REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3558 OF 1989

VALENTINOS FOOTWEAR MANUFACTURERS LIMITED.....PLAINTIFF

VERSUS

BATA SHOE COMPANY LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff in its amended plaint dated 21st May, 2009 seeks the prayers as under:

(i) General damages as pleaded in paragraph 7; General damages for breach of contract and loss of goodwill.

(ii) Kshs.13,392,109.60 for loss of revenue and profits.

(iii) Costs and interest. Interests on (i) and (ii) above prevailing court rates from the time of breach till settlement in full.

(iv) Costs of this suit.

(v) Such further or other relief as this Honourable court may deem fit and just to grant.

The above prayers are based on the Exclusive Manufacturing Agreement dated 14th June, 1988 entered between the Plaintiff and the Defendant.

As pleaded in the Plaint the Plaintiff avers that the Defendant unlawfully breached the specific terms of the said agreement when it:-

a) Failed to order any sufficient contract goods thus necessitating the Plaintiff to manufacture well below its agreed manufacturing and agreed capacity.

b) Failed and/or refused despite persistent demands to supply and/or sufficient raw materials for the manufacture of the contract goods.

c) Failed and/or refused to pay the Plaintiff any sufficient consideration as stipulated in Clause 8 of the Exclusive Manufacturing Agreement.

d) Improperly and without notice changed designs necessitating delay in production.

Due to the above breaches the Plaintiff claims to have suffered losses as stipulated in paragraph 7 of the Amended Plaint but mainly he claims the specific losses in production, in revenue and profits amounting to shs.13,392,109.60 and goodwill.

The Defendant in its Amended Statement of Defence denies all the claims and has put the Plaintiff to strict proof of the claims and has also raised issues of *locus standi* and the Plaint being fatally defective etc.

The hearing of this old case commenced on 28th July, 2010 and got delayed because of change in representation from the Defendant and delay in preparing the submissions etc.

The Plaintiff testified through its Managing Director, Martin Wainaina Kenyanjui and called one witness.

The Plaintiff company was incorporated in the year 1984 to manufacture quality footwear and started manufacturing its products in the year 1986 after importation of machinery and knowhow from Italy. In 1987, he was invited to attend a meeting with Defendant's company International senior employee along with its Regional Director and Managing Director.

Being interested in the Plaintiff's business, the Defendant company visited and inspected the Plaintiff's plant and machinery, verified the volume and technical sufficiency of its staff and it was disclosed to them by PW1 that the Plaintiff Company was financially assisted by Development Finance Company of Kenya (DFCK) by way of a loan to the tune of Kshs.13,500,000/=. All these inspections and its outcome were detailed in the Plaintiff's letter dated 17th September, 1987. After all these due diligence, the parties entered into an Exclusive Manufacturing Agreement dated 14th June, 1988.
As per Clause 2 of the said agreement, during the term of the agreement, the Plaintiff was to operate and use its factory solely for the purpose of manufacturing the contract goods to the order, for the account and for the cost of Defendant. During this term of the contract, the Plaintiff did not manufacture any other goods except the contract goods. The Plaintiff has detailed the breaches in paragraph 3 of its amended plaint mentioned hereinbefore.

It is further claimed by the Plaintiff that as a result of the breaches by the Defendant, the Plaintiff has suffered loss and damage which are

(i) It was unable to pay all its staff and had to reduce employees;

(ii) It suffered loss in production;

(iii) It suffered loss in revenue and profits amount to Kshs.13,393,109.60/=;

(iv) It suffered loss of business goodwill.

The Defendant in its defence, has denied these averments made by the Plaintiff. The main contention of the Defendant is that in the anticipated relationship, the Plaintiff's underlying role was to obtain import licences to import raw materials and the same could only be obtained once foreign exchange allocation was secured from the Central Bank of Kenya. The Clause relied on these contentions by the Defendant is Clause 5 of the agreement which reads:-

"5. So long as this Agreement continues Valentinos shall be solely responsible for:

(a) Applying for, obtaining and using all necessary import permits and foreign exchange allocation necessary for the importation of any materials required for the manufacture of the Contract Goods which have to be imported into Kenya subject to the availability of import licence."

In the background of these short averments made by both the parties, the issues to be determined were agreed by consent. They are:-

1. Are the allegations in Paragraph 4 of the Plaint or any of them true?

2. (a) Was the Defendant required by the contract to order any particular quantity of goods?

(b) If the answer to 2(a) is "yes", did the Defendant breach such requirements?

3. (a) Was the Defendant required by the contract to supply and if so how much raw material?

(b) if the answer to 3 (a) is "yes", did the Defendant breach such requirements.

4. Did the Defendant fail to comply with Clause 8 of the contract?

5. (a) Was the Defendant under any contractual obligations to give notice of change of design?

(b) if the answer to 5 (a) is "yes", did the Defendant fail to give any such notice?

6. (a) Was the Plaintiff required by Clause 5 of the contract to obtain all necessary documentation and permits in connection with the importation of the raw materials?

(b) Did the Plaintiff fail to obtain such permits?

(c) If the answer to 6 (b) is "yes", was the Plaintiff said failure the cause of any failure by the Defendant to provide raw materials?

7. Has Plaintiff suffered any loss as a result of any breach of contract by the Defendant?

It is not in dispute that the parties entered into the exclusive manufacturing agreement, and as per Clause 2 thereof, the Plaintiff was to operate and use the factory solely for the purposes of manufacturing shoes to be used by the Defendant.
The crucial Clauses for the purpose of this suit are Clauses 3 and 5.

"3. (a) Valentinos undertakes to meet all orders for the contract goods placed by Bata (so far as its manufacturing capacity allows) and Bata undertakes that subject as hereinafter provided Bata will purchase from Valentinos its full output of the Contract Goods. For the purposes of this Clause Bata will keep Valentino's informed in advance of its anticipated requirements of the Contract Goods;

(b) Subject to the availability of all necessary materials and subject to force majeure and on events beyond the control of Valentinos occurring which delay, hamper or stop production of the Contract Goods Valentinos will promptly execute all orders for the Contract Goods placed by Bata.

5. So long as this Agreement continues Valentinos shall be solely responsible for:-

(a) applying for, obtaining and using all necessary import permits and foreign exchange allocations necessary for the importation of any materials required for the manufacture of the Contract Goods which have to be imported into Kenya subject to the availability of import licences and identified separately from any other goods or materials of Valentinos whilst they are at the Factory.

(c) Bata will also provide all designs of the Contract goods to be manufactured by Valentinos on the following conditions.

(i) Copyright in all drawings and designs rests with Bata and Valentinos shall not appropriate to itself or attempt to appropriate or claim such drawings or designs or any part thereof as its own property.

(ii) Valentinos will return to Bata any such drawings and designs when requested to do so by Bata.

(d) Bata may also provide machinery and equipment to Valentinos on loan to facilitate the manufacture of the Contract Goods. Such Machinery and Equipment shall at all times remain the property of Bata and shall be maintained by Bata's personnel."

The Plaintiff has also relied on Clause 8 of the agreement which stipulates that the Defendant was to pay the factory price to cover the production expenses.

The said provision stipulates:-

"8. In consideration of the manufacture of the Contract Goods by Valentinos in accordance with the provisions hereof Bata shall pay to Valentinos the factory price of finished Contract Goods which meet Bata's quality requirements calculated in such a way that the price will cover all reasonable production expenses incurred by Valentinos in manufacturing the Goods and provide a percentage profit margin per pair of shoes calculated on a basis agreed by Bata and Valentinos for each type of shoe to be manufactured. In calculating the price to be paid by Bata for the Contract Goods the costs of all materials supplied by Bata shall be deducted from the overall production expenses referred to above so that Bata is not charged for the costs of such materials."

It is contended by the Plaintiff that Clause 3(a) of the Exclusive agreement, the Defendant was to purchase Plaintiff's full output of the contract goods. The Plaintiff also contended that the as per letter from the Plaintiff dated 17th September, 1987 addressed to the Defendant, the Plaintiff confirmed that in its very modern shoe factory with complete new machineries, it had a capacity to at least produce 1000 pairs of shoes per single shift, while the expectation of the Defendant was 600 pairs per day. Moreover, in a letter dated 1st September 1988 by the Defendant addressed to the Plaintiff that the Defendant confirmed that the Plaintiff was fully occupied in producing shoes for the Defendant and that a further assurance was given that the production so purchased would enable the Plaintiff to pay back its previous loans with interest from the revenue generated as a result of the Exclusive Agreement.

The Plaintiff relied on the Judgment of *Lord Wilberforce* in the case of ***REARDON SMITH LINE –VS- HANSEN-TANGEN*** **1976 1W.L.R. 989, 995 – 997.** The following observations were emphasized.

"No contracts are made in vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the 'surrounding circumstances' but his phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating… What the court must do must be to place itself in thought in the same factual matrix in which the parties were."

Relying on Clause 3 (a) of the Agreement, the Plaintiff submitted that it undertook to meet all orders for the contract goods placed by the Defendant which then was to purchase its full output. The Defendant did not fulfill the obligation under the said provision i.e. the Defendant did not place the orders as per the assurance given and thus has committed breach of the contract resulting in the loss of income to the Plaintiff.

In response to the contention by the Defendant, that the Plaintiff was required to obtain all necessary import permits and foreign exchange allocations necessary for the importation of any materials and that it failed to do so, it was emphasized by the Plaintiff that obligation to apply for, to obtain and use all necessary import permits and foreign exchange for the Defendant was subject to the availability of import licence and hence it is not an obligation to be performed prior to the implementation of the agreement. The Defendant had to just place an order to enable the Plaintiff to apply for and obtain the permit.

As the matter solely depends on the correspondence between the parties and on the agreement exchanged, it may be appropriate for me to mention them in brief:

(1) *Letter dated 17th September, 1987* from the Plaintiff. It is an introductory letter and some reference has been made of this letter herein above. (Plaintiff's Exhibit 1)

(2) Letter dated 27th April, 1988. Considering a survey document for Industrial imports, the Plaintiff sought guidelines from the Defendant of the expected requirement for the imported materials. (Plaintiff's Exhibit 2)

(3) Exclusive Manufacturing Agreement. (Plaintiff's Exhibit 3) for the term of twelve months from 14th June, 1988.

(4) Letter dated 15th July, 1988 from the Plaintiff.
Enclosed the details of raw materials and finished shoes in its store prior to the effective date of agreement and seeking guidelines how to use and what to do with them. (Plaintiff's Exhibit 4)

(5) *Letter dated 22nd November, 1988* from the Plaintiff seeking clarification from the Defendant and seeking for a guarantee for its foreign exchange loan which could be converted in local currency by a commercial bank. (Plaintiff's Exhibit 5)

(6) *Letter dated 1st December, 1988* from the Defendant. It states *inter alia* "**We can never guarantee you for any future loan since this is not the policy of our organization. As far as our agreement is concerned, we are willing to co-operate and give you as much assistance as we can, but on your side, we do not seem to have much success. First of all, you did not obtain the materials you promised to import in order to maintain continuous work. We are making every effort to provide you with work, even at the cost of reducing our own production to make sure that you have something to do. We are also trying to find alternatives to give you only uppers for the time being but, in case you cannot get the components (heels) needed to finish the shoes we will be obliged to stop providing you with work."** It further raised issues on quality of the products. (Plaintiff's Exhibit 6)

(7) *Letter dated 10th January, 1989* from the Plaintiff. It responds to the issues raised by the Defendant in its letter dated 1st December, 1988 and raises counter issues of under supply of raw materials and the manner of costing arrived at by the Defendant. It states that the Plaintiff's income is derived from the Defendant and only 52,300 pairs and 5,603 pairs of uppers had been supplied within 7 months as against the expected 105,000 pairs. (Plaintiff's Exhibit 7)

(8) *Letter dated 29th June, 1989* from the Plaintiff (Plaintiff's Exhibit 9) in response to the said letter (Plaintiff's Exhibit 7). I quote relevant paragraphs:

"I must also correct the following statements that you/Bata has made:-

(a) I have never given any assurance on import permits.

These as you know and have always known are given by the government at its sole discretion.

(b) I did not ask you to subcontract the manufacture of any footwear. The fact is that Bata of its own volition asked us to do this. .
Let me turn to the contract itself:-

(1) By this agreement, you bound us to exclusively manufacture the contract goods to your order and cost. Clause 2 and 3 are clear on this point.

Furthermore, under Clause 3 you were to purchase our full output.

Clause 7 fortifies the position that we were exclusively bound to manufacture for you.

You were therefore correspondingly bound to place orders, provide materials and purchase the manufactured goods.

(2) You were bound under Clause 6 (b) to supply raw materials to us. This you failed to do satisfactorily consequent upon which we complained to you orally and in writing – See my letter of 10th February, 1989.

Bata is that we produced the contract goods well below our factory capacity.

(3) Bata has made reference to import permits and to Clause 5 (a) and I would comment as follows:-

(a) This Clause must be read together with Clause 3 (b) and it was not a condition of the contract that these permits be secured.

(b) You had all the raw materials to enable us to manufacture.

It is therefore not correct that we ever failed to manufacture in terms of the contract.

(4) As to quality of manufactured goods you must remember that:-

(i) You thoroughly inspected our premises, factory and equipment before the contract.

(ii) Clause 4 places upon you the obligation to monitor quality.

This you did by providing your staff who continually inspected the goods during manufacture and after

(iii) At no time did you ever reject goods for lack of quality in terms of Clause 4. I never received any such notice.

It is therefore untrue that we produced goods below quality.

(5) Costing: you are bound to pay us as claimed because:-

(i) By being exclusively bound to manufacture for you, you are bound to underwrite our costs.

(ii) Under Clause 8 it is stated that you shall pay us:-

(a) Factory price to cover

(b) Production expenses and

(c) A percentage profit margin.

(9) *Letter dated 29th May, 1989* from the Defendant (Plaintiff Exhibit 8). It was notified to the Plaintiff that upon expiry of Contractual Agreement, they would not renew it any further. I further note:-

"However, we wish to inform you that we would like to continue our relationship with Valentinos in the future by means of special orders placed by us to your factory for the products which you will be able to produce at prices beneficial to both of us."

(10) *Letter dated 20th June, 1989* from the Plaintiff raises issues on the low payments and claims the payment of outstanding sum (Plaintiff Exhibit 9).

(11) Schedule and Invoice for the sum of shs.8,377,118/- due to the Plaintiff. (Plaintiff Exhibit 10(a) and 10(b))

(12) *Letter dated 26th June, 1989* from the Defendant. As it has incorporated the defence in totality I shall quote the same (Plaintiff Exhibit 11)

"In conclusion, it has to be recorded that any production given to your company was therefore purely as a Goodwill gesture to keep your factory in operation until your company would ultimately obtain the necessary imported components to enable it to manufacture the Contract Goods. In fact all the items which we requested your company to manufacture could just as easily have been manufactured by us at our Limuru factory."

In furtherance of the claim, the Plaintiff contended that the issuance of the import permits cannot and was not assured by the Plaintiff as it is given at the discretion of the Government. It was urged that the Clause 5(a) of the agreement ought to be read with Clause 3(b) and as per the said Clause the Plaintiff did perform its part of obligation. No requisition or order was ever placed by the Defendant to import raw materials and that there is nothing on record to show that the Plaintiff failed to honour the placed order from the Defendant. Moreover the Defendant also failed to pay sufficient consideration on the supplied shoes. The agreement did not provide for the price of the goods or any method of ascertaining the same and in that case the same has to be determined between the parties during the dealings. The Defendant refused to do so. The provisions of Section 10 of the Sales of Goods Act and Clause 8 of the Agreement were relied upon to support this contention. Clause 8 has stipulated *inter alia* that while agreeing the cost of the manufactured products the same should be ascertained by the parties taking into consideration all reasonable production expenses in manufacturing, the percent of the profit margin per pair of shoes agreed by both the parties and deduction of the cost of materials provided by the Defendant. The Plaintiff has shown from the correspondence that the Defendant failed to place consistent orders, to supply the materials and to ascertain the cost as agreed. It was also submitted that from the manner in which the agreement has been implemented, the Defendant knew or ought to have known that the Plaintiff was bound to suffer loss which resulted in it being placed under receivership. The case of ***HADLEY V BAXENDALE [1854] 9EXCH 341 AT 354,*** *was relied upon in which*the court observed:-

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breaches of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from the

breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

In response to the claim of the Defendant as to unsatisfactory quality, it was submitted that the sample and the materials were to be supplied by the Defendant and the Plaintiff was supposed to ensure the specifications would be met which it did, as per the agreement and that the supplied goods were reasonably fit for the purposes for which they were manufactured as per Section 1(b) of the Sale of Goods Act (Cap 31). Furthermore, the Defendant's personnel were sent to advise on, inspect and manage all stages of production and manufacturing. It was stressed that apart from the mention of the goods being not of satisfactory quality in the letter of 26th June, 1989, the Defendant has failed to show any proof of this allegation. The unilateral decision not to extend the agreement was questioned .However, looking at Clause (1) of the agreement, I do not think it was improper or anything wrong or against the terms of the agreement. The contractual term was for twelve months and the Defendant was expected to give notice only in the event it intended to renew the agreement. Thus this issue should rest at that.

The following passage from the case of ***PRENN VS SIMMONDS [1971] 1W.L.R. 1381*** was relied upon to support the Plaintiff's contention on interpretation of a contract.

"In order for the agreement… to be understood, it must be placed in context. <u>The time has long passed when agreements, even those under seal, were isolated from the matrix of the facts in which they were set and interpreted purely on internal linguistic considerations…</u> We must … inquire beyond the language and see what the circumstances were with reference to which words were used, and the object, appearing from those circumstances, which the person using them had in view … In my opinion, then… evidence should be restricted to evidence of the factual background known to the [arties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim of the transaction'.

Based on the above submissions it was contended that the Defendant has breached the terms of the contract considering the circumstances under which it was entered into. This has resulted in loss to the Plaintiff and the Defendant is liable to compensate the Plaintiff. The witness from the Plaintiff, PW2, produced the accounts which were not controverted and thus it was urged that the claimed sum of shs.13,392,109.60 be allowed to the Plaintiff.

The Defendant's main contention is that the relationship the Plaintiff was envisaging was ***"one where the Plaintiff would be securing foreign exchange allocation necessary for the importation of materials",*** that the underlying role of the Plaintiff was to obtain import licences. The two letters from the Plaintiff, namely, that of 17th September, 1987 and that of 27th April, 1988 were relied upon.

So far as the first letter, which is the initial letter from the Plaintiff, is concerned, I may say that there is no mention of import licence or the requirement of foreign exchange. I may quote a few lines from the said letter.

"I would also like to take this opportunity to formally invite your organization to provide the management and may if of interest acquire some shares which I believe would provide the feelings of belonging. It is important to let me know the acceptability or otherwise of the offer as it would help me in my future planning. I am of course flexible and any other suggestions you may offer would be most welcome. I am open to the commencement of the detailed discussion immediately which I would now is the most appropriate time before getting to the rush of Christmas and back to school seasons."

The second letter asks the Defendant to give the Plaintiff the projected requirement for 1988/89 to support the application for importation. The relevant portion of the letter shall give a clearer picture, namely:

"I am enclosing some documents relating to a survey of industrial imports. This being conducted by the European Investment Bank and is expected to help E.I.B aided projects to import raw materials,

spare parts, machineries and sundries without difficult because they will have allocated such funds to the Kenya Government in foreign currency.

Two European Investment Bank officials visited me on 26th April, 1988 and they did explain how it will work. The import application from will be submitted in the normal way but will on top be indicated that it is E.I.B aided project. <u>The application will be processed in the normal manner and approved because foreign exchange has already been allocated.</u>

To enable them come up with a realistic figure, they wish us to fill a questionnaire <u>indicating the projected requirement for 1988/89</u>. While of course, I shall answer them for what we imported in 1986/87. <u>I thought it is important if you could give me a guideline of what we are expected to bring in 1988/89 in the appropriate pages and leave the rest for my action.</u> To me, I fell it is of great advantage to us because it would largely eliminate problems of getting import licences which <u>I believe is a role I shall be expected to perform when our collaboration is implemented."</u>

It was stressed by the Defendant that as obtaining of the import licence was a prerequisite, the failure of the Plaintiff (which is admitted by PW1 in cross examination), the Defendant cannot be faulted as its obligation was only to pay for such imported materials. This obligation is stipulated in Clause 6 of the agreement. The said failure and others were detailed by the Defendant in its letter of 1st December 1988 (Plaintiff Exhibit 6). As there was no production due to lack of materials, the determination of contract price and consequent profit margin cannot take place.
Lastly in respect of termination of the contract, Clause 9 of the agreement was referred and relied on. Clause 9(a) required either party to give three months notice to terminate the agreement and Clause 9(b) provided other grounds for its termination. The last ground for such eventuality was relied upon, namely, Clause 9(b) (V): It stipulates.

"(v) if the other party is in breach of any of the conditions of this Agreement and has failed to remedy such breach within fourteen days of being requested in writing by the other party to rectify such breach."

Relying thereon it was stressed that the Plaintiff could have mitigated the losses if the Defendant had breached or violated the terms of the agreement. The parties are bound by the terms of the contract and the court cannot quantify the overheads of the Plaintiff once it failed to obtain the import licence. The intention of the parties can easily be ascertained from the correspondence and in the event of failure to procure the import licence, no other or alternative Clause can be imputed by the court. On the other hand the Plaintiff could not produce any request for the materials, because it knew there were no materials imported. The Plaintiff being the first to breach the term of contract, it cannot come to the court to claim damages on the resultant inability by the Defendant. It was submitted that the payments which were made was kind of stop gap arrangement in anticipation of the Plaintiff fulfilling its obligation.

In response to the claim for specified sum of shs13,392,109.60, claimed as loss of revenue and profit , it was brought to the fore that the said sum were supposed to be derived from the sale of contract goods, but no manufacturing took place. The Plaintiff has relied on Plaintiff Exhibit 10(a) and (b). It was prepared by one Jane Ndungu who was not available and PW2 while producing it and admitted that he cannot verify the correctness of the figures given as he has not audited the company's accounts, and that he has not looked at the primary documents from which the figures could have been derived. He also stated that the figures were supplied by the director of the Plaintiff when he was preparing the report.

The two documents (Plaintiff Exhibit 10(a) and (b)) do not reflect whether the transaction as envisaged in the agreement ever took place, they further do not indicate how profit margin or the cost as stipulated in Clause 8 were derived. Moreover, as the liability of the Defendant is not shown or proved, the question of loss does not arise. Relying on the decision in the case of ***FIVE CONTINENTS LTD V MPATA***

INVESTMENTS LTD (2003)1 EA 65, it was stated that accounts analysis could not be of evidential value since it is not a book of account regularly kept in the course of the business.
Following passage from the judgment of the Chief Justice Goddard in the case of ***BOHHAM-CARTER VS HYDE PARK HOTEL LTD (1984) T.L.R. AT PAGE 178*** was cited:-

"On the question of damages, I am left in an extremely unsatisfactory position. Plaintiff must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court saying; 'This is what I lost; I ask you to give me these damages'. They have to prove it. The evidence in this case with regard to damages is extremely unsatisfactory."

It then was submitted that it is trite by now that the special damages must first be pleaded and then strictly proved. A passage from the leading English case of ***RATCLIFF V EVANS (1982) 2 QB 524*** was cited.

"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damages, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

Finally it was submitted that the Plaintiff, in any event, was financially burdened at the commencement of the agreement and could not meet its obligation and thus it shall not be appropriate to claim the loss of goodwill.

On considering the available facts and principles of law, I would like to place on record at the outset that the parties have not been appropriately able to place the evidence. I may however commend the dexterity of the counsel in the submissions but they in turn must be anchored with evidence on record.

There are some undisputed facts which arose from the evidence, namely:

1) The parties met for their respective interest and entered into the agreement.

2) The Plaintiff was to obtain the import licence and the Defendant was to pay for such imports and store the same to be delivered to be used for the contracted goods

3) The costing for the contracted goods to be arrived at as per Clause 8 of the agreement.

4) The Plaintiff did not obtain any import licence, and did not also import any materials.

5) There is no evidence that any order was placed by the Defendant.

6) The correspondence were exchanged between the parties.

7) Some goods were supplied by the Plaintiff and paid by the Defendant to the tune of shs 3,000,000/-

8) The Defendant intimated on 26th June , 1989 that it shall not extend the agreement.

9) Thereupon the Plaintiff demanded the damages as per the schedule Pex10(a) and (b) plus the other claims and when the Defendant did not pay the claim was made in the present suit.

I do agree that the court can look at the surrounding or relevant facts in order to establish the intention of the parties to give a fair and justifiable interpretation of the contract. However it can do so provided the words of the contract is either ambiguous or unascertainable. As has been stated by *Lord Wilberforce* in the ***Prenn's case (supra)*** the known background to the parties including evidence of ***"genesis"*** and ***"aim of the transaction"*** can be looked at by the court.

To the above I may add that the terms of the agreement can also be looked at in its entirety to arrive at the intention of the parties and genesis of the contract.

The Plaintiff had just started its business with a loan of substantial amount from the bank. It was in need of the assistance from some other party. The parties met for its mutual benefit. The Defendant wanted someone to obtain imported materials and the Plaintiff with its establishment wanted to have consistent and continuous market for its manufactured goods. For reasons not clear from the record of the case, none of the parties could fulfill its wishes. Apart from a letter written before the execution of the agreement, the Plaintiff has not asked for any requisitioned goods and the Defendant also is not shown to have been inquiring about the import licence or sending orders for required products. The Plaintiff also has been unable to show that whatever little products which were delivered to the Defendant were ordered under the contract. I also note that at the initial stage, the Plaintiff had asked the Defendant whether it can buy the products which are in its store (Plaintiff Exhibit 4). The letter also alludes to the raw material which the Plaintiff had in its store and the Plaintiff asked the Defendant to take over the same. The court is not told what happened thereafter. Finally the Defendant Indicated to the Plaintiff that despite all efforts from its side the expected results were not achieved and thus at the expiry of the contractual period it would not renew the contract. (Plaintiff Exhibit 8).

Vide its letter dated 26th June, 1989 (Plaintiff Exhibit 11) in response to the Plaintiff's letter of 20th June, 1989, (Plaintiff Exhibit 9), the Defendant stated *inter alia* that any production given to the Plaintiff was purely as a goodwill gesture to keep it in operation till the necessary imported components were obtained to enable it to manufacture the contract goods.

The Plaintiff on the other hands relied on Clauses of the agreement as is detailed in earlier part of this judgment.

It can easily be noted that the real problem started once the intimation was given to the Plaintiff that the contract would not be renewed. The Plaintiff, in short, relies on the provision that the Defendant shall make sure that the Plaintiff is fully occupied so that the Plaintiff can repay its loan (Plaintiff Exhibit 6 letter of the Defendant dated 1st December, 1988). But the same letter also raises the complaint on non availability of the import licence. It is evident that the import licence has not been obtained. Nothing is shown by the Plaintiff that it tried to obtain the same.

I have already found that the Defendant was within its contractual rights to intimate that it shall not extend the contract. The Plaintiff, in full awareness of this term of the contract, did execute the agreement. In the letter dated 27th April, 1988 (P Exhibit 2), the Plaintiff has indicated that he would answer and fill in the realistic figure for importation of materials in the questionnaire on the basis of what the Plaintiff imported in 1986/87, although it also sought guidelines from the Defendant. On quick perusal of the said letter, the Plaintiff was indicating that as the foreign exchange for European Investment Bank aided projects had been allocated, the application would be processed in the normal manner and

approved. The court is not told what happened. This letter was written prior to the execution of the contract and during the negotiation period. The Plaintiff also indicated that the importation of raw materials would be its anticipated obligation which eventually was reduced into a term of the contract. The same was not obtained. From the evidence on record, it becomes clear that the Plaintiff has failed to show on balance of probability, that the Defendant is liable to pay the damages to the Plaintiff under the agreement in question. If so, the court cannot assess any damages in absence of proof of liability on the part of the Defendant. Moreover the Plaintiff has, as contended by the Defendant, failed to prove the special damages claimed as per well established tenet of laws. I do tend to agree with the submissions made by the Defendant on this issue.

I do feel that if given sufficient proof, the Plaintiff could have been in a better position. But the court cannot assume any fact in favour of or against a party. My hands are thus tied. The evidence looked at from the principles of laws tilts in favour of the Defendant. Though I must confess it was not an easy task and I have spent many restless moments.

The upshot of all the aforesaid is that I do find that the Plaintiff had failed to prove the claims made in this suit and I, having no other option, do dismiss the same. Each party to bear its own costs.

Dated, signed and **delivered** at Nairobi this 25th day of **October, 2011**

K. H. RAWAL
JUDGE
25.10.2011