



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 688 OF 2006

**JUSTUS ANDENDE AMBASU &
ANOTHERPLAINTIFF**

VERSUS

**DELTA PETROLEUM TRADING COMPANY LTD &
ANOTHER.....DEFENDANT**

JUDGMENT

1. The 1st and 2nd defendants operated a petrol station by the name Shell Petrol Station situated on Jogoo road and Mombasa road. At various dates in the year 2005 and 2006, the plaintiffs claim that they supplied the defendants with Petroleum products on credit. The credit was in accordance with the contract by way of a Memorandum of understanding dated 15th May, 2006 and an agreement signed between the parties pursuant to the said memorandum of understanding. In breach of the agreement, the defendants failed to pay a sum of Ksh. 7,212 ,478 despite the agreement the defendants also issued post dated cheques drawn on the account of the 1st defendants which the second defendant urged the plaintiff not to cash as there was no money in the account at the time.

2. The 1st plaintiff gave evidence in support of this claim he testified that they had trading relationship with the defendant. The plaintiff used to supply petroleum products to the defendants petrol stations on Jogoo and Mombasa road. Initially the defendant used to pay for the products but later both parties agreed on credit terms. The defendants were supposed to receive the product sell them, then deposit the money in the plaintiff's account. However, the debt accumulated and parties agreed how the plaintiff could manage the Petrol Station according to the Memorandum of understanding so as to recover the debt. The defendant issued the post dated cheques and they were supposed to hand over the two petrol stations to the plaintiff to run for two years. They signed a Memorandum of understanding and plaintiff took over the Petrol Station in June, 2006. However, the defendant did not move out of the station and by a letter dated 19th September, 2006; the defendant purported to terminate the contract. The plaintiff obtained a restraining order of injunction which lead the parties to further negotiations where the defendant agreed to take over the station but the plaintiff would retain the car wash by this time the balance of the credit was Ksh. 8,102,897/95 which was acknowledged by the defendants and issued post dated cheques.

3. The plaintiff produced 26 cheques amounting to about 6.9 million, he however, said he had misplaced two cheques he produced the statement of account for the claim of 7,212,478 which was less the sum they had made from the car wash business.
4. The defendant denied the plaintiff's claim in their defence and counter claim. The defendants relied on the memorandum of understanding and claimed that it was the plaintiff's responsibility to operate the petrol stations exclusively and pay all the debts and liabilities. It is further alleged the plaintiff was supposed to inject a further capital of 3 million to pay off trade debts but in breach of the agreement the plaintiff failed to settle the creditors accounts and ran down the business thus the defendant claimed that they were not indebted to the plaintiff and prayed for general and special damages.
5. The defence case was presented by the 2nd defendant who is also a director of the 1st defendant. He testified that he used to receive a supply of petroleum products through the 1st defendant they also entered into an Memorandum of understanding but the plaintiff failed to inject capital and ran down the Petrol Station. The 2nd defendant was compelled by circumstances to write a letter terminating the joint management and he highlighted his concerns in the letter dated 19th September, 2009. The plaintiff sued the defendants and that is when they entered into the 2nd Memorandum of understanding and the plaintiffs were supposed to be paid. However, the stations were taken by Shell BP and money could not be paid.
6. The above is the summary of the pleadings and the evidence adduced in support and against this case. The issue for determination is whether the plaintiff has discharged the burden of proof that on a balance of probabilities the defendants owe the sum of Ksh. 7,212,478. The defendants also filed a counter claim although they do not seem to have adduced evidence to show the special and general damages that they sought in the counter claim in the on set I find no evidence in support of the counter claim which is hereby dismissed with costs to the plaintiff.
7. As regards the plaintiff's claim, it is common ground that the parties entered into agreement by way of a memorandum of understanding dated 1st June, 2006 which was between the plaintiffs and defendants all the parties signed. The parties also signed an agreement which adopted the terms and conditions of the Memorandum of understanding and further providing how the defendant will settle the debt owing to the plaintiffs. Pursuant to that agreement and Memorandum of understanding the defendants issued post dated cheques and payment was to commence on 31st October, 2006 until the debt was fully recovered. Those cheques were never paid the plaintiff testified that he was requested not to send them for payment because the defendants had no money. The defendant did not offer any evidence by way of an explanation why he issued post dated cheques to pay the debt. The plaintiff's evidence also supported by the statement of account which the parties had agreed upon and the defendants had issued the post dated cheques although the defendant claimed the debt was owned by the 1st defendant, the Memorandum of Understanding and the agreement were entered into by both the 1st and 2nd defendants. The contract was terminated by the 2nd defendant acting on behalf of the 1st defendant the defence that the second defendant is not liable lacks credibility. The plaintiff's evidence is clearly supported by documents and on a balance of probability the plaintiff proved their claim. Accordingly judgment for the plaintiff is hereby entered against the defendants jointly and severally for a sum of Ksh. 7,212,479 with interest at court rates. The plaintiffs shall also have the costs of this suit.

JUDGMNT READ AND SIGNED THIS 22ND DAY OF OCTOBER 2010

**MARTHA KOOME
JUDGE**