IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 244 OF 2003

BUCHMANN MEDICAL CARE …….....……..... PLAINTIFF

VERSUS

PLANOMED AFRICA LTD …….....……..DEFENDANT

Coram: Mwera J

Gichuhi for plaintiff

Munyasia for defendant

Njoroge, court clerk

JUDGEMENT

This cause was instituted when a plaint was filed in court on 18/3/03. The plaintiff company's claim against the defendant company was for DM 321.72 (or equivalent in Euros) plus US $ 41,187.50 being the price of goods sold and delivered. The particulars of the invoices were stated as: invoice no. 97/1/0251 of 21.3.97 for DM 371.72 and another No. 97/1/0254 of 27.3.97 for US $ 41 187 50. It was pleaded that the defendant had failed or neglected to pay the stated sums after due demand was made. It accepted the goods and so the plaintiff should get judgement as prayed.

On 22.5.03 a defence was filed claiming that the defendant was a stranger to the claims made and the sums demanded. It was never indebted to the plaintiff at any time and for whatever sum. If such state of things existed the receipt of goods and incurring of any debt, was by an entity known as Buchmann Medical Care and Services Ltd incorporated in Kenya – not the defendant. As at this point it is not clear whether the defendant intended to make that company, it claimed to be the debtor, a party to these proceedings or not. However, the defendant lodged a counter - claim to the effect that it was all the time an agent of the plaintiff before – Buchman Medical Care and Services Ltd – a sister company of the plaintiff, was incorporated locally. And so the defendant was claiming the value of the services it rendered to the plaintiff and/or a share of the profits received by the plaintiff which share the defendant was entitled to. Particulars of this claim were not pleaded but it was stated that the same could be rendered later – perhaps by amending the pleading or something. For now that bit remained vague, if the court can so remark.

A reply to the defence and defence to the counter-claim was filed on 4.6.03, with the litigants joining issue in some paragraphs of the defence, without admitting others. It was nonetheless added that the

plaintiff supplied all the goods to the respondent on its request.

Bills of lading and pro-forma invoices were sent to it. The goods were not supplied to its subsidiary at all. Demands to pay had been delivered all to no avail.

Coming to the counter - claim the plaintiff denied owing the defendant any money or that the two had an agreement to share profits. There had never been a demand for such.

The record does not seem to hold any issues agreed or otherwise but on 18/3/04 the plaintiff filed a bundle of documents (Exh P1). The defendant did likewise on 23.6.04 (Exh D1) and the trial opened before Kubo J, as he then was, on 21.9.05. Later the judge went into retirement and the typed proceedings were placed before the undersigned to continue with the trial from where it stopped.

From the plaintiff's submission, one Stephan Buchman flew in from Germany to testify (PW1). Doing the best possible from the typed proceedings, it can be said the plaintiff and the defendant had a trading relationship between 1994 and 2001 – dealing in medical supplies/items. The defendant selected six items from the quotation dated 5.03.97 on the letterheads of Buchmann Medical Care & Services Ltd, signed by one P. Mutua. This P. Mutua was the director of Buchmann Medical – an independent company from the plaintiff who was based in Germany. The defendant was using the same facilities as the local Buchmann company. But when the proforma invoice for DM 321.72 no. 97/1/0251 dated 21.03.97 was sent, it was addressed to the defendant company herein (Exh P1 – 8, 9, 10). The defendant received it. A commercial invoice was then dispatched to the defendant (Exh P1 – 11, 12).

And then the second shipment for $ 41 187.50 was dispatched as per the copy of bill of lading (Exh P1 - 13) to the defendant. The defendant never made the 2 payments hence the reliefs claimed. The defendant was never an agent of the plaintiff and no services were to be paid for by the plaintiff. There has never been any demand. Accordingly the letters the plaintiff wrote about the defendant between 1994 and 1996 (Exh D1 – 1 to 32) did not mean much. There was never a demand for services rendered by the defendant to the plaintiff. Perusing for instance letters of 13.06.95 (Exh D1 – 1, 2) addressed by the plaintiff to the Ministry of Health and the Director, Kenyatta National Hospital, the court noted that the defendant was being introduced as the plaintiff's **"local representative."** - not agent. PW1 added that the defendant had not broken down the services rendered and so its counter – claim ought to be dismissed.

In cross examination, PW1 said that the defendant company, Planomed Africa Ltd, was the **agent** of the plaintiff company registered in Germany but having incorporated another company (by the same name?) in Kenya. If what is transcribed from Kubo J's handwritten proceedings is as good as it could be, this court understood PW1 to say that he was a lone director for the parent company (Germany) while his father, Manfred Buchmann, himself and Philip Mutua (who wrote Exh. P 1 – 5) plus Josphat Kaniu were directors of the local Buchmann. While Kaniu was the managing Director of Buchmann Kenya, Mutua was its director while PW1 was resident in Germany. The offices of the local Buchmann company were in a place Coffee Plaza. The defendant company operated from there as well as other companies.

PW1 knew of a company called Medifast where Josephat Kaniu was a director; he also knew of another company called Beehive where Kaniu was also a director. These 2 companies had a relation with the plaintiff company as the one the defendant company had. PW1 seemed to know little of the operations of Medifast and Beehive in 1997. But Buchamann Germany (the plaintiff) traded with the local Buchmann and the defendant as well as Medifast.

The local Buchmann participated in local tendering for its own markets and for the plaintiff. The plaintiff was only aware of some of these tenders. But whoever received commercial invoices and shipment from the plaintiff (Buchmann Germany) made payments directly to it. The witness stated that the plaintiff (Buchmann Germany), Buchmann NIS (the local one) and the defendant were separate entities. Then in 2001 the defendant company ceased to share offices with Buchmann NIS (local). The local company did not write to the plaintiff (in Germany) to say whether Dr (?) Mutua paid the invoices or not. So it was not correct for the defendant company to claim that even as it shared offices it was denied access to the sight of documents.

Then Mwihia (Mutua?) resigned from Buchmann NIS (local) but no valuation was done after Mutua resigned as director to determine liabilities, profits or shareholding claimed in the counter-claim. PW1 did not know if books of account of Buchmann NIS (local), the defendant and Medifast were ever audited. Later there was an audit of Buchmann NIS (local) but PW1 could not say anything about the defendant company and Medifast. Referring to an invoice at page 112 of the plaintiff's exhibit (probably Exh. P1 – 11, 12), delivery was said to have been done in June 1997. If the court be correct in that, because Exh. P1, did not go to pp. 112, then the invoice no. 97/1/0254 for $ 41.187.50 claimed here is the other in dispute. Demands to pay this invoice had been both oral and in writing. PW1 did not have a copy of the written demand but the normal period for payment was 90 days. An oral demand was made in 1998. Then reference was made to some ledger of the defendant company dated 16.1.98. PW1 noted an entry of 27.5.98 but denied that this was proof of payment by the defendant to the plaintiff. "of 8.3.2004." Then the defendant laid a claim of Ksh. 15m against the plaintiff without stating the basis. There was no reexamination. To finish with PW1, he produced an air ticket dated 9.9.05 for his travel expenses from Germany to Kenya. That closed the plaintiff case.

Philip Mutua Kithi, the managing director of the defendant company (DW1) knew the plaintiff company. The two had a trading relationship. The defendant used to supply medical goods to Kenyatta National Hospital (Dental School) and also to private doctors and dentists. When a tender was won by any of their 3 companies (the defendant, Medifast, the local Buchmann) the plaintiff would invoice the winning company for documentation and customs clearance purposes. The local Buchmann NIS got large offices at Coffee Plaza and Cannon House to accommodate the 3 local companies. Tendering was done at the 2 buildings while the accounts section was at Cannon House handling financial transactions between the local companies and the plaintiff (Buchmann Germany). There was no such a section at Coffee Plaza. The head of the accounts section was answerable to Kaniu who was the managing director (MD). When a payment was made to the company (who won the tender), the accountant checked all that to determine what was payable to the plaintiff. Customers paid by cheques to the local (winning) supplying company. The cheque was banked in the account of that company from which the accountant and the M.D would determine how much to remit to Germany after taking into account local commitments – rents, salaries, motor vehicle running. When payment was remitted to Buchmann Germany, it would then pay local companies a commission of 7.5% of the invoice value, unless otherwise specified. So the local companies acted as the plaintiffs representatives and before the local Buchmann was incorporated, the defendant company acted as such - a representative as per the letters referred to above (Exh D1-1,

2). The companies that by agreement were to get 7.5% of the invoice value were:

i) Planomed Africa Ltd – the defendant herein
ii) Buchmann Medical Larez (Care?) Service, Nairobi and
iii) Medifast Africa Ltd.

Apparently the defendant was accommodated at Cannon House because DW1 told the court that business went on well there until 1999 when the plaintiff was awarded a tender for surgical leaves (gloves?) worth sh. 120,000,000/=.

Due to the arrangement of typed pages (mixed up) this narrative ought to be taken back somehow.

The plaintiff company after making DW1's defendant company its representative in East Africa for some time, its "owner" Mr. Manfred Buchmann and Stephen Buchmann (PW1) advised to incorporate the local Buchmann in Kenya. Four months later the 4 directors decided to incorporate Medifast Africa Ltd with PW1 and Muniu being directors for the sake of participating in tenders to supply medical items to the Ministry of Health. Whenever one of the 3 companies won a tender, it would source for supplies form the plaintiff in Germany. Sometimes payments were made to it after goods had been delivered or to the local winning/supplying companies who would transmit payments to Buchmann Germany.

Now back to the tender of sh. 120 m by/to the Ministry of Health, the defendant demanded its commission from the plaintiff and that was the beginning of souring of their relationship in 2000. In May

2001 DW1 walked out of Buchmann offices with an agreement that later discussions would be undertaken on the way to distribute commission and stocks. That never took place. That commission used to increase/decrease but generally it was fixed at 7.5% as per Exh D1 – 3(e), 4 (d) dated 10/06/96 and 02.07.96. When Manfred Buchmann (PW1) visited Nairobi he could place orders for goods from the plaintiff using letterheads of either Planomed or Medifast. With no particular reference to the documents in Exh D1, DW1 told the court that the bundle included invoices leading to the claim in this suit. DW1 did not take any records from Buchmann Group of companies. So he caused a notice to be served to produce the 2 invoices in dispute here, bank records of the defendant, Medifast and Buchmann Nairobi (local). Bank records would show how money was transferred and remitted to the plaintiff in Germany, by the 3 local companies. The custodian of these records was the group accountant, and not either the witness or Kaniu. It was further in DW1's testimony that after Kaniu left the plaintiff company, the German directors did not continue trading in Nairobi and he did not know if the plaintiff wound up its operations here. It was repeated that the three local companies – Planomed (the defendant), Medifast the Nairobi Buchmann operated under one umbrella but had one accounts department, sales team, cars and general staff. Back once again to the sh. 120 m tender which the local Buchmann won, the local companies including the defendant asked for their commission set at 5%. The plaintiff directed them to convert some of the stocks they held into cash but that was not possible. This was a point of disagreement and the defendant moved away from the other 2 local companies. Before that break DW1 had enjoyed a company car and other privileges as a director. He was allowed to move away with some Planomed stocks in or about August 2001. By then the plaintiff had not made any demand as to the payment of the 2 invoices pleaded here either against the defendant company or DW1 personally.

The witness admitted that the defendant was paid DM 321.72 (Invoice no. 97/1/0251, of 21.3.97). But the proceeds were used in running expenses of the 3 local companies. The money did not go into a separate account of defendant or to any individual. All that could only be found in the books of account which were always in custody of Buchmann Group even as at the time DW1 left in 2001. Those are the records the defendant sought to be produced when it was sued. They were never availed to the witness even after his lawyers requested and the plaintiff's lawyers duly responded on 25.6.04 (Exh. D4). The witness had state so when a chamber summons dated 23.4.04 was filed to avail documents. DW1 never had the records in issue. It was the group accountant whose evidence was thought very crucial here. The witness confirmed that the proceeds of the two invoices, basis of claim herein were paid to Plamomed, but the defendant or DW1 did not handle the money. The local companies paid money directly to the plaintiff in Germany and only got their bit in the form of commissions. DW1 relied entirely on the defence and the counterclaim and as per his witness statement filed in court on 15.10.08. He wished that the suit be dismissed while the counter claim was allowed.

In what appears from the record to constitute cross – examination, DW1 told the court that he or the defendant company was not a stranger to the 2 invoices in dispute.

He referred to the companies working under the group name of Buchmann Medical Care incorporated in Kenya in one office, one accounts department and same directors of each company. The group of companies could operate bank accounts of all the 4 companies. When DW1 with his company left the group, he did not carry away any records. They were left behind. A document referred to as "Item 38" in EXh D1, but not easily detected, was said to be evidence that the 4 companies shared accounts i.e. a director from either the defendant Buchmann or Medifast could sign cheques for any of the companies' bank account. Then answers were given on other aspects, this court was unable to quickly link to the issues before it. At this point DW1 was stood down and Josphat Mwaura Kaniu (DW2) took the witness stand.

DW2 came to know of the plaintiff company in 1995 when he was running his two small companies – Medifast Africa and Beehive Enterprises Ltd. The latter was a forwarding company. It was Philip Mutua (DW1) of Planomed Africa Limited, another small company, who introduced DW2 to the plaintiff. DW1 and 2 agreed that their two companies do operate from the same premises and also team up to tender for medical supplies. The supplier would be the plaintiff company. After working with it for a while, it was agreed that they form a local company with 4 directors – Manfred & his son Stephan Buchmann were the 2 German directors, while DW1 (Mutua) and DW2 (Kaniu) were the local ones. So the 3 companies –

Buchmann Medical Services (local), Planomed Africa Ltd and Medifast Africa Ltd got engaged in the same business of medical supplies, with Beehive clearing the imported goods. Buchamann (local) was the umbrella company and DW2 was appointed its managing director. All the 4 companies operations were centralized with a single accounts department. A board of directors from Buchmann (local) and the plaintiff appointed the accountant. The two directors of Buchmann Germany, the plaintiff, were Manfred and Stephan Buchmann. They also became directors of the local Buchmann. The 3 (local) companies tendered separately to supply medical items which would be sourced from the plaintiff in Germany.

Being aware of the 2 invoices claimed in this case DW2 was surprised that they had not been paid. Up to June 2002 when DW2 was managing director of Buchmann (local), he had not been informed of this. He had remained MD even after Planomed, the defendant, left the umbrella operations with other companies. DW2 referred to financial offer of prices for listed items (Exh P1 – 1 to 4). Offers from the plaintiff were made at the local Buchmann and the 2 invoices in issue confirm accepted import of goods as per proforma invoices (Exh P1 – 8, 9). The goods were supplied to the defendant, through Buchman (local). The customer was the MOH (Ministry of Health?) and payment was made to the defendant, and eventually to the plaintiff. The mode of operations was that since all the 4 companies had one account department, that accountant lumped together payments of a few commercial invoices then made one payment to the plaintiff in Germany. The arrangement was for economy's sake because bank charges could be prohibitive for instance to make a single payment of DM 321.72, about sh. 12,000/= over to Germany. It was the accountant who knew what was in the account of each of the 4 companies because, though not a signatory, he obtained balances, statements and payments by customers. This accountant checked all the accounts, advised on how much to remit to Germany and how much to retain for the local set up. If one account e.g. of the defendant had money it could be used to remit some to Germany even for the other local firms. DW1, 2 were signatories and the plaintiff would be informed of the financial status in each account. DW2 could not remember what happened to the money therein (Exh. P1 – 11, 12), invoice for US $ 41,187.50 raised on March 27, 1997. Such usually took 60 – 90 days to be paid by a customer. It ought to have been paid by end of June 1997. The same period for the invoice of 21.3.97 (DM 321.72). No claim/demand was made by the plaintiff. DW2 took this claim as an afterthought, adding that at the time of his departure in 2002, he left the accountant there. After a week, DW2 returned to find Buchmann (local) had moved offices. Whenever money was sent to the plaintiff via the bank (eg Exh. D1 – 38) as it was done on 14.2.96, confirmation would be received and be filed by the accountant. He was the one to confirm whether the sums claimed in the 2 invoices in dispute were received in Germany. The same officer had the records to show if part of the sums went into paying local running expenses. DW2 as managing director knew that when DW1 left, he was not allowed into the accounts offices. Those were instructions from the plaintiff in Germany. He only took his table and 2 chairs. It surprised DW2 that a matter arising from two 1997 invoices was made a court claim in 2003 after both DW1, 2 had left. Then DW1 (Mutua) was back on the witness stand for further cross examination.

He told the court that the money being claimed must have been paid. DW1 had no evidence because all the records were left with the plaintiff. It was confirmed that the goods in issue were nonetheless received after the defendant won a tender or tenders. But when eg Kenyatta National Hospital paid for the goods, the defendant in turn paid the plaintiff (Exh D1-33 (a) (b). The defendant had one account (Exh D1-66) with National bank of Kenya as per the bank statements covering 28/2/97 to 31.8.98. Payments to the plaintiff could be made from this account or the accounts of the 3 other companies which operated under one umbrella of Buchmann. However, the 2 invoices herein were not made via the defendant National Bank of Kenya account. Probably some of it was used locally to benefit the plaintiff's group of companies. Evidence to show this was left with the plaintiff's finance manager when parties parted ways in 2001. The manager, one Wanderi Kingori was left in the plaintiff's offices at Cannon House.

DW1 then said that the counter - claim was value for services the defendant rendered to the plaintiff plus a share of profits. There was no written agreement for supply of such goods or services and no specific sum had been pleaded except sh. 23m contained in the response to the request for particulars. There were no documents to support that, though. The profits to be shared with sh. 15m due to the defendant was based on no documents but estimation only. And there had been no demand made on the plaintiff because their trading relationship had been good.

In re- examination, the court heard that transactions were carried on also through Medifast and Buchmann, the local company, that was incorporated in Kenya. Documents to support all the transactions were in the plaintiff's local office at Cannon House where Wanderi Kingori retained all financial records.The defendant was not able to take away any of these due to an abrupt parting of the ways.

DW2 (Kaniu) was put back in the witness stand for cross-examination. He said that although a customer would pay the defendant by cheque into its account at National Bank of Kenya and even with the claim that the plaintiff was paid for all the goods it supplied, there was no evidence to support that. But the plaintiff must have been paid, there having been no demand served. Then the witness went on to refer to some payments made e.g. on 3.7.98 to the plaintiff but there was nothing to show that these included or were in respect of the invoices claimed. But payments could accumulate and be made later. And again it was repeated that proceeds received could partly be paid over to the plaintiff in Germany while the rest could go into paying for local expenses. If the 2 invoices were not paid there should have been a demand by the plaintiff. Such was never made. The claim was just hanging out there. This closed the trial and both sides submitted.

On the plaintiff's part, counsel went over the pleadings, the evidence – oral and documentary, the issues for determination and the relevant authorities. The court was told that it was not in dispute that the goods stated in the 2 invoices of 1997 were received by the defendant company. The defendant got paid but that it could have used the proceeds to pay for some local expenses for the benefit of the plaintiff, incurred by various companies, that were housed in one office. But that there was no evidence to this effect, let alone pleading to such arrangement.

As far the counter-claim is concerned, no special damages were pleaded and none had been proved. It should be dismissed in respect of a claim for value of services rendered or share in profits. There was no written agreement or stated custom of trade in this regard. The case of **GalaxyPaints Co Ltd Vs Falcon Guards Ltd** [2002] 2 EA 385 that determination of issues flowed from the pleadings and issues placed before court while **Ryce Motors & Another Vs Muroki**(1995 – 98) 2 EA 363 states the need for special damages to be specifically pleaded and proved. And **Siree Vs Lake Turkana El Molo Lodge Ltd**[2000] 2 EA 521 as well as **Jivanji** Vs **Sanyo Electrical Co. Ltd** [2003] 1 EA 98 were cited on the same aspect of specific pleading and proof of special damages. All concluded, with asking for the prayers in the suit to be granted while dismissing those in the counter-claim. The issue of PW1 travelling expenses was left but to be considered by the taxing officer.

On behalf of the defendant it was submitted that the nature of the trading relationship of the plaintiff company based in Germany and the defendant in Kenya was that as a representative in Africa, the defendant received goods from the plaintiff which it sold, remitted the proceeds to the plaintiff and received commission on the same. When a local company bearing the same name as the plaintiff was incorporated, two other companies – Medifast and Beeline joined in the business and all 4 companies operated under one roof. Any of either Planomed, Medifast or Buchamann (local), tendered for goods supplied by the plaintiff, in its own name. The goods were sent to it, it sold them, got cheques which were then handled/banked by a single accounts department on behalf of all the companies. From the pool of proceeds, some money was deducted for the running of the local outfit (the group of four) while the rest was remitted to the plaintiff in Germany to pay an orally agreed commission of 7.5% to the company which had won the tender. The defendant agreed that it received the goods stated in the 2 invoices in question. Payments were received and utilised as stated above. There was no demand about unpaid for goods sold in 1997. Then the parties fell apart and in 2003 this suit was belatedly brought. The plaintiff did not dispute the mode of the financial arrangement explained by the defendants' witnesses, either through PW1 or such other as the accountant (Wanderi). It did not produce the financial and bank records which were left in the Buchmann (local) offices, when requested to do so or as were communicated to it regularly. In the circumstances the claims in the suit were not proved and should be dismissed. But the defendant's counter claim must be allowed because the defendants' witnesses had been coherent and unshaken in their testimony, even if no documents were tendered

Beginning with – (A) the main suit, this issues may be broadly put as:

Issue 1 – The nature of the claim
Issue 2 - Evidence
Issue 3 – Conclusion.

ISSUE 1 – The Nature of the Claim: It is that the plaintiff delivered the goods which were received by the defendant as per the two questioned invoices. That is not denied. The defendant's (DW1) evidence was that the goods were sold and payment received. PW1 who did not appear conversant with the kind of trading relationship his company had with the defendant, variously described it as one of an agent and/or its representative in Kenya. He did not tell the court, as the evidence from the defendant's 2 witnesses claimed that once the goods were supplied and sold, any of the 3 companies operating from the same office in Nairobi ie, the defendant, Medifast and the local Buchmann, the proceeds were placed in accounts administered by one accountant. Then this accountant would advise Kaniu (DW2 the MD Buchmann Nairobi), who would then authorize what part of the proceeds to transmit to the plaintiff in Germany and what part to retain in Nairobi to pay for rents, salaries, motor vehicles etc. In essence this bit of the operations and financial management etc run by Buchmann (local) of which PW1 was a director, with DW2 as M.D and DW1 (Mutua) as another director, did not seem to be known to PW1 or at least he did not testify in that regard.

In the witness statement by Philip Mutua (DW1) filed in court on 15.10.08, plus that of Kaniu (DW2) filed in court on 4.8.09, no doubt the plaintiff's witness was aware of what has just been referred to ie regarding handling the financial transactions. He had the opportunity to dispute it. He did not. And seemingly PW1 did not know or he did not tell the court that the transactions were based on the commission basis. When the plaintiff was paid from Nairobi, it did pay commission to the local company which had won the tender and effected the sale. The commission was said to stand at 7.5% of the value of the invoice, varying either way. What the foregoing amounts to is that the defence evidence as to the nature of the trading relationship remained unrebutted or uncontroverted and that is what the court found to have been the state of things.

ISSUE 2 Evidence: Reference is made to above the defence evidence regarding the nature of transactions as given by DW1, 2. These witnesses also told the court the 2 invoices must have been paid in about 3 months of receipt, by pooling all the proceeds of sales by the 3 companies in Nairobi, before deciding how much to remit to Germany and how much to apply to the local outfit. It was added that the remittances were made as and when sufficient funds were available in the accounts such a transaction ie to remit made economic sense, because sending to Germany a small sum could only attract high bank charges. And that the 2 invoices of 1997 were only made subject of this suit in 2003, without any demand to pay having ever been made against the defendant. That left the court with an impression that even without evidence of paying specific to these invoices, payment was nonetheless made in their nature of doing things. The court was also inclined in this direction, bearing in mind that the defendant did not, as per evidence, deny receipt of the subject goods.

Another aspect of evidence that seemed to tip the balance of probabilities in favour of the defendant is that the defendant company left the local umbrella (Buchmann Nairobi) where it had operated, without any records. DW1 told the court and DW2 confirmed that all financial transactions were run from a single accounts department manned by one called Wanderi Kingori, employee of the plaintiff, in its local office. When both DW1, left that office, after a disagreement over commission of a certain tender, they left the financial records there and the plaintiff did not produce them on being so requested and it did not even avail the said Kingori as its witness. Indeed had he testified, lots of light could have been shed both on the plaintiff's claim and defendant's defence and counter – claim. But that was not to be.

ISSUE 3: The conclusion: At the end the court was left with the view that the plaintiff had not proved its claim on the balance of probabilities and its claim ought to be dismissed.

(B) The counter Claim: The defendant admitted that it was an agent of the plaintiff before it got Buchmann (local) incorporated.

Then it added:

"(b) **The defendant claims the plaintiff's value of services rendered and/or shares of the profits received by the plaintiff to which the defendant was entitled (particulars whereof to be stated).**

From the tenor of this piece of pleading it is indicative of a claim to some specific sums of money - both for services rendered and/or a certain percentage of earned profits. Such a claim cannot be of a general nature left to the court to assess general damages. So the defendant was obliged first to render and place before court evidence – oral, express or by trade usage, of the agreement to render the said services and earn a share of the profits. Then prove specifically that the services were actually rendered and a specific sum was earned but not paid. And/or proof that such a certain sum of profits were earned by the plaintiff, a share of which the defendant was demanding and further evidence that demands were made for payment but none was forthcoming – hence the suit. That is how the claim ought to have been placed before this court.

Issue 1 - The claim: It was not placed before court as outlined above or as near to it as to make the court adjudicate over it. All was put forth in a vague and, if anything inelegant way, not approximating to a justifiable claim for specific/special damages capable of being computed/calculated and, if warranted, awarded.

Issue 2 The Evidence: Other than the vague claim stated, there was no evidence whatsoever to specifically prove the claim for services
rendered or a share of profits deserved. Alluding to sh. 23m or sh. 15m stood there hanging in the air. There was no basis whatsoever.

Issue 3 The Conclusion: The counter - claim was not proved and it too ought to be dismissed.

In sum the suit herein is dismissed with costs and similarly the counterclaim is dismissed with costs.

Judgement accordingly.

Delivered on 17.3.11

J. W. MWERA
JUDGE