



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE 776 OF 2002**

**EDFAM LIMITE.....1<sup>ST</sup> PLAINTIFF**

**E. M. MUNYINYI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOHN N. NGARUIYA.....1<sup>ST</sup> DEFENDANT**

**SAMMY KARANU MUNYINYI.....NECESSARY PARTY**

**J U D G E M E N T**

1. The Complaint herein was filed on 26 June 2002. In it, the Plaintiff prays for Judgment against the Defendant under a variety of headings as the suit involved the supply of caustic soda to a company known as Rift Valley Textiles Ltd from which the Defendant had obtained an order but required the Plaintiff's financial assistance to fulfill the same. The various prayers included B£.18,135 being the value of the caustic soda, shs.100,000/= covering an airfare paid on the Defendant's behalf, Shs.350,000/= paid to Kawison International allegedly for clearing and forwarding services, Shs.125,000/= paid to George Ndungu again allegedly for clearing and forwarding services and in the alternative to the value of the Caustic Soda (B£18,135) Shs.800,000/= being half the cost of purchasing the caustic soda and the shipping costs thereof.

2. The Defence was filed herein on 23 July 2002. In it the Defendant admitted approaching the Plaintiffs with the business proposal to supply Caustic Soda Solid to **Rift Valley Textiles Ltd**. He detailed that it became the 1<sup>st</sup> Plaintiff's responsibility to meet the purchasing costs for the Caustic soda as well as the costs of shipping and clearing. The Defendants admitted that he ordered the Caustic soda from a London supplier **Sahem International (U.K.) Ltd**. and that the order was placed in the name of the 1<sup>st</sup> Plaintiff. He further admitted that he had flown to London at the Plaintiff's expense, in order to clinch the deal and to make sure that the Caustic Soda was satisfactorily shipped. He also admitted to paying monies given to him by the Plaintiffs for the express purpose of facilitating the order of the supply of Caustic Soda. However, the Defendant denied that he was aware that the shipping documents were forgeries for they had been sent directly by the said Sahem International directly to the 1<sup>st</sup> Plaintiff. The Defendant denied any fraud on his part or that he admitted to frauds.

3. The hearing of the suit commenced on the 21 January 2004 before Emukule J (as he then was). Mr. Gachoka then for the Plaintiff, called the 2<sup>nd</sup> Plaintiff **EDGAR MAURICE MUNYINYI** as PW1. He stated that he operated 2 business, a dry cleaner and Edfam Ltd. which is a business investment company. The Defendant, John Ngaruiya is married to PW1's niece. He stated that in August 1995, he sold some land and had some free cash and was approached by the Defendant with a business proposition. The latter knew the Managing Director of Rivatex Ltd. a textile manufacturer which business required caustic soda for its textile processing. The Defendant was to canvass the Caustic soda orders from Rivatex Ltd and the Plaintiff would provide money to him to purchase and supply the caustic soda. The profits would be divided. The Defendant obtained orders from Rivatex Ltd. in the name of the 1<sup>st</sup> Plaintiff. PW1 was persuaded that there would be a better profit margin if the caustic soda was purchased in London and directly imported. PW1 agreed to this proposition as he had had successful business dealings with the Defendant, in the past.

4. Documents were presented by the Defendant showing that the London Company Sahem International (U.K.) Ltd. ("Sahem") were able to provide the Caustic soda. The 1<sup>st</sup> Plaintiff thereupon instructed its bankers to remit the sum of B£18,135.00 to Sahem which they duly did. Thereafter, the Defendant was approached by the Plaintiff who detailed that it was desirable for him, the Defendant, to fly to London to check the material Caustic soda before it was shipped. The Plaintiff made arrangements and provided a return air ticket for the Defendant worth approximately Shs.100,000/=. About a month after the Defendant returned from London, he informed PW1 that the Caustic Soda had arrived in Mombasa and that he requires money for clearance purposes. PW1 was provided with a Bill of Lading dated 27/10/1995 emanating from West European Container Lines. A copy of the bill of Lading was produced to court. The 1<sup>st</sup> Plaintiff then was required to and paid Shs.350,000/= to a clearing agent based in Nairobi. Later, PW1 requested information from the Defendant as to what had happened to the shipment to be informed that it had been wrongly consigned to Dar-es-Salaam. PW1 became suspicious and went to the offices of West European Container Lines then along State House Road, Nairobi to be informed that the Bill of Lading dated 27/10/1995 was a forgery.

5. PW1 then testified that he had approached the Defendant who had started avoiding him. Finally, towards the end of 1996, the Defendant having stated that he did not want to go to court, the Defendant wrote various notes acknowledging and promising to pay the 1<sup>st</sup> Plaintiff its money. There were two letters signed by the Defendant in this regard, the first dated 11 July 1996 and the second dated 27 June 1996. PW1 stated that the first letter acknowledged that the Defendant owed to the 1<sup>st</sup> Plaintiff Shs.800,000/= being half the costs of the Caustic soda, the amount of the shipping charges, the sum of shs.100,000/= for the air ticket, all to be paid by November 1996. The 2<sup>nd</sup> letter detailed that the Defendant would pay the amount of Shs.350,000/= which the 1<sup>st</sup> plaintiff had paid to Kawson International Ltd, the clearing agent. PW also produced an acknowledgement from the Defendant to pay shs.125,000/= being part of the money paid to one George Ndungu for clearing services. PW1 produced copies of these documents to court marked "Edfam A, B & C". He also produced the pro-forma invoice for the Caustic Soda from Sahem for B£18,135, the delivery note from Sahem showing that the Defendant had received 65 (tons presumably) of Caustic soda plus B£3000. PW1 detailed that no Caustic Soda was ever received from London and the Defendant has not paid the money promised/demanded.

6. In cross-examination, PW1 detailed that this was a joint claim as between himself and the 1<sup>st</sup> Plaintiff Edfam Ltd. The claim was for money had and received, to be repaid, not for breach of contract but breach of trust. PW1 detailed what he had advanced to the Defendant and what had been provided/paid for by the 1<sup>st</sup> Plaintiff Company, hence the joint claim. PW1 detailed that his wife was a co-shareholder and director in the 1<sup>st</sup> Plaintiff Company and knew of the arrangements with the Defendant and consented to them. PW1 acknowledged that he had reported the matter to the police but that the aforementioned letters (A, B & C) were written a long time after the report was made to the police, who chose not to prosecute. Thereafter, there was considerable evidence given concerning a Mr. Karanu who introduced PW1 to the Defendant. However, PW1 confirmed that Mr. Karanu was not involved with this transaction although PW1 had done business with him previously. PW1 confirmed that Mr. Karanu had been present in all the Defendant's dealings with the Plaintiffs. PW1 had not sued Mr. Karanu although the latter was

said to have received the 65 tons of Caustic Soda along with the Defendant.

7. PW1 confirmed that he had been very careful with the transaction, he had not personally paid for the air ticket. The documents were in the name of the 1<sup>st</sup> Plaintiff and it had paid directly from its account. PW1 confirmed that the cheque had been made out to Karanu's International Ltd and not the Defendant, who PW1 confirmed had not received any monies direct from the plaintiffs. PW1 confirmed that at the point of discharge in Mombasa, the shipping agents were Panfreight Shipping Agents and the documents did not reveal an office for that company in Nairobi which was why PW1 had contacted the offices of West European Containers Lines. PW1 then confirmed that he had reported the matter to the C.I.D. but he was unaware as to whether the Defendant or Mr. Karanu had made a statement to the police. He decided to pursue the Defendant through the civil courts as he had lost interests in pursuing him through the C.I.D.

8. The Plaintiff confirmed that the transaction had taken place in 1995/96 and that he only filed this case on 26 June 2002. All that time he had tried to get the family to bear upon the Defendant. He stated that he had accepted half the money because the situation had been desperate in July 1996. He was praying for payment of what he could get – see alternative prayer in the Plaint – No. 5. The profits, he agreed, would be shared 50/50. He did not foresee any losses or sharing of losses as, in this instance, the business was not transacted. The Plaintiff stated that he had been introduced to a representative from Sahem on one occasion at a police station named "George" but he had never seen George again and he shut out Mr. Karanu from his life and had not seen him since 1996.

9. In re-examination, PW1 confirmed that the letters of acknowledgement (of debt) were written in his office and that he did not force the Defendant to write them. PW1 said that he never knew that Mr. Karanu was going to London to verify the goods. As far as he was concerned, it was the Defendant who was going to London. He did not know who between the Defendant and Mr. Karanu who had received the goods. He had received instructions from the Defendant as to who to pay. As far as he was concerned, the Caustic Soda had never arrived in Kenya. Finally, PW1 confirmed that he had extended no undue influence on the Defendant to write the letters of acknowledgement. Thereupon, Mr. Gachoka closed his case.

10. DW1 was the Defendant. He was the general manager of a business known as Fexistone Enterprises, dealing in water pipers, meters and debt collection. He knew the 1<sup>st</sup> Plaintiff from a Ted Kabora who, in turn, knew Mr. Karanu. DW1 had contacts with Rivatex with which company he had previous dealings. When Rivatex required Caustic soda, he approached Mr. Karanu as he had his fingers burnt on an earlier venture. He did not know PW1 and was introduced to him by Mr. Karanu. PW1 would finance the Caustic soda order. Although he was married into the family, the relationship was not close and it was brought to his attention that pW1 was related to DW1's wife. PW1 confirmed that there was no documentary evidence as to what was the arrangement between him and PW1 as regards the Rivatex Caustic Soda order. PW1 and the 1<sup>st</sup> Plaintiff would take 50% of the profit on the deal and the other 50% would be shared as between Karanu, Ted Kabara and DW1. Both Mr. Kabara and Mr. Karanu were present whenever DW1 met with PW1. The order from Rivatex was procured in the name of the 1<sup>st</sup> Plaintiff. However, this was not the first transaction on between the four of them. There was a previous transaction from which a profit was realized and split 50/50. That Caustic Soda was sourced from Nairobi.

11. For the 2<sup>nd</sup> transaction, quotations for the Caustic soda were obtained from South Korea, South Africa, Germany and the U.K. PW1 suggested the U.K. because of shipping distance Sahem was not known to DW1 but he had come to know of the company as a source of 2<sup>nd</sup> had clothing a business that DW1 had now abandoned. DW1 said that he visited all the relevant embassies and reported his findings to PW1. DW1 stated that he was not present when the financing was arranged and never saw the invoice from Sahem. He did not know whether PW1 forwarded the monies from his own personal resources or through the 1<sup>st</sup> Plaintiff. The order was placed and he travelled to London together with Mr. Karanu. He did not know why PW1 could not go personally but came to learn that he had paid for Mr. Karanu to travel to London as well as himself. They stayed in the same hotel and DW1 ascertained that the London

product conformed to sample. He confirmed the delivery not No. 466 of 26/8/1995. Karanu was the other signatory thereto. Together, they went to see the shipping agent, which was P. Shah Paul Agencies and the Bill of Lading said payment had been made in full. They were to pay the agents in Mombasa who would pay the shippers. After delivering the Caustic soda to Shah Paul Agencies, DW1 and Mr. Karanu flew back to Nairobi on the same flight.

12. After a month, DW1 did not bother to check whether the goods had arrived in Mombasa as the shipping documents were to be sent to PW1 of Edfam Ltd. The London agents were in daily contact with PW1 and he would advise DW1 and the others of the arrival of the goods or otherwise. PW1 asked DW1 to follow up the matters as the shipping documents had arrived. He wrote out a cheque for the shipping and clearance charges to the Mombasa agents who was known to DW1 as he had done a lot of business with him. Three of them proceeded to Mombasa and stayed at the same hotel – DW1, Mr. Karanu and Ted Kabure. Each of them received an allowance of shs.5,000/= for their stay. The three of them were in Mombasa following up the same shipment. The clearing agents informed them that the Caustic Soda had not been off-loaded in Mombasa, the ship had sailed to Dar-es-Salaam and would be back in a week. After that week the three of them were told by the clearing agent that he was not sure when the ship would return to Mombasa. They telephoned PW1 who directed them to obtain a refund from the clearing agents which they did, returned to Nairobi and refunded PW1 the money.

13. All 3 of them DW1 stated – Mr. Karanu, Ted Kabare and himself then asked PW1 for some money. PW1 gave Ted Kabare Shs.70,000/= although the latter had requested Shs.125,000/=. PW1 gave DW1 Shs.125,000/=. PW1 also gave some money to Mr. Karanu. PW1 had said that the 3 of them should pay the balance of the money. DW1 acknowledged receiving Shs.125,000/= but could not remember who typed out the acknowledgement. Mr. Kabare and Mr. Karanu (Ted and Sammy as they were described) also signed similar acknowledgements. DW1 stated that the account was signed before it was made, which was an error. The understanding that the 3 of them were to pay shs.350,000/= was a confusion. He confirmed that the account was in his own handwriting.

14. DW1's evidence as to investigations carried out by the C.I.D. was rather muddled. He stated that PW1 had telephoned him to say that a Mr. "George" of Sahem had been arrested and that he was to go to explain to the C.I.D. about "George" – DW1 gave a statement and after about half an hour Ted Kaburu and Mr. Karanu also came to give a statement. Mr. "George" was then brought to them together with PW1 and DW1 was informed that he and Mr. Karanu knew "George". They were asked to wait while "George" recorded a statement and thereafter the officer in charge told them that "George" had been locked away and would be detained for some time until PW1 came with more evidence with which to charge "George". They were then dismissed. The next day he went to PW1's office and was given the option to put up 50% of the capital and split the profits of a new transaction/shipment 50/50. He was shown Exhibit 3A dated 11/7/1996 and PW1 told him that if "George" of Sahem had not shipped the goods, he would sue him in London and DW1 would be helpful in London. The delivery period for Rivatex was open ended as year later, he had checked with the Managing director of Rivatex who confirmed that he could still deliver the Caustic soda. The arrangements with PW1 were not documented anywhere except the letter of 11/7/1996. DW1 did not feel guilty about excluding his friends Ted Kaburu and Mr. Karanu from the new arrangement but their reaction to that news was unfriendly. However, nothing happened as regards the new undertaking. PW1 visited him once but the matter was not mentioned.

15. Under cross-examination, DW1, could not remember the last time he had met PW1 and confirmed that there had been a previous transaction for the supply of Caustic soda to Rivatex, he sourced the orders, Karanu and Ted Kabure would purchase the goods. DW1 confirmed that the agreement was that he would source the order and PW1 would finance the same in Edfam Ltd's name. DW1 described the visit to the British High Commission so as to source the order in the U.K. Met with the British Commercial attaché, who gave them Sahem's name but DW1 knew then in relation to the supply of 2<sup>nd</sup> hand clothing. When they were in London they met with Feorge Waria of Sahem but DW1 knew him as "George" not "Waria". George informed him and Mr. Karanu that he would obtain a supply of Caustic soda from Leeds. He did not say that he was a supplier of the product only an agent. They did not call PW1 to tell him of their arrival in London. They were issued with receipts and took them to Sahem who then took

them to the shipping agents. Arrangements for the shipping of the Caustic soda were done by Sahem who sent the receipts to Edfam Ltd. DW1 confirmed that the cost of the goods was B£18,135.00. He stated that he never paid any monies to Sahem.

16. DW1 then was taken through his evidence as to what had transpired when he went to Mombasa together with Ted Kabure and Mr. Karanu. He stated that they talked to the clearing agent one George Ndungu. He denied taking Shs.350,000/= (refund?) in cash and he cannot remember who signed for the receipt thereof. He denied giving the clearing agent Shs.65,000/=. The Shs.350,000/= he said, was given back to PW1 who lent Shs.75,000/= of it to Ted Kabure and he had requested Shs.125,000/= of it for his own use. Mr. Karanu also borrowed. He requested the money as a personal loan and he thought he had signed for it. A day or two later, he had borrowed the Shs.125,000/=. He denied any second payment of Shs.350,000/=. He did not request a further shs.350,000/= from PW1 for clearing the goods. He did not know whether the Caustic soda ever arrived in Mombasa, but he knew that it was never delivered to Rivatex.

17. DW1 was then shown the letter of 19 April 1996 Exhibit 3 "C". He admitted his signature thereto and that it was an admission that he had received Shs.125,000/=. He said that neither the police nor anyone else had forced him to write the letter. He could not remember why there was the discrepancy on the date of the letter and the signature. He was then shown the letter dated 27 June 1996 Exhibit 3 "B". He stated that he was the one to pay. PW1 paid Kawson, the shipping agent. This is a matter by himself he said, nobody forced him to write the letter. He had paid Shs.125,000/= not Shs.350,000/=. He was then shown the letter dated 11 July 1996, Exhibit 3 "A". What he meant by that letter was that once the Caustic soda had been received, he undertook to pay back Shs.800,000/=. This is no mention of any intended transaction. He acknowledge that the letter had been written by him and he undertook to pay the money by November 1996. He had not so paid and did not intend to pay.

18. DW1 was shown the Defence filed herein and confirmed that he had given instruction to his advocates to file the same. He also confirmed that he wrote the letters Exhibits 3 "A", "B" and "C" and that nobody forced him to write the same. Upon re-examination. DW1 confirmed obtaining quotations from other sources for the Caustic soda. He said that he went into the transaction together with Mr. Karanu and he did not know why the latter had not been sued. He confirmed that he had arrived in London with Mr. Karanu, 3 days after the money in payment for the Caustic soda had arrived. It was not correct that Mr. Karanu was in London for his own business reasons. He confirmed the shipping date for the goods was the 27 October 1995, 2 months after he was in London. Sahem packed the container, he was not present. He did not give PW1 the shipping documents, Sahem mailed them to Edfam Ltd.

19. The cost of shipping being Shs.350,000/= was paid by cheque by PW1 not by telegraphic transfer. He did not request PW1 in February 1996 for a further Shs.350,000/=. He was then re-shown the typed letter of 19 April 1996 for a further Shs.350,000/=. He was then re-shown the typed letter of 19 April 1996 Exhibit 3 "C" and said that he did not type it, he found it ready. He said that he signed the letter because the arrangement was that as seen as the goods arrived, he would pay back PW1 the same money. That money would come from George Ndungu as a refund of the shipping charges. The letter dated 11 July 1996 was in connection with the next transaction which is why DW1 undertook to pay Shs.800,000/= being half the costs of the Caustic Soda, Edfam would meet the other half and Karanu and Ted Kaburu would be cut out of the deal. DQ1 would share half of the profit that is why he committed to the arrangement. Finally, DW1 confirmed that he had met up with pW1 at C.I.D. Headquarters and that he was investigated. He did not know a Mr. Aura who supposedly introduced PW1 to "George" of Sahem.

20. At this stage of the proceedings, the Defendant made an application to join Sammy Karanu to the proceedings by Chamber Summons dated 30<sup>th</sup> March 2004. Consequently, Emukule J ruled the application on 23 June 2004. Later, the firm of R. W. Mbanaya & Co. advocates came on record for the Defendant. There were a couple of further applications including the one to amend the Plaintiff by adding Sammy Karanu as a Defendant. In the end and in accordance with Emukule J's Ruling of 23 June 2004, Sammy Karanu was joined as the necessary party. That Amended Plaintiff took 2 years to be filed. In May 2007, the Advocates for the Defendant made an application to strike out for want of prosecution. That

application did not proceed and in August 2008 the then Advocates for the Defendant made an application to get off the record as representing him. That was when Mbanya & Co. advocates came on the record for the Defendant. The matter was set down for hearing and an application made to save the Defendant by registered post.

21. This then was the position when the matter first came before me on 6 December 2012. Mr. Gachoka appeared for the Plaintiff and Mrs. Bunya for the Necessary Party. The latter noted that the Necessary Party had been joined at the behest of the Defendant but that a glance at the Amended Plaintiff showed no cause of action as against the Necessary Party. She asked that the Necessary Party be released from the proceedings and as Mr. Gachoka had no objection, I so ordered with the Necessary party's costs being paid by the Defendant. That left the Plaintiffs and I ordered that they should file their submissions and the matter could then come for judgement. There was no appearance before me when the matter next came before me on 26 January 2012 but it was then mentioned before me on 22 February 2012 and by that date, Mr. Gachoka had filed the Plaintiffs' submissions.

22. The Plaintiffs' submissions opened with a background to the case which I have summarized above. They related how the Plaintiffs had paid for the Caustic soda in the amount of B£18,135 to Sahem. Purchased the Defendant an air ticket to London worth Kshs.100,000/= and paid to have the Caustic soda cleared upon arrival in Mombasa at shs.350,000/=. The Plaintiffs referred to the 3 letters marked as 3 "A", "B" and "C" and pointed to how the Defendants had agreed to pay half the amount of the Caustic soda at Shs.800,000/=. plus the cost of the air ticket at Shs.100,000/= plus repayment of the clearance charges (as the Caustic Soda never arrived) at Shs.350,000/=. The Plaintiff then summarized the Defendant's case as per his evidence given before court.

23. The Plaintiffs pointed at the admissions in the Defence (paragraphs 7, 8, 9, 10 and 11 of the Plaintiff). The evidence that the Defendant gave as to his travelling to London and the receipt of Shs.350,000/= for the payment of the clearance charges. The Plaintiffs referred to the agreed Statement of Issues filed by both parties on 26 February 2005 and detailed as follows:

**“1. Whether or not a condition was imposed by the 2<sup>nd</sup> Plaintiff to the effect that any order procured by the Defendant would have to be in the name of the 1<sup>st</sup> Plaintiff.**

**2. Whether the Defendant acted in good faith when requesting the Plaintiffs to send money for the purchase price of caustic soda, to meet air fare to London and pay clearing and forwarding charges.**

**3. whether the documents given to the Plaintiff by the Defendant were fake and forgeries and whether the Defendant was aware of this fact.**

**4. Whether or not the Defendant was fraudulent as better particularized in paragraphs 7, 8, 9, 10 and 11 of the Plaintiff.**

**5. Whether or not the Defendant admitted and confessed to the particulars of fraud and misrepresentation in writing and agreed to refund the money to the Plaintiffs.**

**6. Whether or not the Plaintiffs are non-suited.**

**7. Whether or not demand and intention to sue has been given.**

**8. Whether the Plaintiffs are entitled to the reliefs sought?**

**9. Who should pay the costs of this suit?”.**

24. As far as the Defendant's fraud was concerned the Plaintiffs' submissions referred the Court to paragraph 13 (a) – (h) of the Amended Plaintiff as follows:

**“13. The Plaintiffs on learning of the calculated fraud by the Defendant confronted him and the Defendant confessed to the alleged fraud. The Plaintiffs established that indeed the entire business transaction was a well calculated fraud by the Defendant and the Necessary Party.**

**PARTICULARS OF FRAUD BY THE DEFENDANT AND NECESSARY PARTY**

- (a) Representing to the plaintiffs and making them believe that they had a genuine order to supply caustic soda solid to M/s. rift Valley Textiles Ltd when no such soda existed.**
- (b) Fraudulently arranging for the Plaintiffs to transfer money to Sahem International (U.K.) Ltd.**
- (c) Fraudulently arranging for the Plaintiffs to pay air fare for defendant to go to London allegedly to verify the goods.**
- (d) Fraudulently arranging for the plaintiffs to transfer money to a fake clearing and forwarding agent in Mombasa.**
- (e) Fraudulently going to London and converting to their own use the total sum of Sterling Pounds Eighteen Thousand One Hundred and Thirty Five (£18,135).**
- (f) Converting into own use by deceit the sum of Kshs. Seven Hundred Thousand paid to the alleged clearing and forwarding agent.**
- (g) Planning the said scheme of elaborate fraud and deceit to illegally get money from the plaintiffs.**
- (h) Converting the Plaintiffs money into own use when no consideration has passed to the Plaintiff”.**

As far as the law is concerned, the Plaintiffs referred the Court to *Anson’s Law of Contract 28<sup>th</sup> Edition* at pages 243/4 commenting upon the well known authority of **Derry vs. Peek** [1990] 14AC as to what constitutes fraud. I was also referred to **Abdulla Bin Mohammed El Kiumi v Azzan Bin Zahor El Ruweki** [1958] 1EA 553. I was the Plaintiffs’ submissions that fraud had been proved by the Plaintiffs. The Defendant had admitted that the Plaintiffs gave money to him for the purchase of Caustic soda. No evidence had been brought by the Defendant to controvert that of PW1 and the Defendants had never chosen to call his alleged 2<sup>nd</sup> witness.

25. I consider that the easiest way for me to rule on this matter is by reference to the agreed Statement of Issues filed herein on 26 February 2003. It seems to me that at the time both parties were keen to see this litigation come to an end thus identifying the matters in issue between them. I deal with such utilizing the parties numbering:

- (1) There was condition imposed by the 2<sup>nd</sup> Plaintiff that the Caustic soda should be procured in the name of the 1<sup>st</sup> Plaintiff. The Proforma Invoices dated 3 and 21 August 1995 from Sahem clearly indicates the Caustic Soda supply from Edfam Ltd, as does the Delivery Note No. 466 dated 26 August 1995 (Plaintiffs’ Exhibit 4).
- (2) The verbal agreement between the parties was that Plaintiffs would put up the money while the Defendant would source the order for the Caustic soda and process the same including the purchase thereof, shipping to Kenya and delivery to Rivatex Ltd. As the Caustic soda never arrived and was consequently never delivered to Rivatex Ltd. the Defendant can hardly be said to be acting in good faith.
- (3) The one shipping document produced before Court was the Plaintiffs’ Exhibit 2. We only have the Plaintiffs’ say so that this document was forged by the Defendant never denied the same.

(4) Paragraphs 7 – 11 of the Plaintiff particularize the details of the transaction both in London and Mombasa. At paragraph 5 of the Defence dated 22 July 2002, the Defendant admits the contents of those paragraphs.

(5) As to the Defendant admitting to the fraud, the evidence as to this is contained in the Plaintiffs' Exhibit 3 "A", "B" and "C". Exhibit 3 "A" which the Defendant admitted was in his handwriting and signed by him on 11 July, 1996 admits that he and Sammy Karanu Munyinyi received 65 tons of Caustic soda and B£3000 from Sahem International. He further undertook to pay Shs.800,000/= to Edfam Ltd. (the 1<sup>st</sup> Plaintiff) being half the cost of the commodity and the Shipping Charges. He further undertook to pay Edfam Ltd. Shs.100,000/= being the amount paid for his air ticket to London to verify the goods. He stated that he would be able to pay the total amount by November 1996. Exhibit 3 "B" details that the Defendant took Shs.350,000/= from Kawison International and hence he was the one to pay the 2<sup>nd</sup> Plaintiff the said money in full. Exhibit 3 "B" is dated 27 June 1996. Finally, Exhibit 3 "C" details the Defendant acknowledging receipt of shs.125,000/= from Edfam Ltd. the 1<sup>st</sup> Defendant being part of the money paid to George Ndungu for clearing the Caustic Soda. Exhibit 3 "C" is dated 18 April 1996.

To my mind, although the Defendant has not actually admitted to fraud, he has agreed to refund to the Plaintiffs' the sums detailed in Exhibit 3 "A", "B" and "C".

(6) The Plaintiffs are not non-suited.

(7) By Plaintiffs' Exhibit 5, I am satisfied that notice of intention to sue was given to the Defendant by the Plaintiffs' Advocates letter of 18 October 2001.

(8) The Amended Plaintiff prays for the following:

**"1. Sterling Pounds 18135 being the value of the caustic soda solid aforesaid.**

**2. Kshs.100,000 being Air Fare paid on Defendants' behalf.**

**3. Kshs.350,000 paid to Kawison International.**

**4. Kshs.125,000 paid to George Ndungu.**

**5. In alternative to prayer 1 herein above Kshs.800,000 being half the cost of caustic soda and shipping.**

**6. Cost on 1,2,3,4 and 5 herein above at 28% being the prevailing commercial rate from the date of receipt of the said sums until payment in full".**

As prayer 5 supra is expressed in the alternative, I hereby enter judgement for the Plaintiffs as follows:

A. The Kenya shillings equivalent of B£18,135 being the amount paid by the 1<sup>st</sup> Plaintiff for the Caustic soda which never materialized. The Central Bank of Kenya's buying rate of exchange as at today's date shall apply.

B. KShs.575,000/= covering the refund of the Defendant's air fare to London and monies paid to clearing agents in Mombasa.

C. The costs of the suit as against the Defendant.

I am unable to award interest on the sums detailed in A and B above as the Plaintiffs' have not prayed for the same in either the Plaintiff or the Amended Plaintiff herein.

**J. B. HAVELOCK**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of May 2012.**

**G. V. ODUNGA  
JUDGE**

**In the presence of:**

No appearance for Plaintiffs.

No appearance for Defendants.