IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, AKIWUMI & LAKHA JJ.A)

CIVIL APPEAL NO. 9 OF 2000

BETWEEN

KENYA BREWERIES LIMITED.....APPELLANT

AND

KIAMBU GENERAL TRANSPORT AGENCY LIMITED.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Hon Lady Justice Aluoch) dated 27th October, 1999

in

HCCS No 1567 of 1997)

****

JUDGMENT

KENYA BREWERIES LIMITED .....APPELLANT

AND

KIAMBU GENERAL TRANSPORT AGENCY LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court ofKenya at Nairobi (Hon. Lady Justice Aluoch) dated 27thOctober, 1999

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****

Lakha JA (dissenting).

Introductory

This appeal is from a decision of the superior court (Mrs Aluoch J) made on 27th October, 1999. The judge entered judgment for the plaintiff, Kiambu General Transport Agency Ltd, for substantial damages against the defendant, Kenya Breweries Limited.

In outline, the plaintiff's claim is that because the defendant unlawfully terminated its appointment as the distributor of the defendant within Kiambu district in the Republic of Kenya in breach of agreement it suffered loss and damage. A total of seven witnesses testified at the trial whereof the plaintiff called three while the defendant called four. The hearing lasted eighteen days and the learned judge took about four months before she delivered judgment on 27th October 1999, running into forty-seven foolscap sheets.

The Plaintiff's Case

At the hearing of the appeal it was accepted by Mr Gatonye (who had not appeared in the superior court) on behalf of the plaintiff that the letter of 17th October 1980 was the heart of the plaintiff's case. It varied the agreement between the parties as was conceded by Mr Kilonzo (who had also not appeared in the superior court) on behalf of the defendant, there being special business relationship extending to about forty years. The letter provided that the plaintiff's agreement would not be terminated unless it was given ten years' notice. Yet by its letter of 5th March 1997 the plaintiff in breach of the agreement between the parties terminated the same giving only 90 days' notice entitling the plaintiff to damages. Relying on the representations contained in the said letter the plaintiff committed substantial investment, financial commitment and developed appropriate infrastructure for the promotion of the defendant's products.

In the alternative, the defendant procured the plaintiff's execution to the distribution agreement dated 8th July 1996 by undue influence.

The Court is asked to set aside the said distribution agreement, to declare the plaintiff's termination of its distribution agreement unlawful and void and to award damages.

The Defendant's Case

Mr Havelock who appeared for the defendant in the superior court accepted that the letter of 17th October 1980 varied the terms of the contract between the parties. He denied its authenticity and admissibility. He also made submissions that subsequent execution by the plaintiff of the agreement of 1996 created estoppel waiver and acquiescence so that the plaintiff could not rely on them and repeated the denial of any undue influence. Both liability and damages were disputed.

The Judgment in the Superior Court.

The judge found in favour of plaintiff. She held, first, that the letter of 17th October 1980 to the plaintiff varied the terms of the 1980 distribution agreement as concerns the notice period of termination of the agreement for the plaintiff which became ten years resulting in the defendant being in breach. Secondly, that the letter Ex 1 dealt with compensation for agency areas relinquished. Thirdly, that the plaintiff acted on the representations made to it and made substantial investments and finally that the new agreement was procured by undue influence exercised by the defendant. She awarded damages in the sum of Shs 241,586,711.58/= plus costs and interests.

Conclusions

(1) Liability

The one single issue that was hotly contested was the defendant's letter of 17th October 1980 (Ex 4). It reads in part as follows:-

"..... It sounds as if you are concerned that your distributorship could be terminated without notice. This is not the case. You have been our long serving distributor and we had a very happy association. Consequently, I would give assurance that so long as you continue to perform satisfactorily we have no intention of terminating your agency. In the unlikely event of circumstances arising for us to want to terminate your services, we would no doubt give you a reasonable notice and ten years would be reasonable notice to enable you to make the necessary adjustments in your business. I sincerely hope that that would not be necessary as it is not even contemplated". (emphasis supplied).

Mr Kilonzo objected to its admissibility as Mr Havelock did before the superior court. But the only ground was that the letter was addressed from EA Breweries Ltd which is not the defendant although there is evidence that they all used the same names. There was only one distribution agreement the plaintiff held for the distribution of beer and that was from the defendant. It could have referred to nothing else. The existence and authenticity of the letter was not in dispute. As a matter of pleadings, upon a careful consideration of the defence and, in particular, of paragraphs 6, 7 and 8 of the defence, I am satisfied that there is no specific denial of the letter. What is more it is apparent from Mr Havelock's submissions before the superior court that he adopted the letter as varying the distribution agreement. In all the circumstances the letter, in my judgment, was properly admitted. But even Mr Kilonzo himself, before this Court, conceded that the letter constituted a variation of the 1980 agreement between the parties.

I now turn to consider the effect meaning and the impact of the letter. As already stated, Mr Kilonzo considered it as varying the terms of the 1980 agreement. The contents of the letter amount to the plainest possible assurance, as the letter itself claims. I have no doubt that the assurance therein contained is binding on the defendant.

This estoppel applies to representations as to the future. Take the kind of assurance which was held binding in *Central London Property Trust Ltd v High Trees House, Ltd* [1956] 1 All ER 256 and in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1954] 2 All ER 28 revsd HL [1955] 2 All ER 657. In each of those cases a creditor during the war gave an assurance to the other party that he would for the time being forego sums which were thereafter to become due to him. In the first, it was rent; in the latter, it was sums payable by way of compensation. The assurance was not a contract binding in law, but it was an assurance as to the future; it was intended to be acted on, it was acted on and it was held binding on the party who gave it.

This estoppel also applies to representations about legal relations. In *Harnam Singh v Jamal Pirbhai* [1951] AC 688 which was an appeal (No 8 of 1950) from an order of the Court of Appeal for Eastern Africa (March, 9th, 1949) affirming an order of the Supreme Court of Kenya (November 5th, 1948) it was an unequivocal statement by a tenant that he "will remain in occupation as a statutory tenant". The statement was not a contract, and not regarded as such, but it was an assurance as to the legal position - as to the legal consequence known to both – which was to be intended to be acted on, was acted on, and was held to be binding. It did not give rise to a cause of action in itself, but it did prevent the party making it from setting up a defence which would otherwise be open to him. In that sense it gave rise to an estoppel, which can here be raised as it is supported by pleaded facts.

The judgment of their Lordships was delivered by Lord Radcliffe. At P 699 he states:-

"Their Lordships have found it impossible to accept the learned judge's conclusion that at the date of the suit there was in existence something other than a statutory tenancy. They consider that as between these parties this point is disposed of by the letter which the respondent's solicitors wrote to the appellant on August 25th, 1943, and which is referred to in para 11 of the amended plaint. The appellant had on the previous day served the respondent with one of several successive notices to quit, possession being required on or before September 30th, 1943. To this the solicitors replied:- "Our client will not vacate the premises in accordance with your notice but will remain in occupation as a statutory tenant from the date of the expiry of the notice." This statement is both explicit and conclusive. It is an unequivocal intimation that as from September 30th the respondent will claim no tenancy rights as a matter of subsisting contract but will thereafter treat himself as a tenant holding over under the protection of the Ordinance. In their

Lordships' view that letter created an estoppel between the parties."

I am unwilling to regard the present case as anything different in principle. The letter of 17th October 1980 amounted to – and indeed, was – a clear assurance that the notice period for termination of the contract was ten years. The plaintiff acted on that assurance, it altered its position on the faith of it, and it is binding on the defendant, who cannot now be allowed to go back on it; and that is all we are concerned with here.

I think the judge was right on this point.

Quite apart from the fact that Mr Havelock did not deny the agreed issue No 4 raising the question whether the plaintiff acted on the assurance, the learned judge made an express finding in this regard when she stated:-

"My further finding from the evidence on record is that the defendant's warranties and descriptions as described in paragraphs 6 and 7 of the plaint induced the plaintiff to make substantial investments and other financial commitments and to develop capital intensive infrastructures for the promotion of the defendant's products."

With respect, I agree. It does not appear to me that these findings of fact can be successfully challenged in this Court having regard to the settled principles and practice of this Court as to when it can interfere with the findings of fact.

What then is the impact of the letter of 17th October 1980 to the agreement between the parties. The governing agreement at the time of the termination was the agreement of 12th June 1980. Mr Havelock, for the defendant, conceded, properly in my view, that the letter varied the agreement. It varied the notice period to that of ten years. The learned trial judge so found and, with respect, I agree. In my judgment, the assurance was binding on the defendant and fully applied.

But it is then said that by executing the last agreement dated 8th July 1996 the plaintiff had waived or acquiesced in the period of the notice as stated in the agreement and there was an estoppel. None of these special defences was pleaded, urged or relied on in the superior court and are therefore not open to the defendant before this Court.

In view of the above, the only other issue to which it is necessary for me to refer is the question of undue influence. It is not necessary to decide this appeal on this ground. However, the prospects of the defendant reversing the trial judge is unreal. This is so because of the express finding of fact made by the trial judge on this issue in believing the evidence of the plaintiff as against that of Mr Wanjala, the third witness for the defendant. As the learned judge herself described she preferred the evidence of the plaintiff to that of the defendant on the basis of the demeanour of the witness. And it does not appear to me that this was an exceptional case in which this appellate court would be justified in reversing the decisions of the trial judge founded upon the judge's opinion of the credibility of witness formed after seeing and hearing his evidence: See also *Peters v Sunday Post Ltd* [1958] EA 424.

The Damages

It is perhaps convenient at this stage to consider and assess the damages, if any, to which the plaintiff is entitled. These must be viewed by the critical application of the averments pleaded in paragraph 14 of the plaint. It claims the plaintiff's alleged loss and damages. It has two limbs, cost of winding up the business: Shs 70,962,296.90 (as amended) and loss of profit Kshs 169,624,414.68.

The plaintiff had to wind up its distribution business and there was evidence before the trial judge that payment to the employees added up to Shs 5,025,356.69. In addition, there was evidence which the trial judge accepted that some Kshs 65 million being unpaid to the banks from the business. I have no reason to depart from the learned judge's findings nor have I been persuaded that they are in any way erroneous. I am satisfied, as the trial judge was, that the cost of winding up the plaintiff's business was Kshs

70,962,296.90.

In an endeavour to prove its loss over a period of ten years the plaintiff called as an expert Mr Reuben Munyao Kimotho, BA in Economics from Makerere University in 1971 with an MBA from the University of Alberta in Canada in 1973. Based on his financial forecast the trial judge awarded a sum of Kshs 169,634,414.68 by way of loss of profits.

With respect, it is unfortunate that I am unable to accept the forecast so made as a basis for an award of damages for loss of profits. In the first place, there is nothing to show that the element of mitigation of damages was considered sufficiently or at all in reaching the final figures for loss. Secondly, the figure was not in any way discounted to take account of early receipt or accelerated payment. Thirdly, it took no account of the risks that the business might not be able to operate successfully or profitably for a further period of ten years. Fourthly, the plaintiff's distribution agreement itself was subject to earlier termination for breach or for possible competition by collaborating with South African interests. Mr Kimotho's calculations were all very fine in theory but his overall figures have no relation whatever to reality.

It is the duty of the plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the Court a great deal of material and expect the Court to make a finding in its favour. As was said by Lord Goddard, CJ, in *Bonham Carter v Hyde Park Hotel Ltd* (1948) 64 TR 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak throw them at the head of the Court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it." See also the case of *Ouma v Nairobi City Council* [1976] KLR 297 at 304."

I am not obliged to go through the charade of making my own discount from the expert's figure. I, therefore make no award in favour of the plaintiff for the claimed loss of profits.

Nor am I willing to allow the plaintiff to change the basis of its claim to that of loss of commission. This was neither pleaded nor urged and the trial judge made no decision on it. It is, therefore, not open to the plaintiff to rely upon it.

The trial judge also made an award of Kshs one million. No general damages can lie for a breach of contract. This award of Kshs one million is unsustainable and I would set it aside.

(3) *Caveat*

The question of production and admission in evidence of an agreement between the plaintiff and a South African party is not dealt with in this judgment. The defence of a breach on the part of the plaintiff for competition based thereon was not pleaded or relied on in the letter of 5th March 1997 as a ground for termination of the distribution agreement. It was not an issue before the superior court and, therefore, not relevant.

Result

It is for these reasons that I am reluctantly compelled to propose to allow the appeal to the extent of deleting paragraph 3 of the decree appealed against and substituting therefore the following:-

"That the defendant do pay to the plaintiff the sum of Kshs 70,962,296.90 as cost of winding up with interest thereon at 12% per annum from 28th October 1999 until payment in full."

I would order that each party shall bear its own costs of this appeal.

Akiwumi JA This appeal is against the judgment of Aluoch J wherein, she awarded a total of Shs 241,586,711.58 by way of special and general damages, to the respondent for the wrongful termination of the respondent's existing letter of appointment as a wholesale distributor of the appellant's beer, and for

the respondent having been made by undue influence, to accept another letter of appointment under which, the appellant purported to terminate the respondent's distributorship of the appellant's beer.

The respondent in this appeal, is a limited liability company, substantially owned by James Njenga Karume. This Company and another firm, which was not a limited liability company and in which Karume had substantial interest, had been a wholesale distributor for many, many years of the well known brands of beer brewed by the appellant, also a limited liability company, and its predecessors which, until only recently, enjoyed the monopoly of brewing beer in the country.

On 28th February, 1963, the predecessor to the respondent, Kiambu General Transport Agency, a firm, owned by Karume, had accepted a letter of appointment as a wholesale distributor of beer, not of the appellant, but of another institution namely, the Brewers' Association of East Africa whose membership consisted of seven limited liability beer brewing companies in Kenya, Uganda and Tanganyika, including the East African Breweries Ltd in Kenya. This letter of appointment provided for its termination by either party giving the other, one month's notice. Subsequent to this, the Kiambu General Transport Agency, by a letter of appointment of 12th June, 1980, was appointed a wholesale distributor, not of the Brewers' Association of East Africa, but of the appellant, which is a different legal entity and a limited liability company at that. This letter of appointment which was signed by Karume, to show that he accepted the terms contained therein, provided for its termination by twelve months' notice given by either party, to the other. It is also noteworthy that although the respondent had been incorporated on 23rd December, 1966, as a limited liability company, and upon which, according to the respondent's plaint, it had "acquired all the business carried out by Kiambu General Transport Agency", it was the Kiambu General Transport Agency, a non existent or separate legal entity, that was named as the distributor in the letter of appointment, and which, to make matters more confusing, was signed by Karume as having accepted its terms, in his capacity as Managing Director of the respondent which was not the distributor designated in the letter of appointment. A few months after this appointment of Kiambu General Transport Agency as a wholesale distributor of the appellant's beer, Karume on 22nd October, 1980, received a letter dated 17th October, 1980, addressed to him on behalf of the respondent and not, Kiambu General Transport Agency, from HB Hobson, the Managing Director not of the appellant, but of East African Breweries Ltd. Although the letterhead of this letter showed that East African Breweries Ltd had an interest in Kenya Breweries Ltd, the two companies were nevertheless, separate legal entities. Anyway, this letter which stated that a ten year's notice to terminate Karume's distributorship would be reasonable, and which was to assume crucial importance in the case of the respondent, was undoubtedly in reply to a letter which Karume had written some two years before, on 17th October, 1978, not to the appellant whose beer Kiambu General Trading Agency was, according to its letter of appointment of 12th June, 1980, then distributing, but to East African Breweries Ltd. Karume, in his evidence, chose to ignore this letter and gave a different reason why Hobson wrote his following letter of 17th October , 1980:

"East African Breweries Ltd 17th October, 1980

The Hon J N Karume MP

Kiambu General Transport Agency Ltd

PO Box 134

Kiambu

Dear Hon Karume,

I refer to your letter of 4th November, 1978 addressed to our chairman. Delay in replying to it due to an oversight on our part is regretted.

As you know, we have a standard contract for all our distributors. Generally speaking, we do not take

away business from our distributors except in the cases where they are unable to distribute our products for one reason or the other. We believe in keeping our distributors for as long as possible so long as their performance remains satisfactory.

It sounds as if you are concerned that your distributorship could be terminated without notice. This is not the case. You have been our long serving distributor and we have had a very happy association. Consequently, I would give assurance that so long as you continue to perform satisfactorily we have no intention of terminating your agency. In the unlikely event of circumstances arising for us to want to terminate your services, we would no doubt give you a reasonable notice and the ten years would be reasonable to enable you to make the necessary adjustments in your businesses. I sincerely hope that that would not be necessary as it is not even contemplated.

Yours sincerely,

B H Hobson

Managing Director."

According to this letter, (underlining supplied) Karume must have complained in writing that his distributorship could be terminated without notice. When Hobson wrote his vague and unspecific letter of 17th October, 1980, Karume was a Member of Parliament, and Hobson appears, though uncommital, to have been rather deferential because of this: First of all, he unnecessarily emphasized the role of Karume himself, and not that of the respondent or the one designated in the 12th June, 1980, letter of appointment, as the distributor of beer, and without stating of which particular brewery; secondly, Hobson must have known at the time, that neither the respondent nor Karume was a distributor of East African Breweries Ltd and was therefore, questionably, merely exploiting his position as Managing Director of East African Breweries Ltd, the holding company of the appellant, to palliate a Member of Parliament; and the rather ludicrous statement that ten years would be reasonable notice for the termination of Karume's services, without specifying which particular standard contract and in respect of which brewery, he was talking about.

In his evidence on oath and in his attempt to support this documentary evidence, Karume, as I have stated earlier, avoided any mention of his letter of 4th November, 1978, to the Chairman of East African Breweries Ltd. Strangely, and rather dubiously, he relied not on this letter, but rather on unpleaded discussions that he said he had had with Hobson not in 1978, but in 1980. This is what he said:

"In 1980, Hobson was managing the breweries. He knew me as a customer. I look at page 3 clause 17 in the 1980 agreement. The termination period was 12 months. I produce the agreement as Ex 3. I was happy with the termination clause at that time. After a while I went to see Hobson the Managing Director. I saw him and we discussed as we had worked for so long. I thought the period was too short. I said so, because since 1958, I had invested heavily and the time could not allow me to dispose of the motor vehicles. I put to him my problem and first, he said he was happy with our relation.

He told me though agreement was 12 months or 1 year, nobody from Kenya Breweries could come and tell me you go because of the long period.

That 12 months was only a formality. He told me that nobody could terminate my business of 12 years. I told him to give me a note. I look at a letter dated 17.10.80, this letter was written to me by Mr Hobson. He told me that considering all those years, the only reasonable period I could be given was 10 years."

Assuming that Hobson's vague and unspecific letter, which seems not inconsistent with the above excerpt of Karume's wishy washy evidence, was written on behalf of the appellant and not East African Breweries Ltd as appears on the face of it, and taking into account its conflicting background which is apparent from the letter itself, and Karume's evidence, can this letter be regarded as amounting to a specific or implied amendment not only, of an existing, but also, of future written standard contracts of distributorship that the respondent as such, or Karume in his personal capacity, has, or may enter into,

with the appellant as opposed to East African Breweries Ltd? I would say, no! And will revert to this later.

However, the respondent in its plaint, claimed that as a result of Hobson's letter, it embarked on substantial investments in real property and motor vehicles, the particulars of which were also pleaded. But the respondent was not being truthful as all the six real estates referred to in this regard, in its plaint, were, according to the further particulars supplied by the respondent, all purchased before Hobson wrote his now famous letter. The motor vehicles, however, appear to have been purchased afterwards.

Apart from the letter of appointment of 12th June, 1980, the other letter of appointment by the appellant of the respondent as its wholesale distributor, which the appellant allegedly wrongfully breached, and which constitutes one of the grounds of the respondent's suit against the appellant, was the one dated 8th July, 1996. The terms of this letter of appointment were accepted by Karume on behalf of the one designated as the distributor therein. This letter of appointment, contains the following important terms. In paragraph 19(a), it is provided that the agreement may be terminated by either party giving the other "90 days notice" and in paragraphs 19(b) and (c), even "forthwith", under certain conditions. All these negate the ten years' notice contained in Hobson's letter of 17th October, 1980.

As in the letter of appointment of 12th June, 1980, this one of 8th July, 1996, also provided in paragraph 20 that:

"This letter of appointment supercedes and revokes any and every letter of agreement previously accepted by you or entered into between us."

Which supercedes Hobson's letter of 17th October, 1980, assuming it had any force at all. The letter of appointment then contains this final paragraph:

"We hereby give you notice that your present appointment (if any) as our distributor will terminate one calendar month after the date of this letter if not revoked sooner by your acceptance of this offer."

which means that the respondent's then existing letter of appointment, if it can be said that it had one, was to be relinquished not by a ten year's notice, but after one calender month. And lastly, the letter of appointment of 8th July, 1996, designated Kiambu General Transport Agencies and not the respondent or Kiambu General Transport Agency, as the distributor.

The acceptance was signed by Karume, but the capacity in which he signed the acceptance is illegible. But be that as it may, and since no clerical mistake was urged, it is arguable whether the respondent, not being the designated distributor, can bring the action it did. But no matter.

On 7th May, 1985, the Managing Director of the appellant had written to Karume that he would be paid compensation for relinquishing the respondent's distributorship in respect of the Gatundu and Githunguri areas. What is important, however, is that this letter reiterated that payment of compensation for relinquished distributorship areas will "be treated in the context of the one year notice, applicable to our standard agency agreement". James Njenga Karume only endorsed on this letter that its contents had been duly noted. He did not raise any objections to the one year notice that was reiterated. He must have accepted it. If he genuinely relied on Hobson's letter, one would have expected him to have objected to it.

In the concluding part of his cavalier evidence, Karume summed up his case as follows:

"I don't know how this agreement was taken back to KBL after I had signed. I never gave Chomba any document to take to the defendant. I am looking at Ex 7 Notice of Termination I received. 90 days was reflected. Notice was given in accordance with clause 19(a) Ex 3, the previous agreement, at clause 17. The notice clause, for 12 months. There was a letter written by Hobson assuring me that my contract could only be terminated after 10 years. Such a letter is Ex 4. I maintain that I am entitled to 10 years less the 3 months I got. I am claiming damages profit based on 10 years. I am also claiming termination benefits paid to the plaintiff staff because I had to terminate them as the agreement was no more. My

finance manager will have termination benefits. Also somebody from my auditors will come and give the details of the 10 years I am claiming. Mr Weru is my Firm Manager. Kang'ethe & Associates are my auditors. Again I look at Ex 6 clause 20. By signing this agreement it did not revoke previous agreements."

The other ground upon which the respondent's case was based was that even if Hobson's letter of 17th October, 1980, did not apply, his acceptance of the letter of appointment of 8th July, 1996, had been procured by undue influence exercised on Karume by PG Wanjama, the then General Manager in charge of sales, marketing and general distribution of the appellant. In his evidence on this issue, Karume, who was clearly an astute businessman, and whom Aluoch J in her judgment described as "a very shrewd businessman who helped to popularize the sale of KBL's products for many years, and built an empire from beer business", stated as follows in his examination in chief:

"In 1996, I had no problem with Breweries as far as distribution was concerned. In 1996, there was a circular sent by the Breweries. This is the one I produce it. The Breweries said they discovered anomalies.

They said they had a new agreement to be signed by everyone to ensure that relationship continue. They showed us a copy of a (sic) agreement. Somebody was sent to bring it to me. They sent Wachira to bring it to me. He was on the management. He brought to my office in Kiambu. I look at a copy of agreement which I produce as Exh 6. I read the agreement entitled letter of appointment. At first, I refused to sign it. I was worried, afraid because I thought it was a trap meant to kick me out. I knew there was another agreement in existence termination within 12 months. I sent the agreement back with Wachira. The following day I talked to the General Manager P J Wanjama, who is present in Court. I told him that I refused to sign the new agreement brought to me. He told me that there was nothing they intended to change on my part. That they would not change my distribution. I agreed as I had been given such assurance since 1958. Eventually, I told him to have the documents brought back and I would sign.

Wachira brought the documents the same day and I signed the agreement. I told him I had agreed to sign because I was given assurance by the General Manager. Wachira also assured me that there would be nothing. My business would go on as usual. I knew Wanjama. We come from the same village and we are friends. His father was my friend. I was the master of ceremony at his wedding. I knew him from family background. When I talked to Wanjama, I believed him. I had no reason to doubt it. If I had doubt, I would have refused to sign. I look at page 4 of the agreement. I signed it. It was a termination clause at para 19. Either party can terminate by giving 90 days. On 5.3.97 my agency was terminated. This was the letter of termination."

In cross examination, Karume gave the following unhelpful evidence:

"I recall when I signed Ex 6, the agreement is dated 8.7.96 and at the back I can verify my signature. I cannot tell whether I signed before the Safari Park Hotel meeting. There is no date when I signed. I talked to Mr Wanjama who is in Court before I signed this agreement. I discussed with him on the telephone. I had called him. Mr Wanjama, must be a very forgetful person because, I talked to him. I know Mr Chomba, but I have never talked to him. I was dealing with Wanjama directly. I talked to Wanjama, not Chomba. If the agreement was drafted on 8.7.96 why was it delayed until after 31.7.96. I think the whole thing is being fabricated. I remember I signed after I had talked to Mr Wanjama and after reading the whole document. We discussed at length with Wanjama, he said there was nothing wrong and my business would not be affected. He did not pressurize me but he advised me that I could lose my agency distribution if one month expired and I had not signed. The agreement of 8.7.96 the notice of termination was 90 days. When I spoke to Wanjama I asked him why the notice had been reduced to 3 months he said they wanted a uniform agreement for all the distributors.... I spoke to Mr Wanjama. I told him there was no point in signing this agreement as there was another agreement. I signed when Wanjama convinced me that there was nothing wrong. I signed because I had dealt with KBL for 38 years and nothing changed. I thought the present officers were the same as the old ones. We talked of clause 19. Wanjama assured me that nothing would change. Clause 19 is one of the reasons I did not want to sign the agreement I had talked to Wanjama on the phone many times. I know Chomba casually. He works in the sales department. I did not discuss this agreement with him. I don't know if my workers did. I cannot recall when I signed

this agreement. I did not keep a record because I did not know a case would arise."

My assessment of this evidence which I, as a member of the Bench hearing the first appeal from the decision of Aluoch J, can do, (See *Peters v Sunday Post* [1958] EA 424) is that the evidence of Karume does not support the proposition that Hobson's letter superceded the letters of appointment of 12th June, 1980, or 8th July 1996. The vagueness of the evidence of Karume to my mind, shows evasiveness on his part. He appears to have deliberately avoided making any direct reference to Hobson's letter or to any specific assurance given to him by Wanjama as to the ten years' termination notice, which induced him to accept the letter of appointment. In this respect, Karume also had said that, Wanjama:

"did not pressurize me but advised me that I could lose my agency distribution if one month expired and I had not signed."

On Karume's own evidence, he did not in my view, establish that he had by undue influence, been induced by Wanjama to accept the letter of appointment of 8th July, 1996. It is true that the learned judge of the High Court, had the benefit of seeing and hearing Karume and Wanjama give evidence in person, but my assessment of their evidence leads me to a conclusion that differs from that of the learned judge. She had observed that:

"Given the importance which the defendant attached to the new agreement as accompanied by Ex 5, is it possible that Mr Wanjama could have given PW 1 assurances in order for him to sign the new agreement?

As I consider that question, I must bear in mind the fact that Mr Wanjama had information about PW 1 on competition. Information which was disturbing to the defendant company, yet PW 1 was refusing to sign the new agreement on suspicion that the defendant wanted to kick him out.

Given the circumstances I have described above I find that Mr Wanjama gave assurances to PW 1, Hon Njenga Karume that there was nothing they intended to change on his part, so he should go ahead and sign the agreement. I watched both Mr Wanjama and Hon Njenga Karume give evidence in Court. I observed that Mr Wanjama tried to distance himself from Hon Njenga Karume, whilst talking about him. He was very official about him, only describing him as 'past distributor at KBL and the local MP for Kiambu, where my parents come from', yet there was evidence to the contrary.

I observed that Mr Wanjama was 'too careful' whilst answering questions on whether he gave assurances to Hon Njenga Karume or not. His voice was a bit shaky whilst answering questions on this matter of assurances to PW 1.

This made me come to the conclusion that he did not give his evidence truthfully on this point, and I concluded that he gave assurances to PW1 that they intended to change nothing on his part and on that assurance, PW 1 signed the new agreement."

She then went to say that:

"Hon Njenga Karume struck me as a fairly simple minded person and very trusting in his dealing with KBL. He trusted Wanjama, and on that basis signed the new agreement, which was later used to terminate his distributorship....."

I do not think that Karume was a "fairly simple minded person and very trusting in his dealings with KBL", as the learned judge held. The extent of his business empire is inconsistent with this finding by the learned judge. Furthermore, if he was that trusting, why did he, in his evidence in chief, and in which carefully avoiding any reference to his letter of complaint of 4th November, 1978, say that in 1980, he verbally complained to Hobson about the 12 months' notice of termination contained in the 12th June, 1980, letter of appointment and had then astutely, asked Hobson to put in writing that his distributorship would only be terminated upon the giving of a ten years' notice. I would say that it is out of character for a man of such astuteness as Karume, who said he had demanded and obtained a written assurance from Hobson, not to have in the existing circumstances, asked for a similar one from Wanjama, if Wanjama

had really given him a verbal assurance that the letter of appointment of 8th July, 1996, would be terminated only by a ten years', and not a ninety days', notice. Karume said that he had relied on Wanjama's vague and inconsequential remark that: "there is nothing wrong". Finally, the onus is on the respondent and not the appellant, to first establish the respondent's case.

On my assessment of the evidence of the respondent, I fear that I have come to a conclusion different from that reached by the learned judge, in which she does not arrive at any clear and specific conclusion on the crucial issue, namely, the role that Hobson's letter played in the whole affair. In my view, the evidence adduced on behalf of the respondent to establish its case of undue influence, is by itself, unsatisfactory. The learned judge misapprehended the evidence on this score. The respondent's claim for damages on the ground that he was unduly influenced into accepting the letter of appointment, fails.

And now, I go back to the issue whether Hobson's letter of 17th October, 1980, can be said, having regard to the background evidence which I have analysed above, to have amended not only, the 12th June, 1980, letter of appointment but also, the one of 8th July, 1996. This Court in the case of *Mburui Matiri & Sons v Nithi Timber Co-operative Society Limited* Civil Appeal No 125 of 1987 (unreported), held in the unanimous judgment of Platt, Gachuhi and Apaloo JJ A, that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract. In that case, the implied condition was not even one that arose out of an alleged separate written undertaking, but one that was contained in the contract itself, under the heading "other conditions". In his judgment, Apaloo JA as he then was, put the matter in his customary succinct manner, this way:

"The question for consideration in this part of the case, is whether as a matter of law, such stipulation should be implied. The rights and obligations of the parties were founded on their written contract of the 10th November, 1984. And if my appreciation of the law on this aspect of the case is correct, no stipulation can be implied in a written contract unless it can be said to be mutually intended and necessary to give business efficacy to the contract. It is clear to me that the appellant intended to have a refund of his deposit once he provided the bank guarantee. The difficult question is, on the evidence, can it be said that the society shared that intention? Did it intend to give up its cash security for a bank guarantee? That guarantee was subject to review on the 30th June, 1986, just one year of its date and is liable to cancellation on thirty days' notice to the society. As a form of security, it is less advantageous to the society than the cash held. There is nothing in the evidence to which one can point at as showing a clear and unambiguous intention on the part of the society to give up its cash guarantee for what was, after all, a paper security. So whatever may have been the appellant's intention, it is not shown that that was equally the society's. That being so, there is no basis for holding that both parties mutually intended the stipulation contended for on behalf of the appellant."

As I have already adverted to, Hobson cannot legally be said, when he wrote his letter of 17th October, 1980, to have been acting on behalf of the appellant so that the appellant would be bound by it. In my view, and as I have already observed, the ridiculous ten years' notice of termination if at all, it was granted by the appellant, cannot be said to apply to all future letters of appointment by the appellant of the respondent as its wholesale distributor so as to affect the clear terms of that of 8th July, 1996. Indeed, such ten years' notice cannot be said to give efficacy to the letters of appointment allegedly breached by the appellant. If anything, it would undermine their efficacy and as the circumstantial evidence adduced seems to show, enable Karume through his acquired interest in a rival company of the appellant, to distribute the products of that rival company. The dubious account by Karume as to how Hobson came to write his letter of 17th October, 1980, does not help matters.

There is nothing in Hobson's letter which one can point at as showing a clear and unambiguous intention on the part of East African Breweries Ltd, let alone, the appellant, to replace the 12 months' notice and the 90 days' notice of the termination respectively, of the letters of appointment of 12th June, 1980, and 8th July, 1996, in which the respondent is not even designated as the distributor, with the ten years' notice of termination referred to in Hobson's letter of 17th October, 1980. There is also nothing in the documentary and verbal evidence adduced by the respondent to imply this on the part of the appellant, that its letters of appointment were subject to Hobson's letter. In my view, once Karume accepted the

letters of appointment of 12th June, 1980, and 8th July, 1996, on behalf of the respondent, if that can be said to be so, in the circumstances that I have described, the respondent was bound by the terms of those letters. But of course, from the ambiguity that pervades not only, the circumstances leading to the writing of Hobson's letter of 17th October, 1980, and the letter itself, but also, the distributors designated in the letters of appointment, it cannot even be said that the respondent was the distributor designated in the letters of appointment of 12th June, 1980, and 8th July, 1996, so as to vest in it, the right to sue the appellant in the first place. For the same reasons too, Wanjama's alleged verbal assurances, even as described by Karume, cannot amount to an amendment of the 8th July, 1996, letter of appointment.

The appellant's hundred grounds of appeal can be summarized as contained in the ninety eighth ground of appeal, that:

"The award of Kshs 241,586,711.58 to the respondent by the Court lacks factual and legal basis and the Court proceeded on wrong .....principles in reaching such an award."

I agree entirely with this ground and allow the appeal and set aside the judgment of the learned judge. The appellant will have its costs of this appeal and in the High Court.

Gicheru, JA Addressing this Court on 28th June, 2000, Mr Gatonye who appeared with Mr Kimani for the respondent submitted that the heart of the dispute between the parties to this appeal was the letter dated 17th October, 1980 and addressed to Honorable J N Karume, MP (PW 1) by the appellant's Managing Director, Mr B H Hobson. That letter was tendered in evidence in the superior court and marked exhibit 4. Its contents which were on a paper bearing the letter-heads of East African Breweries Ltd were as follows:

"The Hon J N Karume, MP

Kiambu General Transport Agency Ltd,

PO Box 134,

Kiambu

Dear Hon Karume,

I refer to your letter of 4th November, 1978 addressed to our chairman. Delay in replying to it due to oversight on our part is regretted.

As you know, we have a standard contract for all our distributors. Generally speaking, we do not take away business from our distributors except in the cases where they are unable to distribute our products for one reason or the other. We believe in keeping our distributors for as long as possible so long as their performance remains satisfactory.

It sounds as if you are concerned that your distributorship could be terminated without notice. This is not the case. You have been our long serving distributor and we have had a very happy association. Consequently, I would give assurance that so long as you continue to perform satisfactorily we have no intention of terminating your agency. In the unlikely event of circumstances arising for us to want to terminate your services, we would no doubt give you a reasonable notice and the ten years would be reasonable to enable you to make the necessary adjustments in your businesses. I sincerely hope that that would not be necessary as it is not even contemplated.

Yours sincerely,

B H Hobson

Managing Director."

In his evidence in the superior court in connection with this letter, PW 1 who has been one of the directors of the respondent since its inception had this to say:

"In 1980, Hobson was managing the breweries. He knew me as a customer. I look at page 3 clause 17 in the 1980 agreement The termination period was 12 months. I produce the agreement as Ex 3. I was happy with the termination clause at that time. After a while I went to see Hobson the Managing Director. I saw him and we discussed as we had worked for so long. I thought the period was too short. I said so, because since 1958, I had invested heavily and the time could not allow me to dispose of the motor vehicles. I put to him my problem and first he said he was happy with our relation.

He told me though (the) agreement was 12 months or 1 year, nobody from Kenya Breweries could come and tell me you go because of the long period. That 12 months was only a formality. He told me that nobody could terminate my business of 12 years. I told him to give me a note. I look at a letter dated 17th October, 1980. This letter was written to me by Mr Hobson. He told me that considering all those years, the only reasonable period I could be given was 10 years."

PW 1 further testified that in 1980 B H Hobson was the Managing Director of the appellant and exhibit 4 was written in connection with his distribution agency. He also said that it was possible that he might have written to Mr Hobson on 4th November, 1978.

The respondent was incorporated on 23rd December, 1966 with two subscribers, one of whom was PW 1 who was and still is one of its directors. Prior to its incorporation, PW 1 was trading in beer distribution in the name and style of Kiambu General Transport Agency and his first letter of appointment as a distributor for the products of Allsop (EA) Ltd and dated 28th February, 1963 was from the Brewers Association of East Africa amongst whose members was East African Breweries Ltd. Which later became Kenya Breweries Ltd and has now reverted back to its original name of East African Breweries Ltd. He confirmed his acceptance of the terms of that letter of appointment by his endorsement on it on 1st March, 1963. That letter was tendered in evidence in the superior court and marked exhibit 2. Clause 9 of the eleven terms in this exhibit read as follows:

"9. This appointment can be terminated by either party giving the other one month's notice in writing, except in the event of non-compliance with the above terms in which case either party shall be entitled to terminate the arrangements immediately."

These arrangements were superceded and revoked by the appellant's letter of appointment to the respondent as a distributor of its beer products, namely; Tusker, Pilsner, White Cap, City, Tusker Export and Guiness Stout in almost the whole of the old Kiambu district. This letter was dated 12th June, 1980 and was received by the respondent on 25th August, 1980. PW 1 as a director of the respondent accepted on its behalf the appointment as the appellant's distributor of its beer products on the terms and subject to the conditions set out in that letter. That letter was tendered in evidence in the superior court and marked exhibit 3. Clause 17 of this exhibit stipulated that:

"17. Subject to the provisions of clause 18 hereof, your appointment, hereunder will remain in force until termination by not less than twelve (12) months notice, expiring on the last day of any calendar month, served in writing by either party on the other."

Clause 18 related to the respondent's distributorship being terminated for breaches of certain terms and conditions set out in exhibit 3 and clause 19 of the said exhibit clearly stated that:

"19. This letter of appointment supercedes and revokes any and every letter or agreement of similar nature previously accepted by you or entered into between us."

It would seem therefore from the foregoing clauses that after exhibit 3 superceded and revoked the arrangements in exhibit 2, save for breaches of certain terms and conditions set out in the former exhibit, termination of the respondent's distributorship was otherwise well taken care of for in terms of clause 17, it was to remain in force until a notice in that regard of not less than twelve (12) months expiring on the

last day of any calendar month was served in writing by either party to the distributorship agreement on the other. It would appear to me therefore that the anxieties referred to in exhibit 4 that the respondent's distributorship of the appellant's beer products could be terminated without notice cannot have been in connection with exhibit 3 for a termination notice of not less than twelve (12) months expiring on the last day of any calender month as is referred to above could well have been more than twelve (12) months and thus take care of the parties long and happy relationship as testified to by PW 1 in his evidence in the superior court and as is referred to in exhibit 4. In referring to PW 1's letter of 4th November, 1978, it looks like the focus of exhibit 4 was exhibit 2 wherein the distributorship of Kiambu General Transport Agency could be terminated by its being given one (1) months notice in writing or without notice in the event of non-compliance with the terms of the said exhibit.

When PW 1 was re-examined in the superior court by counsel then appearing for the respondent herein in that Court, Mr Kimani, who is now being led by Mr Gatonye for the same party in this appeal, he had this to say in relation to exhibits 3 and 4:

"I am looking at Ex 3 – agreement dated 12-6-80. I see clause 17. It provided a period notice of 12 months. I was not satisfied with that period notice, that's why I went to the defendant's office and was given 10 years. That agreement was altered by a letter Ex 4. To date the period notice I know of to terminate any distribution agreement is 10 years. That letter was signed by a senior person B H Hobson, the Managing Director, who later became Chairman of KBL. Ex 4 came from the defendant company and was signed by Hobson who was with KBL for over 40 years. Ex 4 was written subsequent to my negotiation with Hobson. Our discussion related to my dissatisfaction with the period notice. We discussed and I said that because I had invested heavily a period of 12 months was not enough. I am looking at Ex 3. KBL used to be EABL before it changed its name. The defendant used to use these letter heads."

According to PW 1, exhibit 4 was subsequent to his negotiation with B H Hobson over the period of notice stipulated in clause 17 of exhibit 3. Peter Gachathi Wanjama (DW 3), the appellant's Marketing Director, however when cross-examined in the superior court by the leading counsel, Mr Oraro, then appearing for the respondent in that Court, over exhibit 4 testified that the same was a response by B H Hobson to a letter dated 4th November, 1978 addressed to the then Chairman of East African Breweries Limited, Mr K S N Matiba. It re-assured PW 1 that his distributorship agreement would not be terminated without notice and that he would be given reasonable notice.

At the hearing of this appeal on 26th, 27th, 28th, 29th and 30th June, 2000, the submission of counsel for the appellant, Mr Kilonzo, on exhibit 4 was that it made no reference to exhibit 3. Indeed, according to him, it related to exhibit 2 which was then in force when the anxieties contained in it were expressed by PW 1. It had no relevance to exhibit 3 and was not a variation of the same for uncertainty. It was not submitted to the appellant's Board of Directors for approval. According to counsel, exhibit 4 was no more than a letter of comfort from one good friend to another. Mr Gatonye's submission on this document, however, was that it constituted a variation of exhibit 3 so that the respondent was entitled to a period of 10 years notice from the appellant before the termination of its distributorship of the appellant's beer products. It was a binding contract between the parties and the consideration on the part of the respondent was the undertaking to perform satisfactorily in its distributorship. Exhibit 4 changed the period of notice of termination in clause 17 of exhibit 3 from 12 months to 10 years. Thus, the parties business and legal relationship was given effect by exhibit 4 as they so intended.

Exhibit 2 was signed for the Brewer's Association of East Africa and on the acceptance of its terms and subsequent endorsement by PW 1 on behalf of Kiambu General Transport Agency, it constituted a binding contract between the parties thereto. Similarly, exhibit 3 was signed for the appellant by the latter's sales and marketing manager and on the acceptance of its terms and conditions set out therein coupled with the subsequent endorsement by PW 1 on behalf of the respondent, it too constituted a binding contract between the appellant and the respondent. Exhibit 4 which from the date-stamp on it was received by PW 1 on 22nd October, 1980 though authored on a paper with East African Breweries Ltd letter-heads by B H Hobson, Managing Director, it is noteworthy that the latter neither authored it for East African Breweries Ltd nor on behalf of the appellant. As Mr Kilonzo for the appellant pointed out in

his submission on it, it may well have been no more than a letter of comfort from one good friend to another.

A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. Hence, the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as for the formation of a contract. Indeed, the agreement for variation must further be supported by consideration – see *Halbury's Laws of England*, fourth edition, volume 9 at page 391 paragraph 569. If the agreement is a mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement – see the case of *Vanbergen v St Edmunds Properties Limited* [1933] 2 KB 223.

Although Mr Gatonye for the respondent submitted that the undertaking by the respondent to perform satisfactorily in its distributorship of the appellants' beer products constituted the consideration on its part in relation to exhibit 4, clause 18 (b) (v) of exhibit 3 required the respondent to do so. Indeed, the same was couched in the following terms:

"18. (b) Your appointment as our distributor may be terminated forthwith upon service on you of notice in writing to that effect ..... (v) If in the opinion of KBL as it may in its absolute discretion determine you are not maintaining sufficient stocks as may be specified by KBL in its absolute discretion of our products to adequately supply your area with our products within 14 days of the receipt by you of a notice in writing from KBL specifying the stocks of our products to be carried by you."

Clearly the undertaking by the respondent as is referred to above constituted no consideration on its part in relation to exhibit 4. In its form, the said exhibit was no more than to give the respondent a voluntary indulgence. In any event, from what I have attempted to outline above, it had no bearing on exhibit 3. If anything, it looked towards exhibit 2 which latter was abrogated by exhibit 3.

Exhibit 3 was superceded and revoked by the letter dated 8th July, 1996 addressed to the respondent by the appellant. That letter appointed the respondent as a distributor of the appellant's products with effect from the date above mentioned in certain areas of Kiambu district. That letter generated some controversy between the respondent and the appellant and eventually sparked off the respondent's claim against the appellant.

Its terms and conditions had after some discussion between the respondent and the appellant been accepted and endorsed by PW 1 on behalf of the respondent. It was tendered in evidence in the superior court and marked exhibit 6. Clause 19(a) of that exhibit provided as follows:

"19.(a) This agreement may be terminated by either party giving to the other ninety (90) days notice."

Pursuant to that clause, the appellant by a letter dated 5th March, 1997 and addressed to the respondent gave to the latter ninety (90) days notice of termination of their distributorship agreement – exhibit 6. This letter was tendered in evidence in the superior court and marked exhibit 7. At the expiry of that notice on 2nd June, 1997 the aforementioned distributorship agreement was terminated.

As I indicated at the beginning of this judgment, the dispute between the appellant and the respondent was predicated on exhibit 4. Indeed, this exhibit was the fixed point upon which the judgment of the superior court was grounded. Without reliance on it, that judgment would tumble down like a house of cards. If, as I have held that this document had no bearing on exhibit 3, then, it was of no relevance to the execution of exhibit 6 and all the energy expended and the expense incurred by the parties to this appeal in relation to the said document was sadly wasted. In my view the, respondent could not lay a claim against the appellant based on exhibit 4 for the termination of this distributorship agreement with the appellant in terms of exhibit 6. Having come to this conclusion, I consider that to engage in any further debate in this appeal is superfluous and I do not intend to do so. Consequently, I would allow the appellant's appeal, set aside the judgment and decree of the superior court and award the costs of this

appeal and of the trial in the superior court to the appellant. As Akiwumi, JA agrees, there will be a majority judgment of the court in these terms.

Dated and delivered at Nairobi this 11th day of August, 2000.

J.E.GICHERU

.....

JUDGE OF APPEAL

A.M.AKIWUMI

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR