



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 448 of 1999**

**KOBIL PETROLEUM LIMITED:..... PLAINTIFF**

**- VERSUS -**

**SHREEJI TRANSPORTERS (1990) LIMITED:..... 1<sup>ST</sup> DEFENDANT**

**ROBRIC LIMITED:..... 2<sup>ND</sup> DEFENDANT**

**PETER B. GACHAU:..... 3<sup>RD</sup> DEFENDANT**

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

1. The suit herein was instituted by way of a Plaint dated **3<sup>rd</sup> March 1999** and filed in court on **5<sup>th</sup> March 1999**. The Plaintiff's claim against the defendants is for a total of **Kshs.1,918,388.70/=** with interest thereof from **30<sup>th</sup> November 1996** at a rate of 18% per annum against the defendants jointly and or severally.
2. The background of the suit is that by an agreement dated **2<sup>nd</sup> November 1992** made between the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the plaintiff agreed to supply fuel products to the 1<sup>st</sup> defendant on credit basis which fuel products were agreed to be supplied through the second and third defendants' petrol station in their capacity as the plaintiff's appointed dealers and the plaintiff supplied the said fuel products to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Pursuant to the said agreement, the plaintiff continued supplying petroleum products to the defendants. On or about the years 1995 and 1996 the plaintiff alleges it supplied fuel products worth **Kshs.1,918,388.70/=**. It is the plaintiff's claim that the defendants have refused to pay the said amount.
3. The 1<sup>st</sup> defendant filed its defence on **27<sup>th</sup> May 1999**. In denying that they owe the plaintiff the amount claimed, the 1<sup>st</sup> defendant stated that it used to take fuel from the plaintiff petrol station on credit and make payments from time to time until they noticed that there were fraudulent invoices being raised against it. That is when they discontinued taking fuel from the petrol station and demanded that the matter be investigated and accounts sorted out before it could make any further payments. The 1<sup>st</sup> defendant averred that after the parties agreed to reconcile their accounts taking into account the said false invoices, it would make appropriate arrangements to pay such amounts (if any) as may be rightfully due from it.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a defence dated **23<sup>rd</sup> April 1999** and filed in court on the same day. The said defendants further filed an Amended defence and counterclaim on **15<sup>th</sup> February 2007**. The defendants denied owing the plaintiff the amount claimed and stated that any claim the plaintiff had, lay

with the 1<sup>st</sup> defendant who was duly supplied with fuel and other products. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants counterclaim was for a sum of **kshs. 644,700.10/=** on the allegation that the plaintiff, on or about 30<sup>th</sup> September 2000 recklessly and without due regard to the License and Fuel Supplies Agreement, offset main account no. 5126 to sub-account no. 5127.

5. The hearing commenced on **10<sup>th</sup> November 2011** with the plaintiff calling one witness. In her examination-in-chief, the witness (PW1), Mary Wambui Mwangi, who described herself as the current LPG manager of the Plaintiff, testified that she was the sales representative of the plaintiff around 1996 to 1999. She averred that the plaintiff deals in and sells petroleum products in wholesale to petrol stations and other users. She testified that there was an agreement of dealership between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants dated **1<sup>st</sup> May 1995**. She referred the court to paragraph 1 of the Plaintiff's bundle of documents and stated that the Title of the agreement was a "Licence".

6. It was her testimony that Kobil entered into a supply agreement with the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The agreement stipulated the terms governing the supply of products to the 1<sup>st</sup> defendant, which supply was on authorized order forms. The orders were all to be authorized by the 1<sup>st</sup> defendant without whose authority the 2<sup>nd</sup> defendant could not supply the fuel. The 2<sup>nd</sup> defendant was expected to confirm the authorized signatures, after which the 1<sup>st</sup> defendant's drivers would sign upon receiving the product. After the 1<sup>st</sup> defendant had taken the fuel, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants would compile all the order forms and signed invoices for transmission to the plaintiff who would then issue a debit note. She referred the court to paragraphs 27-65 of the Plaintiff' bundle of documents which indicated the Debit Notes issued and the respective amounts. She averred that the debit note at paragraph 66, for Kshs. 193,300/= was subject to a set off vide a debit note no. 9680 for Kshs. 35,919.90/= and the amount was to be excluded from the total claim against the defendants. She further referred the court to various paragraphs of the bundle of documents indicating statements and invoices. She testified that the various statements and invoices were drawn by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and were signed by drivers of the 1<sup>st</sup> defendant. She testified that at the back of the statement at paragraph 203 of the bundle of documents, there were conditions of sale that the plaintiff should charge interest of 1.5% per month on all delayed payments, that is, 18% per annum. She confirmed that the foregoing was the basis for the plaintiff's request for interest at 18% per annum.

7. On cross-examination by counsel for the 1<sup>st</sup> defendant, PW1 confirmed the process through which the 1<sup>st</sup> defendant could take fuel from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She averred that an order would be made and confirmed after which the plaintiff would do the debit notes. She also conceded that there was no order in the bundle of documents and that she was aware that the 1<sup>st</sup> defendant had contested that some fuel were supplied to it. However, it was her contention that the orders were given directly to the plaintiff and where there were no orders the four signatories as authorized by the 1<sup>st</sup> defendant would sign on the invoice. It was further established that, of the invoices that were signed, some of the signatures did not compare with the authorized signatures and others were not clear.

8. On further cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW1 averred that, in all the debit notes, the plaintiff had not debited the 2<sup>nd</sup> defendant and that the plaintiff's bills and statements were to the 1<sup>st</sup> defendant and not to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She testified that the billing of the 2<sup>nd</sup> defendant came as a last resort due to failure of the 1<sup>st</sup> defendant to pay. She averred that, up to the point of sending debit notes, the plaintiff was not aware of any fraud allegations. It was her testimony that they sued the 2<sup>nd</sup> defendant because they were the suppliers of the 1<sup>st</sup> defendant. She also confirmed that there was no express agreement with the 2<sup>nd</sup> defendant on interest.

9. On re-examination, PW1 testified that the invoices were made by the 2<sup>nd</sup> defendant, indicating when fuel was taken, the vehicle number as well as the order number. In the absence of order numbers, there were the signatories. She confirmed that the orders were in the custody of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and not with the plaintiff. She also confirmed that all the invoices were signed by the officials of the 1<sup>st</sup> defendant, who was in possession of the original invoices. She averred that the 1<sup>st</sup> defendant declined to

pay for fuel because there was allegation of fraud. She further averred that the 3<sup>rd</sup> defendant was in court because he was a guarantor and mentioned as such in the agreement. She testified that there was an acknowledgment from the defendants that there was fraud at the petrol station. The plaintiff gave the defendants time to pay the debt but they were unable to agree who was responsible for the fraud and that is why the plaintiff came to court. She concluded by averring that the defendants jointly owed the plaintiff the amount claimed.

**10.** The hearing continued on **1<sup>st</sup> December 2011**, with the 3<sup>rd</sup> defendant providing the sole testimony on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He testified that before they supplied fuel they had to have an LPO duly signed by authorized signatories. He referred to the letter dated **11<sup>th</sup> July 1995** of authorized signatories at page 26 of the agreed bundle of documents. He averred that they supplied fuel on the basis of LPO but signatories themselves could collect fuel and sometimes they gave verbal orders. Immediately they supplied products they raised an invoice and indicated vehicle No., LPO and date of supply. The driver would then sign the invoice and take the original to the 1<sup>st</sup> defendant.

**11.** The 3<sup>rd</sup> defendant further testified that once they had delivered statements fully supported by required documents, the same would be verified and a credit note prepared for the value of the product that they had supplied and a refund for the money used in the purchase of the fuel. The 1<sup>st</sup> defendant also raised a debit note, less the given discount, which debit note was issued to them by the plaintiff. It was the 3<sup>rd</sup> defendant's testimony that no single debit note was ever raised to the 2<sup>nd</sup> defendant during the course of their supply. He averred that all the debit notes were issued to the 1<sup>st</sup> defendant and that it was their obligation to pay the plaintiff. He referred to the debit notes at pg. 203 of the agreed bundle of documents, which were issued by the plaintiff to the 1<sup>st</sup> defendant and averred that most of them were not proper. It was his contention that the statement had some erroneous figures arising from premier service station and another station both in Mombasa which were erroneously included. The 1<sup>st</sup> defendant refused to pay the amounts in the invoices claiming that there were some discrepancies e.g. forgery. He further averred that some invoices which did not have LPOs were those duly signed by the drivers as agreed.

**12.** It was also the 3<sup>rd</sup> defendant's testimony that he had made a summary and analysis of all the debit notes totaling to **Kshs.1, 918, 3888.70/=**. He also stated the amounts in dispute and discovered that the disputed invoices were amounting to **Kshs.295, 493/=** leaving a balance of **Kshs.1, 622, 895.70/=**, which amount should have been paid. On the alleged forgery, he averred that he had given a summary of some signatories and even the genuine signatures were not identical. He testified that it was not easy to know if there was forgery and that in his opinion there was no forgery. He contended that the claim against him and the 2<sup>nd</sup> defendant was not justified and the same should be dismissed.

**13.** On cross-examination by counsel for the plaintiff, the 3<sup>rd</sup> defendant testified that the plaintiff had paid them **Kshs. 618,000/=** but they had no documents to prove the same. The said amount was part of their counter-claim, a claim which arose in the year 1995. He averred that the plaintiff had not refused to pay the balance but had requested them to wait until the issue was resolved. He also averred that he signed the agreement in his personal capacity and it had nothing to do with the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant admitted that the 2<sup>nd</sup> defendant and he were dealers of the plaintiff. He averred that he had signed the agreement for and on behalf of the 2<sup>nd</sup> defendant who was part of the agreement.

**14.** It was the 3<sup>rd</sup> defendant's contention that he was operating not as an agent of the plaintiff but independently and that is why he was paying a licence fee to Kobil. It was part of the agreement that he was to source business for both the plaintiff and the 2<sup>nd</sup> defendant. The plaintiff was also mandated to look for customers for fuel and when they did that there was no need for him to be involved in their negotiations.

**15.** The witness testified that the 1<sup>st</sup> defendant would send their drivers with LPOs which were submitted to the 2<sup>nd</sup> defendant. The LPOs indicated how much was to be supplied and they were to be signed by the directors of the 1<sup>st</sup> defendant. He averred that without the LPOs there would be no fuel. The drivers were

to be issued with an invoice which they had to sign showing they had received the said fuel. The 3<sup>rd</sup> defendant admitted that where there was no LPO but fuel was taken, then he was to blame. However, he stated that sometimes where there was no LPO, the situation could be where the directors themselves either came to pick the fuel or they would call and indicate that some other person was on their way to pick the fuel. In that case they would supply the fuel and issue invoices. Refer to pg 77 of the bundle there are 37 invoices and only 2 with LPOs). Some invoices were given without LPOs, which was not proper under the agreement.

16. He further testified that the amount of **Kshs.1, 918, 388.70/=** was not proper as it included some figures from two stations in Mombasa. He averred that the 1<sup>st</sup> defendant should have paid the plaintiff the undisputed amount of **Kshs.1,622,895.70/=**, while the disputed amount of **Kshs.295,493/=** be paid by the plaintiff and the 1<sup>st</sup> defendant.

17. On re-examination the 3<sup>rd</sup> defendant confirmed that the invoices from the 1<sup>st</sup> plaintiff were not addressed to the 2<sup>nd</sup> defendant but to the 1<sup>st</sup> defendant. He testified that there was no arrangement between the plaintiff and the 1<sup>st</sup> defendant that the 2<sup>nd</sup> defendant would pay the 1<sup>st</sup> defendant's debts. He referred the court to the agreement of supply between the plaintiff and the 1<sup>st</sup> defendant and averred that the name of the 2<sup>nd</sup> defendant appeared on it as a copied party to facilitate supplies. He further averred that he had not in his personal capacity guaranteed to the plaintiff he would pay any of the debts owed to it by the 1<sup>st</sup> defendant or by any other party.

18. A dispute arose and the 1<sup>st</sup> defendant did not pay the money because they were disputing some invoices. The dispute in the invoices partly arose because sometimes the 2<sup>nd</sup> and 3<sup>rd</sup> defendant supplied fuel without LPO especially when there were verbal instructions and when the instructions were on complimentary slips. On numerous occasions, such invoices were paid without question. The 3<sup>rd</sup> defendant averred that they had filed a counter-claim for **Kshs.644,000/=**, being the amount held by the plaintiff as a result of the present case. He asked that the money be released to him.

19. The plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed written submissions on 2<sup>nd</sup> July 202 and 13<sup>th</sup> July 2012 respectively. The said submissions mainly buttressed the evidence as given by the respective parties. It is worthy to note at this point that the 1<sup>st</sup> defendant chose not to call any witness and did not file submissions. I have carefully considered the pleadings, evidence by the parties as well as the submissions by counsels.

20. There are a number of issues that are not disputed in this matter. First, that there was an agreement governing the supply of fuel between the 1<sup>st</sup> defendant and the plaintiff. Secondly, that there was an agreement between the plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Lastly that there was some fraud perpetrated among the defendants. The alleged fraud, it seems, is the reason for the present claim in court.

21. The main issue in dispute is who among the defendants is liable to pay the plaintiff's claim for the sum of **Kshs.1, 918, 388.70/=**. The defendants are blaming each other for the malpractices. To this end, it was testified on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that they were not party to the agreement from which the plaintiff's claim arose and therefore they were not liable to the plaintiff. On the other hand it is the 1<sup>st</sup> defendant's case that they would pay once the accounts were properly reconciled. This is a clear indication that the 1<sup>st</sup> defendant has admitted to owing the plaintiff some money subject to the accounts. It was elaborately explained by DW1 on how the supplies were made to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. The fuel was to be supplied on the basis of LPOs and it was the 2<sup>nd</sup> defendant to raise the invoices after supply was made as required. DW1 admitted that there were instances when the fuel was supplied without the LPOs, whereby the 1<sup>st</sup> defendant just issued complimentary slips or made calls to the defendants. In that case, it is not in doubt that both parties are to blame for the disputes that arose with regard to the supply of the fuel as they did not abide by the terms of the agreement. In fact, DW1 in his testimony admitted that they were to blame where fuel was supplied without LPOs.

22. However, the plaintiff's claim arose as a result of the contract they entered into with the 1<sup>st</sup> defendant dated **2<sup>nd</sup> November 1992**. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant's case, as earlier stated, was that they were not party to this agreement. On the other hand, the plaintiff claimed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were involved in the agreement since the said agreement was copied to them and they benefited from it. The issue here, it seems, is that of **privity of contract**. The Court of Appeal, in the case of **AGRICULTURAL FINANCE CORPORATION - VS - LENGETIA LTD (1985) KLR 765** adopted the definition of privity of contract from Halsbury's Laws of England, 3<sup>rd</sup> edition, Volume 8 at paragraph 10 as follows:

**“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that the person who is a stranger to the consideration of a contract stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”**

23. In light of the above definition it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not party to the agreement between the plaintiff and the 1<sup>st</sup> defendant as much as they benefited from the same. Therefore, the only issue that remains for determination is whether the 1<sup>st</sup> defendant is justified to withhold payments to the plaintiff. It is the 1<sup>st</sup> defendant's case that they will only make payments when reconciliations have been done and the issue of fraud determined. However, the 1<sup>st</sup> defendant did not produce any evidence in court to support the alleged fraud. In addition, they never explained to this court how they wanted the accounts to be reconciled.

24. It was incumbent upon the 1<sup>st</sup> defendant to prove the allegations of fraud or malpractices involved in drawing up the invoices to substantiate their reasons for failing to pay the plaintiff the outstanding amount. Further, it has been testified in this court that not the whole amount of the plaintiff's claim was disputed. It was DW1's testimony that the amount of **Kshs. 1, 662,895.70** was not in dispute.

25. However, evidence adduced and clarifications made on the accounts by the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants show that of the total claim by the Plaintiff of **Kshs. 1,918,388.70**, PW1 did make some qualifications and explained that **Kshs. 35,919.90** against debit note number 9680 whose face value is **Kshs.193,300.00** was to be excluded because the amount had been paid by the First Defendant. This Payment is shown on page 75 of the agreed bundle at item number 6 thereof. The witness had testified as follows:-

**“The debit note number 9680 for Kshs. 193,300.00 was subject to a set off for Kshs.35, 919.90. This amount may be excluded from the total claim against the Defendants.”**

26. Further, a figure of **Kshs. 39,836.36** is also to be excluded from the Plaintiff's total claim and it is explained by a mini-statement at page 202 which shows that it was an amount which is chargeable as against Premier Service Station and not the Second defendant. Consequently the total claim against the Defendant is **Kshs.1,842,632.44** which is the correct figure that the plaintiff claims.

27. The claims against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not been proved. The same are based on the allegation of fraud and non-payments. Elements of fraud or forgery were not proved. However, what is clear is that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were equally involved in a blame game involving non-payments herein.

28. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a counter-claim for **Kshs. 644,000/=** on account of money allegedly withheld by the Plaintiff. However no evidence was led to establish or prove the counter-claim apart from the third defendant merely stating that the plaintiff owed him the said amount. In the end this Court can only dismiss the claim.

29. I have carefully considered the evidence placed before the Court. As I have stated earlier, the claim against the 1<sup>st</sup> defendant has been proved on the balance of probabilities. However, the claims against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not been proved, despite the clear evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were clear participants in the events surrounding the claim. While I disallow the claim against them, I use my discretion to deny them the costs due to their documented participation in the claim.

30. On the issue of interest, I am not satisfied that interest is due at 18% per annum as submitted by the Plaintiff. The 1<sup>st</sup> defendant is not bound by terms printed on small fonts behind a receipt unless it is clear that the 1<sup>st</sup> defendant's attention was specifically drawn to that term in the small print.

31. In the upshot, I make Judgment as follows:-

- a) Judgment is entered for the Plaintiff against the 1<sup>st</sup> Defendant in the sum of **Kshs.1,842,632.44/=**.
- b) Interest thereon at Court rates from the date of filing the suit i.e. **23<sup>rd</sup> April 1999**.
- c) Costs of the suit only as against the 1<sup>st</sup> Defendant.
- d) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Counter-claim is dismissed with no order as to costs.

That is the Judgment of the Court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 15<sup>TH</sup> DAY OF OCTOBER 2012**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Karanja for the Plaintiff*

*Murugara H/B for Mureu for the 1<sup>st</sup> Defendant*

*Teresia – Court Clerk*