



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 233 of 2005

MOBIL OIL KENYA LIMITED.....PLAINTIFF

VERSUS

**RASHID NASORO T/A KAKAMEGA SERVICE STATION.....1ST DEFENDANT
RASHID NASORO T/A BROADWAYS DISTRIBUTORS 2ND DEFENDANT**

JUDGMENT

1. The plaintiff instituted this suit against the 1st and the 2nd defendants jointly and severally seeking for a liquidated sum of Ksh.2,053,474.05/- being the balance of the amount due and owing to the plaintiff in respect of goods sold and delivered to the defendants in the year 1998 and 1999. It is contended that the plaintiff had entered into an Operators Agreement dated 11th November 1994 with the 1st defendant who was then trading under the name and style of Kakamega Service station. The defendants were operating a service station at the plaintiff's premises known as **KAKAMEGA/BLOCK 11/9** situate at Kakamega town.
2. The plaintiff's case was presented by **Ernest Kipkorir Changwony (PW1)** he is the operations manager of the plaintiff's company in charge of Western Kenya. He produced the operator's agreement which was entered into between the plaintiff originally trading as Mobile Oil Kenya Limited but currently trading as Oil Libya Kenya Limited. The Operators Agreement spelt out the terms and conditions on which the defendants were supposed to operate the service station.
3. PW1 told the court that the plaintiff supplied the defendants with oil and lubricants but the defendants defaulted in payment. The witness produced the invoices against which the defendants were supplied with various consignment of oil. The goods were duly received and acknowledged for by the defendants or by their representatives. At first the defendants used to pay for the goods by way of bankers cheque. However by a letter dated 18th February 1998 the 1st defendant requested to be paying for the goods supplied with a cheque.
4. Further by a letter dated 11th November 1999, the 1st defendant admitted liability of a sum of Ksh.2,600,000/- and undertook to pay by monthly installments of Ksh.140,000/- per month until the debt was fully repaid. According

to PW1, the 1st defendant owed a sum of Ksh.1,944,295.90/- while the 2nd defendant owed a sum of Ksh.109,178.15/-. Both the 1st and the 2nd defendants were related entities as they were business names owned by and operated by one person that is **Mr. Rashid Nasaro**.

5. The defendant did not adduce evidence to support the statement of defence in which they denied the plaintiff's claim in total. The 1st defendant in particular denied carrying out business in the name of Kakamega Service station at the suit premises known as KAKAMEGA BLOCK 1/9 and also denied having executed any lease over the suit premises. The 2nd defendant on their part also denied having dealt with the plaintiff's lubricants.
6. Counsel for the defendants filed written submissions, he challenged the suit by the plaintiff on the grounds that the plaintiff lacks *locus standi* to bring this suit because there was no contractual relationship between the plaintiff and the defendants. The evidence by the plaintiff's witness was also faulted and so are the documents that were produced in support of the case such as the Operators Agreement which expired on 11th November 1995 and thus under the provisions of Limitations of Actions Act, the claim by the plaintiff is time barred. Moreover, those agreements were said to offend the provisions of section 19 of the Stamp Act because no stamp duty was paid therefore they are not admissible in evidence.
7. The plaintiff was taken over by Oil Lybia Company sometimes in 2007 therefore Oil Lybia which was incorporated in 2007 after the suit had been filed cannot sustain an action against the defendant. Counsel therefore submitted that the plaintiff has failed to discharge the burden of proof on a balance of probability and urged the court to dismiss the case.
8. On the part of the plaintiff, counsel also filed written submissions and urged the court to find that there was an agreement entered into between the plaintiff and the defendant as a result of which the defendants were supplied with goods. The agreement forms a contract which the plaintiff relied on to supply the goods. Regarding the *local standii* by the plaintiff, it was submitted that the plaintiffs changed their name to Oil Libya Kenya Limited as provided for under section 20 of the Companies Act. According to counsel for the plaintiff, they were able to prove that goods were supplied to the 1st defendant as per the following invoices:

1.	No.IK001841 dated 27/8/99	Ksh.331,370.55
2.	No.IK00284 dated 27/10/98	Ksh.309,672.90
3.	No.IK00298 dated 29/10/98	Ksh.253,258.30
4.	No.IK00551 dated 8/12/98	Ksh.330,932.90
5.	No.IK00587 dated 14/12/98	Ksh.330,932.90
6.	No.IK00630 dated 18/12/98	Ksh.387,047.50
7.	No.IK00675 dated 24/12/98	Ksh.408,307.30
8.	No.IK00833 dated 22/01/99	<u>Ksh.280,278.30</u>
	Totaling to	<u>Ksh.1,944,295.90.</u>

In respect of the 2nd defendant they were supplied with lubricants as per the following invoices

9.	No.INED0998 dated 03/06/99	Ksh.61,29.65
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10. No. INED01217 dated 09/07/99	<u>Ksh.47,548.50</u>
Total	<u>Ksh.109,178.15</u>

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The defendants also in their letter dated 11th November 1999 acknowledged their indebtedness to the plaintiff and made payment proposals.

9. Parties had agreed on a statement of issues which was filed on 31st January 2006 and issues set out for determination are as follows:
1. Was there any agreement and/or contract between the plaintiff and the defendants?
 2. Were the Defendants in breach of the agreement and/or contract entered into?
 3. Are the Defendants liable to the Plaintiff for a sum of Ksh.2,053,474.05?
 4. Are the defendants liable to the Plaintiff for any sum at all?
 5. Did the defendant request any goods from the Plaintiff?
 6. Did the Plaintiff sell the requested and/or any goods to the Defendant?
 7. Were the goods requested and/or sold by the Plaintiff to the defendants delivered to the latter?
 8. Did the defendants perform their obligations under the contract?
 9. When did the alleged cause of action arise?
 10. Is the alleged cause of action statute barred by effect of Section 4 of Cap 22?
10. Perhaps the first issue for determination is whether the plaintiffs' suit is statute barred by dint of the provisions of **section 4 of Cap 22** which provides:
- “An action founded on contract may not be brought after the end of six years from the date when the cause of action accrued.”***
- According to the defendants this suit ought to have been filed at least on 2nd January 2005 and not 4th of May 2005 as is the case. If one were to be guided by the invoices issued by the plaintiffs which they relied on as the basis of the cause of action, the invoices that the plaintiffs relied on were issued between 1998 and 1999. The statement of account that was produced by the plaintiff shows that the 1st defendant continued to service the outstanding account until 31st January 2003. Moreover the plaintiff wrote a letter dated 11th November 1999 in which he admitted liability and promised to pay the outstanding account by monthly installments with effect from January 2000 at the rate of Ksh.140,000/- per month until full payment. In my humble opinion the cause of action started on the 11th November 1999 or if one was to go by the statement of account on 31st January 2003 when the defendants defaulted paying the outstanding account.
11. Accordingly I do not think that this suit is time barred. I proceed to deal with the issue of whether the plaintiff has

locus standi in this matter. This suit was filed by Mobil Oil Kenya Limited according to the Operators Agreement the contract was entered into between Esso Kenya Limited and the invoices were issued by Mobil Kenya Limited when PW1 testified he informed the court that the plaintiff changed their name from **Esso Kenya Limited to Mobil Kenya Limited and currently Oilybia Kenya Limited**. This is as provided for under section 20 (4) of the Companies Act which provides:-

“A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name”

12. Accordingly I find the plaintiff merely changed the name and this does not affect the legal proceedings. This now leaves me with the last issue, whether the plaintiff established their claim on a balance of probability. As noted above, the defendant did not offer any evidence. Counsel for the defendant through their submissions faulted the invoices that were produced in evidence. However the court found those documents were admissible in evidence including a letter by the defendant dated 11th November 1999 in which the 1st defendant admitted liability. All this evidence was not controverted. The defendants attempted to respond to this evidence by way of submissions and especially to challenge this evidence by way of submissions is an unacceptable practice.
13. The invoices show how the sum of Ksh.2.053,47.05 was arrived at. Judgment is therefore entered for the plaintiff against the defendants jointly and severally as prayed in the plaint. The plaintiff shall also have the costs of this suit with interest at court rates.

JUDGEMENT READ AND SIGNED ON 26TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE