



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

**Civil Case 1736 of 1999**

**TOTAL (K) LTD.....PLAINTIFF**

**VERSUS**

**CHANNAN AGRICULTURAL CONTRACTORS.....DEFENDANT**

**JUDGMENT**

The Plaintiff was selling petroleum products to the defendants who were carrying on business under the name of Channan Agricultural Contractors (K). The relationship was of a long time but in 1998 the relationship was governed under the provisions of an agreement entered into on 17.02.1998.

The plaintiff owed the Defendant the sum of Kshs. 15,000,000 /= with interest at 30 % p.a from 06.08.1998 till full payment. In statement of defence the Defendants admitted that kshs. 7,666,190.20 was due to the Plaintiff. The Defendants have paid the same sum leaving a balance of kshs. 7,333,810 /= out of the Plaintiff's claim of Kshs. 15,000,000 /=. The judgment is therefore in respect of the said balance of Kshs. 7,333,810 /=

The Plaintiffs evidence is that the defendants were granted 30 days credit period within which to pay for the products delivered. In time the Defendants defaulted in payments for the supplies delivered. The parties held meetings leading to reconciliation of accounts and the sum of Kshs. 15 million was agreed as due and owing from the Defendants to the Plaintiff.

The evidence is contained in the defendants letter dated 29.05.1998 which states ***“as per our records, Kshs. 10,519,791.85 /= is outstanding. We propose to settle this as follows:***

- 1. 30.06.98 - Kshs. 3,019,791.85**
- 2. 30.08.98 - Kshs. 2,500,000.00**
- 3. 30.09.98 - Kshs.2,500,000.00**

In that letter the Defendants promised to ***“settle the current purchases strictly at 30 days from the date of statement” If the above proposal is acceptable we could offer to back it with a guarantee from our bankers.” Subsequently in a letter dated 16.07.98 headed “outstanding Account” the defendants***

stated “We refer to the above and to our meeting in your good offices last week in which we agreed as follows:

1. **The Account in principle be agreed at Kshs. 15 million pending finalization of the disputes which shall be settled out between our auditors and yourselves.**
2. **The payment of kshs. 15 million is proposed as follows:**
  - a. **Kshs. 2.5 million on 30.08.98**
  - b. **Kshs. 2.5 million on 30.09.98**
  - c. **Kshs. 3.0 million on 30.10.98**
  - d. **Kshs. 3.5 million on 30.11.98**
  - e. **Kshs. 3.5 million on 30.12.98**
3. **We will furnish security.**
4. **Current purchases shall be paid at 30 days from the date of statement.**

On 21.07.98, the defendants wrote another letter stating “**We have agreed to make a payment proposal for Kshs.15.0 million. “We enclose our cheques as follows: Cheques Numbered; 0000263, 000262, 000261, 0000260, 000259, 000122, 000121, 000120. We trust that the above is in agreement.”**

The copies of the cheques were exhibited. However, by a letter dated 11.08.98 the Defendants wrote to their Bankers stopping the payment of the cheques the reason given to the bank is “**the reason for stopping payment is that Total (K) Ltd. and us have not agreed on the terms.”**

Upon receiving the information, the Plaintiffs wrote on 27.08.98 “**Your auditors are only to reconcile the balance of Kshs.4.5 million that is in dispute not the 15 million for which you had issued cheques in settlement. You are aware that the sum of kshs. 15 million is not disputed.”**

The Plaintiff through their Legal Officer sent a demand for kshs. 15 Million and thereafter this suit was filed. It is noted only one cheque in the sum of Kshs.2.5 million was paid **according to the Plaintiff**. In evidence, the PW1 Mr. Ndunda confirmed that the Plaintiff started dealing with the Defendant early 1990s.

The evidence for Defendants was given by third Defendant. He said there were disputes as to he amount owing to Plaintiff on monies taken Kshs.1,511,880.50, wrong debits 3,861,983.50, Kshs. 2,160,389.25.

These disputed amounts totaled kshs. 7,534,253.25 which they did not pay but deducted from the Kshs. 15 million leaving the Plaintiffs claim at Kshs.7,333,810 /=. The witness told the court that the letters concerning the payment of kshs. 15 million were written to speed up the matter. This is a sign of dishonesty at the part of the Defendant. The Court does not believe that the Defendants could have agreed to pay Kshs. 15 million just to speed up the matter. The sum was worked out and found due. Asked why the Defendants who stopped the cheques the witness said the reason was because the Plaintiff insisted on the bankers guarantee. However there is evidence that it is the Defendants insisted on offering their Bankers guarantee only changing to a security on immovable property. This security was in respect of future supplies as stated in the Plaintiff’s letter dated 06.08.98 and Defendants letter of 21.08.98.

It was not in connection with the claim of Kshs.15 million agreed upon. The balance not agreed upon was kshs. 4.5 million. The evidence of the Defendants in this matter amounts to fraud and false representation if it is true that the Defendants issued cheques in the sum of Kshs.15 million to speed up

the negotiations and with intention to hoodwink the Plaintiffs.

This Court finds the behaviour fraudulent and dishonest . This court also finds that the evidence as told by the Defendant's witness is inconsistent with the documentary evidence as exhibited in the Defendants list of Documents. It is this Courts view that the Plaintiff has proved its case on a balance of probability and I enter judgment for plaintiff in the sum of Kshs.4,833,810 /=. Since the Plaintiff has admitted that one cheque for Kshs. 2,500,000.00 had been paid by the Defendant's bank with interest as from the date of plaint for the Kshs. 15 million until payment of Kshs. 7,666,190.20 and thereafter on the unpaid balance kshs. 4,833,810 /= until date of this judgment at the rate of 12 % and thereafter the decretal sum shall carry interest at the rate of 14 % until payment in full.

I decline to grant interest at the rate of 30 % p.a as prayed since no rate was agreed upon and the plaintiff is not a bank. The Plaintiff is also granted costs of the suit to be taxed by the Taxing Officer or to be agreed.

It is so ordered.

DATED this 21<sup>st</sup> day of October 2008.

**JOYCE N. KHAMINWA**

**JUDGE**