

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL SUIT NO. 723 OF 2001

HON. LUKA KIPKORIR KIGEN..... PLAINTIFF

-VS-

THE NATIONAL OIL CORPORATION.....DEFENDANT

JUDGMENT

1. The Plaintiff, Hon. Luka Kipkorir Kigen (trading as Ravine Road Service Station), instituted this suit against the **National Oil Corporation of Kenya Limited** (the Defendant) vide an Amended Plaintiff dated 21st October 2005. The Plaintiff seeks a liquidated sum of Kshs. 4,032,521.00, general damages for breach of contract, costs, and interest at a compounded rate of 35% from the year 1997.
2. The dispute arises from a **Dealer License Agreement** between the parties entered into on 1st August 1997, which granted the Plaintiff a 24-month license to operate a petrol station. The Plaintiff alleges that the Defendant breached the agreement by failing to maintain the equipment, leading to massive fuel spillages and financial loss.
3. The Defendant, on its part, filed an Amended Statement of Defence and Counterclaim dated 6th September 2001 denying liability, and also Counterclaiming a sum of Kshs. 5,392,086.05, allegedly on account of unpaid goods supplied on credit and utility bills.

The Plaintiffs Case

4. The Plaintiff's case is that under the **Dealer License Agreement** executed by the parties on 1st August 1997, he was authorized to operate the **Ravine Road**

Service Station (“Fuel Station”) for a fixed term of 24 months, and that he was, under the agreement, responsible for the day-to-day operations, whilst the Defendant, retained exclusive control and the express obligation to maintain and repair all petroleum dispensing equipment at the station.

5. The Plaintiff contended that the Defendant fundamentally breached its maintenance obligations. According to the Plaintiff, the failure of the equipment commenced on the very first day of operations and was chronic, leading to massive fuel spillages and persistent leakages, which the Defendant’s technicians repeatedly failed to satisfactorily repair, leading to continuous losses.
6. To support his claim, the Plaintiff testified as the sole witness. He adopted the contents of his witness statement dated 11th June 2015 as his evidence in chief, save that he wished to amend and clarify that the sum he claimed was Kshs.4,032,521.00/=, as per his amended Plaintiff. He also produced all the documents listed in his list of documents dated 5th August 2002 and a supplementary list of documents dated 28th February 2011.
7. In his witness statement, the plaintiff stated that in 1997, he entered into a dealer’s licence with the Defendant to operate Ravine Road Service Station on Nakuru–Ravine Road. He had taken a loan to finance the business, but from the first day, the station experienced massive fuel spillages and persistent losses. Despite several repairs between July and October 1997, the problem continued. Under the licence, maintenance of equipment was the defendant’s responsibility, and internal correspondence showed the defendant was aware of the defects.
8. He testified that he engaged the defendant in numerous meetings to resolve the issue, but due to constant management changes and failure by the defendant to attend agreed meetings, no settlement was reached. He denied allegations that he tampered with pumps or failed to personally run the station, noting that all repairs were done by the defendant’s staff and that his continuous complaints showed that he was actively managing the station.

9. He produced **internal memoranda and correspondence authored by the Defendant's own staff and management** acknowledging the existence of leakages and the Defendant's unsuccessful repair efforts. In particular, he produced memoranda dated 28th January 1998 and 16th February 1998, which recorded significant losses of fuel over several months, and a letter dated 14th March 2000 from the Defendant's Managing Director, which, allegedly, expressly admitted the losses and sought to minimize them.
10. The plaintiff maintained that the defendant breached the licence agreement and was negligent in failing to maintain the storage tanks and pumps. The defendant allegedly installed defective equipment, failed to repair faults, and allowed fuel dispensing to continue despite knowing the equipment was defective. As a result, the plaintiff claimed to have suffered loss and damage between 1st August 1997 and 26th April 2000, including loss of fuel products, loss of earnings, bank interest, value of products taken over by the defendant, and repair-related costs, amounting to Kshs. 4,032,521/=.
11. In addition to special damages, the Plaintiff also urged the Court to award general damages for inconvenience, disruption of business, and expenses incurred in pursuing the litigation. He relied on authorities such as **Githambo General Contractors v Kay Construction Co. Ltd [2011] eKLR** and **Ramesh Manek v Kenya Posts & Telecommunications (HCC No. 862 of 1993)**, where courts awarded damages for breach of contract in similar circumstances.
12. Regarding interest, the Plaintiff invoked Section 26(1) of the Civil Procedure Act, and argued that he is entitled to pre-judgment interest at the rate of 35% on the claimed, and cites **Dipak Emporium v Bond's Clothing [1973] EA 553** in support of the proposition that interest should be awarded from the date of filing suit where a party has been deprived of a liquidated amount.
13. On the Defendant's Counterclaim, the Plaintiff denied any indebtedness. He asserts that under the agreement, all supplies were to be paid for upon delivery, and that he never received goods on credit. He challenges the probative value of

the Defendant's invoices, noting duplication, handwritten annotations indicating payment, and reliance on hearsay testimony from a witness who joined the Defendant long after the material events.

14. The Plaintiff maintained that he was always up to date in his payments and that the defendant insisted he continue purchasing normal stock despite faulty equipment. He also gave the defendant every opportunity to inspect his sales records, and he accused the defendant of attempting to doctor those records.
15. The plaintiff denied owing the defendant Kshs. 5,392,086/= and asserted instead that the defendant breached the licence agreement, causing him substantial loss.
16. The Plaintiff therefore prays that the Defendant's counterclaim be dismissed in its entirety, and that judgment be entered in his favour for the sums claimed, together with general damages, interest, and costs.

Defendant's Case

17. The Defendant, in contesting the Plaintiff's case, filed its Amended Statement of Defence and a Counterclaim dated 6th September 2001. While admitting the existence of the Dealer Licence Agreement of 1st August 1997, the Defendant denied any breach of its terms and disputes the Plaintiff's claim for losses.
18. The Defendant contended that the petroleum dispensing equipment installed at the Plaintiff's station was similar to that used in other outlets, against which no complaints were raised. It asserted that any discrepancies in fuel dispensation were attributable to tampering by the Plaintiff or his servants, or to theft occasioned during periods when the Plaintiff was absent from the station.
19. The defendant also relied on a clause that excluded its liability for leakage, theft, evaporation, or loss of bulk products once delivery commenced.
20. The Defendant argued that the source of the Plaintiff's claimed figure of Kshs. 4,032,521.00 was not disclosed, and that the documents produced to support it

lacked probative value because they were unexecuted or lacked source information.

21. In its Counter-Claim, the defendant stated that the plaintiff breached the licence agreement by interfering with the pumps, failing to pay electricity bills, failing to pay part of the April 2001 rent, failing to keep proper books of account, and failing to submit records for annual audit. It alleged that the plaintiff also failed to personally run the station, left it unattended, purchased and sold products from competitors using the defendant's equipment, tampered with equipment without consent, and failed to meet minimum purchase targets.
22. The defendant claimed that it had supplied petroleum products and services worth Kshs.5,392,086.05/= which remained unpaid despite demand. After crediting stock taken over, it claimed Kshs.5,281,869.30/= together with rent arrears and electricity costs, all accruing interest at 21% per annum from April 2000.
23. During the hearing, the defendant called one witness, Antony Gatehi, its credit controller. Mr. Gatehi stated that he was instructed to visit the plaintiff's petrol station in Nakuru to verify sales and purchase volumes for the period between 1st August 1997 and 26th April 2000. He began the exercise on 25th November 2000.
24. The witness stated that in undertaking the exercise, he established that 2,547,700 litres had been supplied to the dealer during the period, and an additional 2,000/= litres had been purchased directly from the depot under the name of Pyrethrum Board of Kenya. Meter readings taken for each pump and the corresponding returns to the tank initially showed no variation from the plaintiff's reported figures.
25. According to the witness, variations, however, later emerged in 1997 due to direct bulk purchases made by the dealer. On 18th November 1997, the dealer purchased 2,000 litres each of PMS and RMS and additional AGO, but the daily sales summaries overstated sales by the same quantities. Similar discrepancies

appeared on 4th November 1997, where meter readings did not match the figures recorded in the daily sales books.

26. The witness asserted that after these anomalies were identified, the dealer declined to provide daily sales books for 1998, 1999, and 2000, resulting in a stalemate and suspension of the verification exercise. The witness also noted that the dealer engaged in direct bulk purchases in the names of other companies, including the Pyrethrum Board of Kenya.

27. The defendant therefore prayed that the suit be dismissed with costs and that judgment be entered on the counter-claim for the stated special damages, costs, and interest

Analysis and Determination.

28. The plaintiff and defendant filed written submissions dated 27th May 2025 and 9th June 2025, respectively. I have considered the same together with the pleadings and evidence filed by the parties. I find the following as requiring the Court's determination:

- i. Whether there was a breach of the Dealer License Agreement dated 1st August 1997.
- ii. Whether the Plaintiff has proved the loss of **Kshs.4,032,521.00/=** and is entitled to General Damages.
- iii. Whether the Defendant has proved its Counterclaim of **Kshs.5,392,086.05. / =**

Whether there was a breach of the Dealer License Agreement dated 1st August 1997.

29. From the pleadings and evidence, it is not disputed that the plaintiff and defendant entered into a Dealer License Agreement dated 1st August 1997 under

which the Plaintiff was to operate Ravine Road Petrol Service Station on Nakuru–Ravine Road. The agreement is produced on pages 28-39 of the plaintiff’s bundle of documents. Clauses 4 and 5 of the agreement states:

“4. The DEALER shall at all times permit NATIONAL to enter the service station with or without workmen and others with or without their tools and apparatus for the purposes of inspecting the service station, books or Equipment therein and / or carrying out repairs to the said Equipment or for the purposes of installing additional Equipment or removing any such Equipment as is required to be removed or for the purposes of monitoring the observance by the DEALER of the terms of this Licence.

5. If NATIONAL shall find it necessary or desirable that the station should be shut down during the period that the repairs, improvements, additions or removals are being effected the DEALER shall hand over the station to NATIONAL or its nominee for the period (including any extensions thereof) certified by the Architect or Contractor appointed by NATIONAL to be necessary for carrying out or effecting of repairs, improvements, additions or removals AND NATIONAL shall not be obligated to compensate the DEALER for any loss of business thereby occasioned.”

30. My understanding of the above provisions of the Agreement is that the responsibility for the upkeep and repair of the dispensing equipment was on the defendant.

31. The documentary evidence produced by the plaintiff, comprising internal memos and correspondence, demonstrates a consistent pattern of equipment malfunction, which the defendant’s own staff acknowledged. That material, which was not challenged, shows that the equipment failures were recurrent and had safety implications as well as financial consequences. The internal memos and correspondence were produced on pages 2–26 of the plaintiff’s bundle.

32. The plaintiff's testimony regarding repeated leakages and spillages was supported by those internal documents. For example, the memorandum dated 28th January 1998 records leakage from the tank necks and notes losses arising therefrom. A subsequent memorandum dated 16th February 1998 details further leakage and quantifies losses over several months. The author additionally observed that although several repair attempts had been undertaken in 1997, the defect remained unresolved. Later correspondence, including a letter from the defendant's then Managing Director dated 14th March 2000, acknowledges the existence of losses and the need to minimize them. It is also clear from the record that the plaintiff also raised the issue directly with the defendant through letters dated 12th April, 19th April, and 20th April 2000.
33. I note that none of the aforementioned evidence was controverted. Based on that unchallenged material, the plaintiff's position that the defendant did not meet its contractual obligation to maintain the equipment, thereby occasioning financial loss, is borne out. It follows that the defendant's conduct amounted to a breach of the agreement.
34. Further, the Defendant's allegation that the Plaintiff tampered with the equipment was not supported by any technical report or expert evidence. Bare allegations of tampering cannot override the Defendant's own internal admissions of equipment failure.
35. Accordingly, it is the finding of the Court that the Defendant was in fundamental breach of the Dealer License Agreement.

Whether the Plaintiff has proved the loss of Kshs.4,032,521.00/= and is entitled to General Damages.

36. The plaintiff claimed a sum of Kshs. 4,032,521/=, and asserts that this amount was specifically pleaded and proven. The Defendant argues otherwise. Having considered the evidence adduced by the Plaintiff, I find that the claim has been sufficiently substantiated through several layers of documentary evidence. In particular, the Plaintiff produced **Exhibit 1-26**, being daily sales records (Plaintiff's Exhibits 1 to 26), to track the performance and losses at the station. Further Exhibit 27, produced by the Plaintiff, demonstrated a comprehensive calculation of the direct financial impact of the leakages.

37. Further, I note that while the Plaintiff provided contemporary records of daily operations, which proved his claim on a balance of probabilities, the Defendant failed to provide technical evidence to dispute the figures. It is a settled principle in law that where a defendant fails to adduce any (or sufficient) evidence, the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. In LINUS NGANGA KIONGO & 3 OTHERS V TOWN COUNCIL OF KIKUYU [2012] KEHC 3881 (KLR), Odunga J (as he then was) citing Makhandia J (as he then was) in the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 stated that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

38. In the circumstances, the Court finds that the sum of **Kshs.4,032,521.00/=** was specifically proved through the Plaintiff's production of daily records, consolidated summaries. This finding is further supported by the Defendant's then Managing Director's admission and acknowledgement of the losses in writing.

39. On the claim for general damages, I am guided by the Court of Appeal decision in **Kenya Tourist Development Corporation v Sundowner Lodge Ltd [2018] eKLR** where it was held that “General damages are not awardable for breach of contract. A party must specifically plead and prove the loss.”

40. The court will therefore decline to grant general damages to the plaintiff.

41. With respect to interest, section 26(1) of the Civil Procedure Act empowers the court to award interest on monetary decrees at a reasonable rate. The section states as follows:

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

42. In this case, I am of the view that it would be reasonable to charge interest from the date of filing the suit to the date of payment at court rates.

Whether the Defendant has proved its Counterclaim of Kshs.5,392,086.05/=

43. The defendant asserted that it supplied various petroleum products and offered other services on diverse dates to the plaintiff amounting to Kshs. 5,281,869.30/=, and despite demand for payment, the plaintiff had refused and or neglected to make payments.

44. In its efforts to substantiate the counterclaim, the defendant produced a series of invoices (Defence Exhibits 6–110). Upon closer examination, I find that these

documents did not meet the evidentiary threshold required. Some were repeated; others bore handwritten notes indicating that the plaintiff had already issued cheques settling the amounts. Such inconsistencies seriously compromised both their authenticity and their evidentiary weight.

45. The defendant further relied on the testimony of Mr. Anthony Gatehi. However, in cross-examination, the witness confirmed that he only joined the defendant's employment in 2010, long after the events giving rise to this dispute, which began in 1997. He therefore had no personal knowledge of the matters in issue. His evidence, being second-hand, amounted to hearsay and was incapable of proving the facts alleged, in line with Sections 62 and 63 of the Evidence Act.

46. More significantly, the defendant's own witness conceded that although the invoices totaled over Kshs. 10,000,000/=, not all the sums reflected were relevant to the counterclaim. This admission demonstrates the figure of Kshs. 5,392,086.05 was neither precise nor supported by credible documentation.

47. In the circumstances, the evidentiary burden placed on the defendant under Sections 107 to 109 of the Evidence Act remains unmet. The defence case discloses no firm or reliable proof of the sums claimed.

48. Accordingly, I find that the counterclaim amounts to no more than unsubstantiated assertions. It cannot stand and therefore ought to be dismissed in full, with costs to the plaintiff.

49. In the end, the court makes the following orders: -

- i. Judgment is hereby entered for the Plaintiff as against the Defendant for the sum of Kshs. 4,032,521.00/=, plus interest at court rates from the date of filing the suit until payment in full.
- ii. The Plaintiff's claim for general damages is hereby dismissed.
- iii. The Defendant's Counterclaim is dismissed in its entirety
- iv. The Defendant shall bear the costs of the main suit and the counterclaim.

50. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026



ADO MOSES

JUDGE

In the presence of: -

C/A - Moses

Mutai.....for the Plaintiff.

Mwenesi..... for the Defendant.

ORIGINAL