



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 25 , 28 AND 29 OF 2009

CONSOLIDATED

KAY KAY MKULIMA STORES LTDAPPELLANT

VERSUS

WORLD VISION.....1ST RESPONDENT
KITHUKI MULTI-PURPOSE COOPERATIVE SOCIETY.....2ND RESPONDENT
KANZOKEA MULTI-PURPOSE CO-OPERATIVE SOCIETY.....3RD RESPONDENT
MAVINDINI MULTI-PURPOSE CO-OPERATIVE.....4TH RESPONDENT
SAMUEL KIVUNGI.....5TH RESPONDENT
JOSEPH KAUNGU.....6TH RESPONDENT
GREGORY MULWA.....7TH RESPONDENT
JULIUS MUASYA.....8TH RESPONDENT
PAUL NDETEI.....9TH RESPONDENT
WILLIAM MUINDE.....10TH RESPONDENT
FLAVIAN K. MUTUA.....11TH RESPONDENT

(Being an appeal from the original judgment and decree in the Chief Magistrates Court Civil Case No. 378 of 2005 by Hon. F. Muchemi, CM on 25/2/09)

JUDGMENT

1. By the order of the court dated **1st November, 2011, Appeals Numbers 25 and 29 of 2008** were consolidated with this appeal (**28 of 2008**) which became the lead file.
2. The appellant sued the respondents claiming for **Kshs. 2,711,425/=** being a sum of money for

certified seeds supplied to the 2nd, 3rd and 4th respondents for which the 1st respondent was allegedly supposed to pay for but did not. The trial court reached a finding that the 1st, 5th, 6th, 7th, 8th, 10th, 11th and 12th respondents were not liable. Accordingly, the case against them was dismissed. Judgment was however entered against the 2nd, 3rd and 4th respondents. The appellant being dissatisfied with the whole of the judgment and decree of the court appealed on the following grounds:-

- i. **That** the learned trial magistrate erred in law and fact in making a finding that the **agreement of 2/3/2002 (P. Exhibit 1)** did not extend and apply to the transaction of **2004**.
 - ii. **That** the learned trial magistrate erred in law and fact by failing to make a finding that the minutes of **29/10/2004 (Exhibit 24)** was attested and approved by the agents of the 1st respondent and which was the genesis of the subsequent meetings of **30/10/2004 (P. Exhibit 25)** and completed by the contract entered on **1/11/2004 (Exhibit 6)** between the appellant and the 2nd, 3rd and 4th respondents.
 - iii. **That** the learned trial magistrate erred in law and fact in failing to make a finding that the 1st respondent was the principle debtor in whole transaction taking into consideration the conduct of the parties, various correspondences, telephone calls and the fact that the 1st respondent founded and funded the activities of 2nd, 3rd and 4th respondents.
 - iv. **That** the learned trial magistrate erred in law and fact in relying on letters written by the plaintiff after delivery of the seeds (*Exhibit 19, 20 and 21*) as evidence of lack of contract between the appellant and 1st respondent.
 - v. **That** the learned trial magistrate ignored the appellant's evidence which was corroborated by the evidence of 2nd, 3rd and 4th respondents that the ordering of certified seed on 1st November, 2004 was authorized and confirmed by telephone calls by the 1st respondent.
 - vi. **That** the learned trial magistrate arrived at the correct position that the seeds were distributed to farmers but erred in law by failing to make a finding who distributed the same to the **third** parties.
 - vii. **That** the learned trial magistrate ignored totally evidence adverse to the 1st respondent adduced by the 2nd, 3rd and 4th respondents.
 - viii. **That** the learned trial magistrate erred in law and fact by finding that **World Vision Area Development Program (WV-ADP)** was not an affiliate and agent of the 1st Respondent.
 - ix. **That** the learned trial magistrate erred in law on relying heavily on evidence which was not supported by 1st respondent pleading to exonerate them from their contractual obligation.
 - x. **That** the learned trial magistrate erred in law by not awarding the appellants interests of the claim from **1st November, 2004** as claimed in the plaint.
 - xi. **That** the learned trial magistrate erred in law by awarding costs to the 5th, 6th, 7th, 8th, 10th, 11th, and 12th respondents.
 - xii. **That** the court erred in law by failing to order how the costs of 5th, 6th, 7th, 8th, 10th, 11th and 12th respondents are to be shared.
 - xiii. **That** the learned trial magistrate's judgment is contrary to law and has occasioned a miscarriage of justice.
3. The plaintiff's case was that in the year **2002**, the **1st** respondent introduced a food security project in **Makueni** which was intended to eradicate poverty in the region. Societies amongst them the 2nd, 3rd and 4th respondents were formed for purposes of getting aid and credit from the 1st respondent for onward transmission to their members/other people.
 4. In the year **2002**, the 1st respondent entered into a partnership with the appellant who was to supply seeds. Per their agreement, the 1st respondent undertook to ensure the societies paid the appellant promptly. The appellant accepted the offer but sought to have the officials of the societies given personal guarantee. Consequently the 5th – 11th respondents signed guarantees, undertaking to ensure terms, conditions and obligations on the part of the debtors were complied with. On the **1st November, 2004** **Mr. Julius Musyoki** who described himself as the **ADP Chairman and Rev. Joseph Kaungu (Kithuki Cooperative)** in a document described as an

- agreement stated that they had been authorised by **World Vision – Makueni ADP** to represent the 2nd, 3rd and 4th Respondents and all societies formed and financially supported by the 1st respondent in seed supply negotiations with the appellant. According to the document the seeds to be supplied were not to exceed the value of **Kshs. 3,000,000/=** that the 1st respondent had pledged. They undertook to ensure payment was done. They signed the document in the presence of representatives of the appellant.
5. Deliveries were made, the total value being **Kshs. 2,711,425/=**. No payment was made. The 1st respondent declined to pay arguing that it was not their responsibility. They urged the appellant to seek payment from individual cooperative societies.
 6. The 1st respondent admitted having had a Food security Project of famine relief whereby the seeds were being supplied by the appellant. It however stated that the projects lasted from **2002 to 2003**. In implementing the project they adhered to the Standard Procurement Procedure set by the **Organization (World Vision Kenya)**. Various suppliers would give quotations which would be analysed at a meeting and the best bidder would be awarded the tender. A Local Purchase Order (LPO) would be raised and seeds would be delivered to a specified destination. The supplier would then raise an invoice to the organization for payment.
 7. It was further stated that in the year **2004**, there was a new emergency seed project that targeted poor farmers in three (3) locations. The person In charge of the project was **Lawrence Kaguno (the Food Security Officer)**. They were not buying seed from the appellant. Seeds were to be obtained from seed vendors and the beneficiaries were to be registered to participate in the seed fair. They registered vendors and kept records thereof. The voucher system was used which enabled farmers to choose whom to buy from. A vendor who did not participate in the seed fair could not have a claim against the 1st respondent.
 8. In his defence the 5th respondent who guaranteed the 4th respondent stated that there was no demand of payment of any money from him and the cooperative society was not a debtor. He stated that the 1st respondent which volunteered to assist the needy by buying seeds and seed implements should be liable.
 9. DW4, **Josiah Mule Muinde**, a representative of 3rd respondent stated that a resolution was made to purchase seeds for their farmers (*members*). The seeds were bought from the appellant. They stored the seeds for sale to farmers. Having not placed any orders for the seeds they were not willing to pay for them.
 10. The 6th respondent stated that he was wrongly sued as he was a guarantor of **Makaki Group** which was disbanded after the 2nd, 3rd & 4th respondents formed separate societies in **November, 2002**. In the year **2002**, seed was supplied by the appellant. Payment was to be made by the 1st respondent.
 11. This being a first Appellate Court, it is my duty to subject the evidence tendered in the lower court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I didn't see or hear witnesses. (*See Peter Versus Sunday Post (1958) EA 424 at page 429*).
 12. All parties are in agreement as to issues to be determined pursuant to the grounds of appeal.
 - i. Whether the conduct of parties infer a legal relationship between the 1st respondent and the appellant.
 - ii. Whether the 1st respondent made a representation to the appellant which they relied upon to their detriment.
 - iii. Whether the 1st respondent through writing, verbal communication and/or conduct made a representation which they are estopped from reneging.
 13. Evidence adduced establishes a fact not in dispute that in the year **2002** following an agreement reached by the 1st respondent and the appellant some seed were supplied and eventually paid for. There was an offer made as proved by correspondences. The offer was reduced into writing. The 1st respondent requested the appellant to enter into an agreement with the 2nd, 3rd and 4th respondents respectively. The appellant was to supply them with farm inputs and the 1st

- respondent undertook to ensure that the societies (2nd, 3rd and 4th respondents) paid the appellant promptly.
14. It is important to note that in their acceptance note, (**Plaintiff's exhibit 2** – letter dated **15th March, 2002**), they were to take a precautionary measure. Only orders made with the knowledge of the 1st respondent's office either in writing or verbally would be honoured. Consequently various officials of the societies (**2nd 3rd and 4th respondents**) executed personal guarantees to indemnify the appellant in case of default by the debtors. The **World Vision-Makueni Area Development Programme (ADP) Manager, Mr. Mutungi** and area Chiefs **Mr. Joseph M. Nzuvi; P. Kituma, Fredrick Kioko**; and the **Director** of the Appellant were witnesses. (**vide Plaintiff Exhibits 3,4 and 5 respectively**). It was proved on a balance of probabilities that an offer and acceptance took place. In the said year, there was indeed a consideration. The 1st respondent admits existence of the said agreement but emphasises the fact that procurement procedures were complied with. The appellant was found to be the acceptable bidder. The authority to pay him emanated from the 1st respondent's national office.
15. The correspondences alluded to are clear. It was neither expressly nor impliedly conveyed that the contract was to extend to the future or any other transaction. The appellant alleged there was an agreement between parties dated **23rd March, 2002** that supported their assertion which was not adduced in evidence. This remained speculation. A court of law does not act on speculation.
16. At this juncture, this court must address the issue of the minutes dated **29th October, 2004**, whether it was attested and approved by the agents of the 1st respondent which later gave rise to the contract dated **1st November, 2004** between the appellant and societies.
17. It may be important to highlight one of the activities discussed as part of the agenda item – planting of seeds. The **Area Development Programme (ADP) Manager** present (**Joseph Ekalale**) notified those present that arrangements had been made for Co-operative Societies to look for seed registered beneficiaries and provide them with seed. The 1st respondent would then refund the money. However, it was not achieved. Thereafter Cooperative Societies were advised to follow up on the issue to get seed on credit that they would be paid. Further he stated that they were advised to send at-least two people from the Societies and the Ministry of Agriculture, to the supplier (KK) the appellant herein to approve that the seeds were of best quality. They were also to identify other supplies and what they were offering.
18. These minutes were prepared by **Kellen Kathambi** indicated as an 'intern', they were reviewed by **J. Mulava**- CRS Coordinator and approved by **J. Ekalale (ADP Manager)**. The meeting having been a management one was for members of the co-operative societies and not agents as stated by the appellant.
19. This calls upon this court to consider what constitutes an agent and master relationship. This kind of relationship is defined in **Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001**, as-

“... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

20. From the foregoing, a consent is a requirement for a relationship of a principal-agent to come into a perceptible existence. An existence of a consent was considered in the case of **Branwhite versus Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587** where **Lord Wilberforce** stated thus:-

“While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.

21. He took into consideration the case of **Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd** and **Bunge Corporation (1967] 2 All E.R. 353** where Lord Pearson with the concurrence of

the House used the words-

“The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even If they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct “.

22. Looking at the content of the letter dated **4th March, 2002, (Plaintiff's Exhibit 1)** the only document adduced in evidence proving communication having taken place between the appellant and 1st respondent in respect of farm inputs; it is apparent that the 1st respondent expressly stated that they intended to partner with the appellant who had been assisting the area communities organized groups to access farm inputs on credit basis. Their duty was to ensure the societies made payments promptly.
23. An interpretation of the above commitment cannot be said to have been tantamount to a representation of an existence of a principal-agent relationship between the 1st respondent and the societies. Its role was of a facilitator not of a principal.
24. The document headed;-

“Certified seeds supply to Mavindini, Kanzokea and Kithuki Cooperatives agreement made on 1/11/2004 at KK Mkulima Offices”

Is authored by **Julius Musyoki** and **Rev. Joseph Kaungu**. The two gentlemen stated that they had been authorised by the **World Vision- Makueni ADP** on behalf of the 2nd, 3rd and 4th respondents to enter into agreement for purposes of supply of goods. It was further stated that the 1st respondent would pay for the said seeds. The document is signed by the two (2) authors in their capacity as **ADP Chairman** and **Kithuki Cooperative** representative respectively in the presence of **Ngila Kimotho** and **Joshua Muteru** representatives of the appellant. It is copied to **world Vision (Makueni ADP)** who are asked to ensure that money remitted to the cooperatives is paid to them soonest.

25. The 1st respondent was not privy to the arrangement entered into by the parties present which was more of an undertaking as opposed to an agreement. Though the 1st respondent's name was mentioned severally, it was not party to the arrangement. Under the doctrine of privity of contract, a contract cannot confer any rights or impose obligations on persons who are not a party to it (***see Preston Mbunzo Nzioka versus the Kenya Power Lighting Co. Ltd. Civil Appeal Nol. 74 of 2003***).
26. It has been stated that the conduct of the 1st respondent various correspondences, telephone calls and the fact that the previous activities were funded before were evidence of existence of a contract. As aforesaid, the main role of the 1st respondent as clearly expressed was one of facilitator between the appellant and the 2nd, 3rd and 4th respondents. The issue of telephone calls having been made prior to delivery of the seeds cannot be proved. Such alleged communication cannot be relied upon by this court.
27. The evidence adduced in the lower Court as correctly found by the trial court proves that there was no contract between the appellant and the 1st respondent for supply of the seeds. The agreement made in **2004** was strictly between the societies representatives and the appellant. The 1st respondent's representative had clearly advised that other suppliers be identified as well. There is no evidence procurement procedures were followed as in the past. Consequently, the parties who reached an understanding are the ones who are liable. The implied contract is therefore enforceable between them.
28. There was correspondence by the appellant to the 1st respondent. They were not acknowledged. There is hence no admission to its involvement in the stated transaction.
29. This brings us to the issue whether the doctrine of estoppel was applicable in the circumstances. In the case of ***Central London Trust Limited versus High Trees house Ltd [1947] 1 KB 130*** the

court held that;-

“... The promise, intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply.”

30. I have aforefound that there was no contract between the appellant and the 1st respondent therefore no promise as envisaged in law was made by the 1st respondent to the appellant in as far as delivery of seed in the year **2004** was concerned. In the premises the doctrine of estoppel is not applicable in this particular case.
31. Having evaluated and re-considered evidence adduced, I have no reason whatsoever to interfere with the decision reached by the trial court. The judgment thereof is upheld. In the result, the appellants appeal is dismissed with costs to the 1st respondent.
32. It is so ordered.

DATED, DELIVERED and SIGNED this **21ST** day of **MAY** 2014.

L.N. MUTENDE

JUDGE