

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 306 OF 2016**

**HON. JUSTICE ALEEM VISRAM**

**4<sup>TH</sup> DECEMBER, 2025**

**BETWEEN**

**JOHNGRAY COMMUNICATION LIMITED.....PLAINTIFF**

**VERSUS**

**GC RETAIL LIMITED..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. This dispute concerns a commercialisation arrangement at the Garden City Mall on Thika Road, Nairobi. The Plaintiff, JohnGray Communication Limited, contends that it entered into a partly written and partly implied agreement with the Defendant, GC Retail Limited, to provide commercialisation services for a five-year period. These included generating revenue from non-gross leasable areas, managing internal and external signage, and organising events and activations. The Defendant disputes the existence of any agreement beyond the

Memorandum of Understanding (MOU) dated 25<sup>th</sup> May, 2015, and denies breaching its obligations.

2. The Plaintiff seeks special damages of Kshs. 76,328,824.07/=, or in the alternative, restitution for value of services rendered, interest, and general damages for alleged loss of reputation. The Defendant, through its Amended Defence and Counterclaim dated 24<sup>th</sup> June, 2022, seeks commissions it claims were withheld, totalling Kshs. 16,978,640.00/=, together with interest and costs.
3. The court heard viva voce evidence from each side. The Plaintiff called its Managing Director, Dr. John Kimani Muthami (PW1), while the Defendant called its Leasing Manager, Ms. Keren Tito (DW1). Both parties produced extensive documentary exhibits.
4. I have considered the pleadings, evidence, submissions, and the applicable law.

**Issues for Determination**

5. The parties placed before the court a combined list of issues which, distilled, require determination of the following: -
  - a. Whether the parties entered into a binding commercialisation contract, and if so, its nature and operative terms?

- b. Whether the Defendant breached that contract in the manner it terminated the relationship on 1<sup>st</sup> March, 2016?
- c. Whether the Plaintiff proved its special damages claim of Kshs. 76,328,824.07/=?
- d. Whether the Plaintiff is entitled to general damages for loss of reputation?
- e. Whether the Defendant has proved its Counterclaim and, if so, to what extent?

### **Analysis and Determination**

6. As this is a civil claim, the standard of proof is on a balance of probabilities. The principle is well stated in *Miller v Minister of Pensions* [1947] 2 All ER 372, where Denning, J. (as he was at the time) held that if the tribunal is satisfied that the version of the party bearing the burden of proof is more probable than not, the burden is discharged; otherwise, it fails.
7. Sections 107 and 108 of the Evidence Act (Cap 80) reinforce that position. Whoever desires a court to find in their favour must prove the facts asserted. Kenyan courts have consistently applied this principle, including in *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR).

**Whether a Binding Contract Existed**

8. The parties agree that there was a commercialisation relationship. The point of departure is whether the relationship was governed solely by the MOU dated 25<sup>th</sup> May, 2015, as the Defendant insists, or whether the operative agreement arose partly through conduct and earlier communications prior to the MOU.
9. The documentary evidence demonstrates that long before the MOU was executed, the Plaintiff had begun substantive preparatory work at the Mall. Emails between 20<sup>th</sup> and 26<sup>th</sup> April, 2015, show that the Plaintiff was already preparing revenue models, capital expenditure projections, pricing structures, and identifying advertising sites. The Defendant's CEO was actively directing this work, demanding projections, and assigning deadlines.
10. PW1 testified, and under cross-examination maintained, that the Plaintiff was already operating on site as early as December 2014, designing and setting up the commercialisation framework. He stated that the MOU "formalised" existing arrangements rather than creating them anew. The contemporaneous emails support this assertion.
11. From the evidence, I find that the agreement between the parties was partly written and partly implied from conduct. The MOU captured the formal terms

but did not constitute the genesis of the parties' engagement. Their commercial relationship predated it.

12. I therefore find that there was a binding agreement, partly written and partly by conduct, governing the commercialisation services.

**Whether the Defendant Breached the Agreement**

13. It is common ground that the Defendant communicated termination of the relationship by the email dated 1<sup>st</sup> March, 2016. The MOU, at Clause 7, permits termination in only two scenarios: -

- a. **where events beyond the control of either party impede performance; or**
- b. **where a party fails to fulfil its obligations, but only after issuance of a 14-day notice to remedy.**

14. PW1 testified that no notice to remedy was ever issued. Under cross-examination, DW1 expressly admitted that: -the 1<sup>st</sup> March, 2016, email gave no reasons; the email did not cite breach, force majeure, or any contractual ground; the termination stated it was "effective immediately"; and the MOU required a 14-day notice period, which was not followed.

15. The email itself contains no allegation of breach. It merely states that commercialisation "will be handled internally" and that the Plaintiff's staff were

no longer required in the premises. That is an operational instruction, not a termination compliant with the requirements set out in Clause 7.

**16.** In *City Clock (K) Ltd v Kenya Wine Agencies Ltd [2018] KEHC 10201 (KLR)*, Tuiyott J (as he then was) held that where a contract provides specific mechanisms for termination, failure to adhere to those mechanisms constitutes breach.

**17.** Applying that principle, I find that the Defendant's unilateral and immediate termination of the agreement, without notice, without invoking the permitted grounds, and without opportunity to remedy, constituted breach of contract.

**Whether the Plaintiff Proved Special Damages**

**18.** Having established breach of contract, the Plaintiff must nevertheless go further and demonstrate the loss actually suffered. Damages do not arise as a matter of course upon proof of breach. The court is only able to award damages where the Plaintiff proves the fact and quantum of loss on a balance of probabilities. This position is consistent with settled principle that damages are compensatory and must be anchored in evidence of actual loss.

**19.** The Plaintiff pleaded special damages totalling Kshs. 76,328,824.07/= under various heads. Special damages must be specifically pleaded and strictly proved.

This is a long-settled principle, recently affirmed by the Court of Appeal in *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevams Limited* [2015] KECA 822 (KLR), which held that only receipts or invoices endorsed “paid” constitute sufficient proof.

**(a) Human Resource Costs – Kshs. 14,354,400/=**

20. Although PW1 produced digital payroll records, he conceded under cross-examination that no bank statements, payment vouchers, or acknowledged payslips were provided. The MOU at Clause 3 placed staff costs on the Plaintiff. The employment contracts produced show the employees were stationed at Regina Pacis, not exclusively at the Mall.
21. The claim was not proved.

**(b) CAPEX – Kshs. 8,747,704/=**

22. The principal document relied on was a proforma invoice. As held in *Total (Kenya) (supra)*, a proforma invoice is not proof of expenditure. PW1 conceded that some infrastructure was erected by tenants or the Mall developer.
23. This head fails for want of proof.

**(c) City Council Licence Fees – Kshs. 2,934,849.22/=**

24. Despite extensive documentary exhibits, no receipt, bank entry, or invoice expressly referencing City Council fees or the pleaded amount was produced. PW1 conceded as much.

25. This claim also fails.

**(d) Revenue from Samsung and Stanbic Contracts**

26. For Samsung, the Defendant produced an email from the Plaintiff's Advocate dated 20<sup>th</sup> February, 2017, acknowledging receipt of Samsung payments and asserting that the Defendant's commission had been settled on all funds received. This is an admission of receipt by the Plaintiff.

27. Under the MOU, the Plaintiff collected revenue from clients and remitted the Defendant's share. The Plaintiff cannot claim revenue from funds already received and admitted.

28. For Stanbic, PW1 admitted the contract was negotiated directly between the Plaintiff and Stanbic, with no evidence that the Defendant was paid or entitled to any share. There is therefore no evidential basis for claiming revenue share against the Defendant.

29. Both claims fail.

**(e) Revenue withheld by clients – Kshs. 7,412,520/=**

30. The Plaintiff alleges clients withheld payments because of the Defendant's instructions. No evidence was produced showing specific clients, amounts withheld, or causation.

31. Therefore, this claim is unproved.

**(f) Revenue from cancelled contracts – Kshs. 27,519,350.85/=**

32. The Plaintiff referred to promotional sheets and LPOs. PW1 conceded that many of these were internal documents left on-site after the Plaintiff lost access. The Plaintiff did not produce executed contracts or client payment records to substantiate this claim.

33. This claim too fails.

**Finding on Special Damages**

34. None of the pleaded special damages was proved to the strict standard required.

The entire claim for Kshs. 76,328,824.07/= therefore fails.

**Whether the Plaintiff Proved Loss of Reputation**

35. The Plaintiff sought Kshs. 20 Million in general damages, relying on *Hydro Water Well (K) Ltd v Sechere & Others [2021] KEHC 22 (KLR)*. That case confirms that breach of contract may ground damages where loss is shown.

36. Here, however: The Plaintiff was permitted by the consent order of 1 August 2016 to complete existing contracts. PW1 admitted all those payments were received. No evidence was tendered of reputational injury or loss attributable to the Defendant.

37. The claim is therefore not awardable.

**Determination of the Counterclaim**

38. The Defendant's Counterclaim includes several components amounting to Kshs. 16,978,640.00/=, comprising unpaid invoices, revenue share from signage, and sums attributed to the Samsung contract.

39. DW1 testified that much of the computation relied on the Plaintiff's documents because, prior to litigation, the Defendant lacked access to the Plaintiff's internal promotional sheets and invoices.

40. The Defendant's witness accepted during cross-examination that portions of the claim were extrapolated from schedules rather than based on actual remittances or issued invoices.

41. The reliable evidence is found in the Plaintiff's own invoices and bank records.

These demonstrate unpaid amounts of: -

- Kshs. 508,372.32/=

- Kshs. 245,489.64/=
- Kshs. 1,771,900.00/=
- Kshs. 69,600.00/=
- Kshs. 40,020.00/=
- Kshs. 888,705.00/=
- Shortfall of Kshs. 2,523.30/=
- Less a credit note of Kshs. 268,327.14/=

42. The net substantiated unpaid amount is Kshs. 3,257,283.12/=. PW1 was unable to dispute these figures, and indeed conceded under cross-examination that some items aligned with the Plaintiff's own documentation.

43. These amounts are sufficiently proved. The remainder of the Counterclaim, including the Samsung-based extrapolations, is unsupported and fails.

### **Disposition**

44. Having considered the pleadings, evidence and submissions, and having applied the relevant law, the Court reaches the following final orders: -

### **Orders**

- a. The Plaintiff's suit is dismissed in its entirety.
- b. The Defendant's Counterclaim is allowed to the extent of Kshs. 3,257,283.12/=: being the substantiated sum proved through the Plaintiff's own invoices and bank records.

- c. The sum of Kshs. 3,257,283.12/= shall attract interest at court rates from the date of this Judgment until payment in full.
- d. The Defendant is awarded the costs of the suit and half the costs of the Counterclaim.

*Dated and delivered virtually via Microsoft Teams this 4<sup>th</sup> day of December, 2025*

**ALEEM VISRAM, FCI Arb**

**JUDGE**

**In the presence of;**

**Court Assistant: Lispa**

.....**for Plaintiff**

.....**for Defendant**