clear that there were recommendations that were made by the 1st defendant's own technicians on how to rectify the problems. However, there was no corresponding evidence to show that the recommendations were ever acted upon. It is apt to give a few examples as follows for context: -

    i. Page 163. The work done was "Calibration check for all dispensers" – The remarks were; "We have been instructed to suspend our our (sic) operations (calibration until further notice)". This was on 23/1/2008.

    ii. Page 164 – 22/1/2008 – Compressor faulty. "Found the compressor outlet pipe burst." "Replaced it back but it's too old needs to be replaced."

    iii. Page 173 – 21/2/2008 – Checked and replaced a faulty delivery hose for AGO. "AGO hose to be replaced."

iv. Page 174 – 21/2/2008 – Taken faulty Air Compressor head for repairs. "Compressor not running normally."

v. Pages 180-181- Ulg pump over issuing. Found the Nozzle for Ulg leaking seriously even when not in use. Interchanged the (sic) from the other pump tested ok. '3/4' delivery Nozzle required."

vi. A sample of similar issues were at pages 184, 189, 197, 205, 209, 221, 231 e.t.c of D. Exh1.

154. Without any evidence to show that the recommendations made by the 1st defendant's own tenchicians were attended to or complied with or when they were complied with, the evidential burden of proof still remained with the 1st defendant and that was not discharged. It meant that the defaults continued to persist thus resulting in the losses complained of. The Court finds that this claim was proved to the required standard.

f) Claim of losses due to manipulation of Computer system – Kshs.4,649,704.97.

155. On Kenserve Systems, D1w2 testified on data and information that was neither in his witness statement nor report. It was not contained in the documents that were exchanged. Mr. Nyachoti Advocate for the plaintiff objected to the same while Ms. Mbuguah Learned Counsel for the 1st defendant submitted that the issue of Kenserve Computer System was introduced in the Further Amended Plaint at page 242 of P. Exh1. That this prompted the 1st defendant to put the manual in its bundle of documents in 2012.

156. I allowed D1w2 to lead the evidence he had and directed that the Court will rule on the objection by Mr. Nyachoti in the judgment whether to disallow the same or not. Having considered the 1st defendants bundle of documents, I find that the objection was without basis and I dismiss the same. The evidence adduced by D1w2 was proper and could be considered and taken into account in considering the claim.

157. It was the plaintiff's contention that they were directed and mandated only to operate using the 1st defendant's computer programs and software. It was the POS Kenserve Accounting System installed and maintained by the 1st defendant. That passwords were given to cashiers, the supervisor and Pw1. However, it turned out that the system was manipulable by the cashiers by which time the plaintiff had lost Kshs.4,649,704.97.

158. The 1st defendant denied this claim and paraded D1w2 and D1w4. The two testified that the system was secure and not susceptible to manipulation. However, they would not explain how the lowest cadre of users of the system, the cashiers could manipulate the data, prices and stocks and inflict huge losses on the 1st plaintiff.

159. The Court's view is that, the moment the 1st defendant restricted its dealer to the use of its system, it guaranteed its safety and security. Although the 1st defendant contended that the said losses were sheer theft by the plaintiff's employees, it could not explain why such theft could be achieved by use of its own system if it was secure as it contended. It admitted that it retained the system for uniformity and for daily monitoring. What is daily monitoring if it is not being in control of the system? The conclusion is that the 1st defendant retained control of the system so that it could monitor the business of the plaintiffs.

160. To this Court's mind, the 1st defendant was liable for supplying and maintaining a manipulable POS system which resulted in the loss of Kshs.4,649,704.79 for the 1st plaintiff . The loss was proved by Pw2. The claim is payable.

g) Claim of losses due to faulty calibrated fuel tankers and short landing – Kshs.2,302,573.47.

161. It was the plaintiffs' contention that this claim was two-fold, loss due to use of faulty calibrated fuel tankers, leakages at the pumps and underground tanks and secondly, short landed fuel. That the fuel supplied was lesser than the fuel billed for. It was contended that in most cases, the quantity of the fuel noted in the delivery notes was less than that which was noted by KRA for VAT purposed at the gate before leaving the 1st defendant's storage facilities and ultimately the quantity that was offloaded unto the station's underground tanks. Evidence of the same was provided. That there were leakages on the underground tanks which led to lost fuel.

162. Liability having been established as aforesaid, the plaintiffs, through Pw2 tabulated the losses in his report at pages 170 to 271 P.Exh1. He crystalized the losses at Kshs.2,302,575.47. In his testimony, D1w2 did not challenge these figures. Accordingly, the claim was proved and is recoverable.

h) Claim of value of stocks and credit notes – Kshs.3,333,592.72.

163. It was the plaintiffs' contention that on 20/3/2010, the 1st defendant took over the Station with all the stocks of fuel and other petroleum products unpaid Bounjour overheads and credit notes due all totaling Kshs.3,333,592.72. That the 1st defendant did a unilateral reconciliation and demanded from the plaintiffs Kshs.1,970,131.35 to which they objected. That since there was no joint reconciliation the claim by the 1st defendant was not payable but rather the 1st defendant was liable for the claim for Kshs.3,333,592.72.

164. On its part, the 1st defendant through D1w1 told the Court that, the stock taking was done jointly. That after stock taking, a figure was arrived at which was credited to the plaintiff's account. At Page 138 D.Exh1, a sum of Kshs.2,298,009.61 was credited to the plaintiff's account on 31/5/2010. That there were no credit notes that had not been credited as at the time of take over.

165. The Court has considered the evidence on record, the testimonies of Pw1, Pw2 and D1w2 and the documents relied on. It is clear that the bulk of this claim was the alleged value of the stock amounting to Kshs.2,298,009.61. This was credited to the plaintiffs account on 31/5/2010. This is clearly shown in the statement of account dated 30/9/2010 at page 138 of D.Exh1. That being the case, the Court finds that that part of the claim and even the balance of the claim of outstanding credit notes was not proved. Accordingly, this claim fails.

166. The last issue is whether the 1st defendant is entitled to its counterclaim. The 1st defendant did not lead any evidence to prove this claim. It is not in dispute that it recalled the Guarantee and paid itself in full. That is why the suit against the 2nd defendant was compromised. The same was not proved and is therefore hereby dismissed with costs.

167. Accordingly, I find that the plaintiffs have proved their case on liability to the required standard.

168. They have also proved several of their claims which the Court has allowed as aforestated totaling Kshs.139,279,574/97.

169. Judgment is hereby entered for the plaintiffs against the 1st defendant for a total sum of Kshs.139,279,574/97 together with interest thereon at court rate from the date of the suit until payment in full. Prayer Nos. (i)(a), (c), (e), (ii) (a) are declined. The 1st defendant's counterclaim is dismissed. The costs of the suit and counterclaim are awarded to the plaintiff in any event.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025**.

A. MABEYA, FCI Arb

DIVISION - JUDGE