REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1861 of 1995

GEORGE M MUSINDI ..... 1ST PLAINTIFF

WILLIAM SHIMANYULA ..... 2ND PLAINTIFF

ALLIANCE TYRES COMPANY LIMITED ..... 3RD PLAINTIFF

VERSUS

SMALL ENTERPRISES FINANCE CO. LTD ..... DEFENDANT

JUDGMENT

The Plaintiffs claim is for an order that:

(a) The defendant be restrained from releasing its securities namely Bukhayo/Lupida/862 Isukha/Shirere/318 and Busotso/Shikoti/4258

(b) The defendant do execute discharges in regard to the aforesaid securities namely Bukhayo/Lupida/862, Isukha/Shirere/318 and Butsotso/Shikoti/4258

(c) That the suppliers do forthwith release the said retreading machinery to the Plaintiffs and the Defendants do pay outstanding demurrage or storage charges from July 1994 to date

(d) A declaration that the purported receivership is null and void

(e) Kshs 60,486,924.00 be paid to the third plaintiff being lost profits and expenses incurred on the project

(f) Kshs 22,737,675.80 be paid to the first plaintiff being lost income from 1993 to date

(g) Costs and interest of the suit

On the other hand the defendant counterclaims against the plaintiffs as follows:

(a) A declaration that the Defendant was and is entitled to exercise its power of appointment of receiver under the debenture both at the commencement of this suit and after its determination

(b) A declaration that the defendant was/is entitled to exercise its statutory power of sale under the

charges both at the time the Plaintiffs' suit was instituted and after its determination

(c) A declaration that the Defendant was and is entitled to recover the outstanding amount now standing at Kshs 36,470,319.10 as at 30th June 2002 together with interest thereon at commercial rates from 30th day of June 2002 the date of the defence and counterclaim till payment in full

(d) Kshs 36,470,319.10 plus interest thereon commercial rates

(e) Costs of this suit

(f) Interest on (d) and (e) above

The 1st and 2nd Plaintiffs were the directors of the 3rd Plaintiff Company Alliance Tyres Company Ltd hereafter called ATCO. The first two Plaintiffs were also guarantors of ATCO having executed guarantees in its favour in the event of default. ATCO was the principal debtor, whereas the Defendant, Small Enterprise Finance Company Ltd (hereinafter called SEFCO) was a company that used to lend finances up to 5 million to small enterprises. SEFCO was a subsidiary of the Development Finance Company of Kenya (DFCK). SEFCO's objectives included financing 70% after confirmation of 30% equity by the project owners.

Prior to the incorporation of ATCO the 1st and 2nd Plaintiffs as promoters approached SEFCO with a proposal to establish at Kakamega, Western Kenya, a tyre retreading factory. Documentary evidence reveals that the following events took place and most of them constitute common ground. SEFCO's terms for the funding included:

i. incorporation of a limited company

ii. preparation of a project proposal or feasibility study

iii. payment of 1% being the registration fees payable with its application

iv. appointment or inclusion of SEFCO as a director of the principal debtor company namely ATCO

v. furnishing of securities to secure the funding

vi. the required loan was to be in the sum of Kshs 3 million

vii. A Board paper by the Board of SEFCO was to be prepared and this was done on 2nd June 1992.

All the above conditions were fulfilled and the Board of SEFCO approved a secured loan to ATCO in the sum of Kshs 3 Million. The loan was repayable within a period of 8 years including one year grace period and the loan was to attract interest at the rate of 20% per annum. A loan agreement and security documents reflect this position.

Documentary evidence exhibited reveals that after the security documents were signed and registered ATCO requested SEFCO to directly release Kshs 3 Million being the loan amount to the suppliers of the new retreading machinery required for the project. The supplier's name was Vulcan Industrial Ltd. The loan moneys were disbursed directly to Vulcan by two equal installments of Kshs 1.5 million each on 30th September, 1992 and 5th October 1992 respectively. The payment was effected against the supplier's invoice and the court was informed that this used to be the practice so as to ensure that the loan moneys are utilized for the purpose intended. The Plaintiff directors had prior to the perfection of the securities and the approval of the loan of Kshs 3 million, confirmed that they had acquired reconditioned machinery worth 1.5 million and this was reflected in the Board paper. This constituted part of the 30% equity

contribution being a pre condition for the funding.

It is also common ground that the programme or schedule of action for the project was:

· June 1992 – Loan approval

· July 1992 – Loan offer was accepted

· August 1992 – Completion of Legal documentation

· September 1992 – Machinery was to be delivered to Kakamega but this was not done and this constitutes the major subject matter of this suit

· Nov/Dec - Machinery was to be tested – this was not done

· January 1993 – Commencement of the Project – this was not done

This last 3 bullets represent the subject matter of this suit. Evidence from the 1st and 2nd Plaintiff confirmed that the project was expected to start making profits from the third year of the commencement of operation which was around 1995.

It is not in dispute that the machinery which had already been paid for by SEFCO as outlined above was not delivered in September because it could not be cleared and the parties to the suit had traded accusations, and pointed accusing fingers to each other on whether it is the inability to raise demurrage and port charges or disputes between the supplier and the plaintiffs or both.

As fate would have it the project did not start at all and among other steps SEFCO appointed a Receiver pursuant to a debenture over the new machinery in January 1994. The other significant event was the filing by SEFCO and ATCO (in receivership) Ltd of a suit against VULCAN – the supplier on 28th June 1994 (HCCC 2337/94 where both SEFCO AND ATCO pleaded breach on the part of VULCAN. The 1st and 2nd plaintiff later applied to be joined in the suit and there is a consolidation order in relation to HCCC 2337/94 and this suit.

ISSUES

Although the court was presented with many documents in the form of at least a bundle by each party the other extreme is that the parties agreed on only three issues as follows:

(1) Were the First and Second Plaintiffs privy to the contracts pleaded in paragraph 1 to 5F of the Amended Plaint

(2) Was the Defendant in breach of the said contracts as pleaded

(3) Are the Plaintiffs entitled to the prayers as pleaded in the re-amended plaint

The pleadings however give rise to the following additional issues:

(4) Was the third Plaintiff in breach of the contracts

(5) Are the Guarantees by the 1st and 2nd Plaintiffs enforceable

(6) Is the debenture over the machinery enforceable

(7) Is the Defendant's counterclaim sustainable

SUMMARY OF PLAINTIFFS CASE:

1) In breach of the contracts entered into by the parties the Defendant has from July 1994 – to-date solely obstructed the release of the said machinery from the warehouse or container in Mombasa Port and thereby caused the total failure or collapse or frustration of the implementation of the said project

2) In breach of the contract the Defendant placed the 3rd Plaintiff under receivership on 12th January 1994 on grounds allegedly that the 3rd Plaintiff had delayed in the payment of the loan and interest

3) The Defendant served notice and threatened to sell the Plaintiffs said properties in exercise of its statutory powers of sale

4) The actions of the Defendant were and still are unlawful, harsh, punitive and actuated by malice and/or are in breach of the Defendants representations

5) That there were certain basic assumptions, representations or conditions precedent underlying the project as expressly stated in the feasibility study upon which the parties relied when they agreed to enter into the said contracts for the implementation of the project which included:

i. The 1st and 2nd Plaintiffs as the sponsors of the project would finance and meet the initial capital expenses of the project as per Clause 4 of the feasibility study

ii. the Defendant would advance to the Plaintiffs through the 3rd Plaintiff Company as the principal borrower the said Kshs 3 million for the purchase of the new machinery for making the retread tyres to be imported from Europe through the identified local agents of the overseas suppliers of the namely M/s Vulkan Investments Ltd

iii. the Plaintiffs would be granted one year grace period before commencing repayment of the principal sum of the loan by 84 monthly installments

iv. the Plaintiff to pay the Defendant the sum of Kshs 40,000 to cover interest for the pre-operating period of the project and thereafter interest to be paid from the operations of the company or the project

v. the project would be self funding and all the revenue for the repayment of the interest and principal sum would be generated from the operation of the project

vi. the Defendant would be appointed as a director of the 3rd Plaintiff company to participate in the decision making process and implementation of its affairs and to ensure efficient operation of the said project

vii. the 1st Plaintiff would resign from his job as the General Manager of Car & General (K) Ltd in order to be the Managing Director of the 3rd Plaintiff Company to ensure its success

viii. that the Plaintiffs relied and acted on the aforesaid representations

SUMMARY OF THE DEFENDANT CASE

i. there was no privity of contract between the 1st and 2nd Plaintiff and the Defendant

ii. there were no preconditions to the loan agreement, charges guarantees or the debenture and the entire commercial relationship between the parties is solely regulated by these documents

iii. the repayment of the moneys lent namely 3 million Kshs was not conditional on the success of the project or its performance and the repayment was to be as per the Loan Agreement and the specified securities

iv. the Plaintiffs did not have adequate funds to clear the container at the port – and was the author of their misfortune

v. the 1st and 2nd Plaintiffs had disagreements with the third party the supplier (Vulcan) and the Defendant was not a party and this led to the non release or clearance of the machinery

vi. the 1st Plaintiff sometime in August 1993 unlawfully and through deceit obtained all the original clearance documents all of which were in the name of the supplier and that the said Plaintiff attempted to clear the said container but was arrested by the Kilindini Police pursuant to a report made to the police by the suppliers

vii. The appointment of a Receiver was intended to secure the machinery and was validly made under the debenture

viii. In order to enforce the securities following default on the part of the Plaintiffs the 1st and 2nd Plaintiffs as guarantors and the 3rd Plaintiff also the principal debtor company the Defendant has called up the guarantees and also served the required statutory notices and further the statutory power of sale has arisen and is enforceable.

EVIDENCE

I have carefully studied the documentary evidence as per the bundles presented to the court by the parties in support of their respective positions. I have evaluated the evidence myself and its effect on each issue. I have read the analysis of the evidence as set out in the written and oral submissions by counsel. The Plaintiffs called three witnesses while the defence called one witness. I have put the evidence adduced on the scales. The court analysis of the evidence tilts in favour of the defendant and I have substantially adopted the very able written submissions of counsel filed on 14th November, 2006. In my own analysis and evaluation I have independently reached the conclusion stated in the submissions of the learned counsel for the Defendant. On the other hand I have rejected that the evidence given by the plaintiffs leads to the conclusions reached by the learned counsel for the plaintiff in the written submissions. The evidence given by the plaintiffs does not on a balance of probabilities support the averments in the plaint.

In particular on the essential and critical point on the effect of the feasibility report and the Board paper on the subsequent formal loan Agreements, charges, guarantees and the debenture my findings on this is that the Loan Agreement represents the contract between the parties and the pre contract negotiations and papers are in my view extrinsic evidence and they cannot be used to contradict the formal terms as set out in the Loan Agreement and the other contracts as described above. I find that the intention of the parties was to record all the terms of the contract in the Loan Agreement and the other formal contracts. Thus, where the interpretation of the feasibility study and/or the Board paper conflicts with the subsequent Loan Agreement the Court is entitled as I have done to reject the document or terms in the feasibility study or the Board paper which defeat the intention as expressed in the Loan Agreement. For example the Plaintiffs contention that their liability to pay the Loan was dependent on the success or implementation of the project clearly conflicts with the terms of the Loan Agreement which provide for payment of principal and interest on the 30th day of each month and by 84 equal monthly instalments. The project was not programmed to make profits until after 3 years yet the only moratorium given by the Loan Agreement is a grace period of one year. The intention of the parties was that the loan was payable over the entire period stipulated save for the grace period. A collateral contract can only be proved where it neither alters nor adds to the whole agreement as agreed by the parties or when the written contract is silent. In this case the Loan Agreement provides for all the contentious points in this matter.

The Parol Evidence Rule

Chitty on Contract 29th Edition Vol – General Principles 12.096 defines the principle thus:

"**It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract ... The rule is usually known as the "parol evidence" rule. *Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation*. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances."**

The court has considered all the evidence on record and finds that the pre-contract documents which were not specifically made part of the subsequent formal agreements such as the Local Agreement charges, or guarantees did not form part of the enforceable contract. The feasibility study and the Board paper and the alleged but unproven representations concerning the resignation of the 1st Plaintiff in order to manage the project do not in the view of the court form part of the contracts between the parties. They only aided the parties in reaching the formal agreements.

I find that the intention of the parties in respect of each formal document is clear and does not need the use of pre contract documents or oral negotiations.

Under the rule they cannot in the circumstances be used to contradict the Loan agreement.

The witnesses for the Plaintiff did admit that the money lent namely Kshs 3 million is still outstanding but they claim that because the project was frustrated they should not be held liable including the company. In my view the written contracts namely the Loan Agreement, charges, guarantee and debentures speak for themselves and it is not the function of the court to rewrite the contracts for the parties. I reject the evidence of the Plaintiffs which purported to go against this position in that the evidence of the alleged frustration and representation was occasioned or caused by the default of the Plaintiff Company and the Plaintiffs in clearing the machinery as earlier agreed between the parties. The third Plaintiff could not raise the clearance charges of approximately Kshs 700,000 and the directors involved themselves with matters ulterior to the Loan Agreement with a third party – Vulcan. These ulterior affairs delayed or frustrated the clearance process. The involvement of the Defendant to assist was not a contractual obligation on their part and the totality of the evidence does not locate any blame on them. It is also important to observe and hold that the appointment of a receiver was as provided in the debenture and no liability or breach stems from this.

High Court Civil Case H.C.C. No.2337 of 1994 contains allegations by all the parties as against a third party who was not represented in this matter. The pleadings are no more than unproven allegations. On the other hand this court has the duty of considering the rights of the parties to the relevant contracts as between themselves. Those contracts speak for themselves and in the event of default and this is not denied and if denied the documents themselves do acknowledge the lending of Kshs 3 million. The Defendant is entitled to enforce the Loan Agreement, the charges and the debenture and also to enforce the Guarantee as per the respective terms. Since the necessary demand notices have been given all the contracts can be legally enforced.

Turning to the monetary claims enumerated in the Amended and Re-Amended plaints, the same were not proved and I did not believe the witness called to prove the claim but as the plaintiffs are still the authors of their own misfortunes they cannot be allowed to benefit from their default. Being in default the monetary claims by the Plaintiffs have no legal basis.

Plaintiffs, 1 and 2 were directors of Plaintiff number three (3) and are not privy to the Loan Agreement in their personal capacities and therefore the only contractual relationship between them and the defendant is that they would be liable to the Defendant in respect of the contracts of charge and guarantee in their individual capacities. The pre contract negotiations or representations whether oral or written which did not form part of the subsequent formal Agreements cannot be invoked by them in the circumstances. In this regard I accept the ratio in the case of ***HOUSING FINANCE CO OF KENYA v PALM HOMES LTD & 20 ... Khamoni J 12KLR 93*** and the Court of Appeal decision in the case of ***KENYA***

COMMERCIAL FINANCE COMPANY LTD v NGENY & ANOTHER 2002 I KLR 106. The claim is therefore dismissed.

Turning to the counterclaim the same is clearly proven and I accept and believe the evidence of the only witness called by the defence. The counterclaim is also clearly proven by the final agreement namely the Loan Agreement, the Chargee the Guarantee and the debenture. For these reasons I enter judgment against the plaintiffs in favour of the defendant as prayed in the counterclaim but disallow any costs to the defendant.

Overriding duty to act reasonably and prudently as men of Commerce

It is clear from the findings and holdings that the legal authorities and the doctrine of precedent plus the thinking of the past decades is for the courts to interpret commercial contracts and give efficacy to the terms as agreed by the parties. This is exactly what I have done. However in this transaction it will be recalled that, what was lent was Kshs 3 million and what is now due is close Kshs 40 million. The project never took off even for a day and the intention of the parties to put in place a useful business tyre retreading venture was ultimately never met. The question is, must the principle of the freedom of contract always reign supreme as Justice Ringera seems to say in one of the cases cited in this matter and should the court always ignore economic factors and circumstances. Can the law at this time and age develop an overriding rule based on Commercial morality and responsibility. To my mind I think the courts should come up with such an overriding principle. In the circumstances of this case between a successful project and the Plaintiffs was the inability to raise Kshs 700,000 to clear the Machinery. On the other end is a financier, the defendant who could have lent the Kshs 700,000 to ensure the commencement of the project. It did not do so and in keeping with the Agreement just stuck to its gun as expressed in the Loan Agreement and the charge and the debenture including appointing a receiver whose remuneration could perhaps exceed the Kshs 700,000 the Plaintiffs needed.

With respect although in keeping with the current Legal authorities and notions of interpretations of contracts I have found in favour of the Defendant – the only reason for having done so is that I would perhaps, singly be swimming against the legal authorities referred to above especially the one of the Court of Appeal and perhaps as far as I know I would not want to spring a surprise on commercial men and women and other entities in holding against them without notice. This need not be so in the future. They had better be fore warned. I am however clear in my mind that this transaction and its ultimate outcome – possible sale of the only assets the plaintiffs own including their homes – the colossal amount demanded so many years after the event – does shock the conscience of this court and I must add it must shock the conscience of the right thinking and ethical commercial men and women ie prudent business people and commercial entities. Where as in this case, the facts and circumstances shock the conscience of the right thinking and ethical commercial people and the conscience of the court the courts ought to develop the law further to stop the injustice. There cannot be commercial justice where the conscience of the court and that of the right thinking and ethical commercial men is shocked. The courts have a responsibility to search for that justice, find it and declare it. In my court I would in similar circumstances in future and having announced it in advance find that notwithstanding the written contracts between the parties the law should imply an overriding duty for all commercial men and women and other entities to act in a prudent manner so as to achieve the overall intention for each transaction. Where the fail bellow this overriding duty the court ought to intervene and adjudicate on the principles of commercial prudence and morality – thus lending Kshs 700,000 would have been the prudent way to achieve the overall intention of the parties which was the setting up of a tyre project.

In future I feel sufficiently inspired to walk this path but I shall not do so today because there was no warning to the people of commerce and we all tend to get wiser after the event! The other reason why I could not invoke the principle is that unlike the duty to mitigate, the overriding principle based on commercial morality should be imposed on all the parties. In the circumstances described the Plaintiff did not apply for the extra funds (Kshs 700,000) nor did the defendant offer to avail the funds. In the case of the duty to mitigate the aggrieved or innocent party is not under any obligation to do anything other than in the ordinary course of business. Thus the duty is discharged where as stated in ***BANCO DE PORTUGAL v WATERLOW (1932) AC 452, 506:***

"**The Law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measure and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."**

In other words a claimant need not take a risk with his own money. However the duty to act as reasonable, right thinking but prudent commercial men and women should be owed to parties in commercial contracts and the duty should much higher and involves some reasonable initiative by both parties in achieving the intention of the contract. Where a contractually "correct" party fails to discharge this overriding duty he ought to be disallowed what he could have achieved if he had discharged the duty. Thus in a case such as this I would have allowed only the recovery of the initial loan less the accrued interest.

In certain situations the free reign of the principle of freedom of contract as defined in the last century would not serve the interest of doing justice and small wonder in many jurisdictions legislators have made inroads into the principle so well described by two of its patron saints below.

In ***PRINTING AND NUMERICAL REGISTERING COMPANY v SAMPSON 1875 LR 19 Fg 462 at 465*** Sir George Jessel observed:

"**if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."**

And the same principle was stated by Henry Sidquick in the ***ELEMENTS OF POLITICS*** (1879) in these words:

"**Suppose contracts freely made and effectively sanctioned and the most elaborate social organization becomes possible, at least in a society of such human beings as the individualistic theory contemplates gifted with mature reason and governed by enlightened self interest"**

Sadly, the world has not yet manufactured the enlightened people answering the description captured by the two gentlemen above nor has the gap of bargaining power between contracting parties necessarily been bridged in the two centuries, hence the need for further thought and intervention both statutory and by the courts under the common law. Closer home Justice Ringera had this to say in the cited case of ***CAESAR NJAGI KUNGURU v KENYA COMMERCIAL BANK HCCC (MILIMANI) 1543/2000*** unreported at page 4:

"**It is not part of the courts mandate to rewrite or otherwise modify those contracts for the reason of changed economic or other circumstances."**

While I have given judgment for the Defendant in the circumstances of this case as the saints of the freedom of contract would all do, I believe that I have served sufficient notice that in my court I might choose a different path as outlined above should I, in future be presented with a fitting case. The principle ensures the attainment of the initial intention of the parties. I visualize a situation where a Commercial Court when moved by either party to a contract to give interim relief should place itself in a position to give such interim relief. If and when the path of justice reveals itself as narrow, dark and lonely the path must be widened and lighted by the courts, the same way a dark night is lighted up by the stars. It is necessary to make a new beginning and a new dawn.

<u>Case for ADR (Alternative Dispute Resolution) justified</u>

Perhaps more than anything else I have come across in the past few years, facts of this case and the apparent unjust outcome brought about by applying the principle of freedom of contract, demonstrate the need for parties to consider invoking Alternative Dispute Resolution (ADR) method in that a mediator would have for instance early in the stalemate of the clearance of the machinery noted that, as between

the parties and a successful common transaction, was a paltry 700,000 and would have identified the need for further funding of Kshs.700,000 by the finance company as a good settlement option. In addition instead of giving a lot of emphasis on the parties contractual rights under the banner of the principle of freedom of contract it is likely that a good mediator would have suggested to both parties that the availability of the Kshs 700,000 represented a win-win situation for both of them. In other words the ability of ADR to draw the attention of the parties not only to their contractual "rights" but also to their "interests" and "values" would have provided an important breakthrough to the stalemate on the clearance of the machinery.

One other idea is that, if the parties had provided a Dispute Resolution Board (DRB), say of one person to be available all the time to identify and resolve disputes as they occur in the transaction such a Board or a single person could have identified the actual interests of the parties and have the dispute or potential dispute resolved immediately it occurred. Although the comparison is out of proportion in time of size and importance there is much to learn from the EURO-***CHANNEL PROJECT CONTRACT,*** underground channel, between the United Kingdom and France, which is one of the biggest contracts in the construction industry and history in terms of value which had separate Boards established under the contract namely Technical, Legal and Financial and they assisted in anticipating, identifying and resolving problem as they occurred during the construction. I think there is a case for changing course in commercial contracts and for practitioners of law and other stakeholders focusing on all possible alternatives in advance or as they occur instead of solely focusing on what is sometimes a horrifying postmortem of the problem based solely on the principle of the freedom of contract. Freedom of contract though a major principle and not a side wind has shown its ugly belly in this matter.

Commercial Morality

There is need to evolve some overriding commercial morality principle to enable the court to intervene even in the face of freedom of contract in situations such as this and I would venture to suggest tests as under:

(1) if you were at the commencement of the contract to ask the parties concerning the consequences which have since arisen and they would answer - No, this is not what we intended to be the outcome or result of the transaction this should provide the first test for intervention.

In this case if you were to ask the plaintiffs if they intended to sue to recover Kshs (appx) 75 million in the transaction the answer would be a No – yet this is what has exactly happened. In this case if you was to ask the defendant if IT intended to recover Kshs 40 million by way accrued of interest without the principal moneys assisting in setting up the tyre business venture the candid answer would be a "NO".

(2) The second test would be does the outcome or result arising from the transaction shock the conscience of the court? Is there proportionality in the outcome. Does the end justify the means? Is it an unconscionable bargain?

(3) Does the outcome leave a bad taste in the mouth of right thinking and upright men of conscience?

In the transaction under challenge the answer to each question is positive.

A loan of 3 million attracting interest of Kshs 40 million approximately which might result in the 1st and 2nd plaintiff's being rendered homeless leaves a bad taste in the mouth even to pronounce the sentence itself. It shocks, it revolts it severs any commercial cord or commercial morality if it exists and at the same time it ought to give rise to new thinking in the development of principles of commercial morality. Any right thinking business person would reasonably share this view if the question were to be posed to him.

This then should form the basis for the courts intervention to give relief that accords with the initial intention of the parties and which reinforces commercial morality and sanity.

I have, as observed above noted that the superman intended to have been "invented" in the 20th and 21st centuries, with gifted mature reason and governed by enlightened self interest to manage transactions on the basis of unfettered freedom of contract was not and has yet been invented and cannot be invented because men and women are created. It follows therefore that the principle of freedom of contract without an underlying commercial morality is like a train whose brakes are slowly failing with each mile covered, it has inbuilt in it seeds of self destruction. This explains the great interventions in many jurisdictions by the Legislature to rein in the freedom – eg. Business Premises Rent law, Rent Restriction Laws, Laws on housing and mortgages and policies underpinning Housing laws, etc.

To emphasise on the importance of Counsel and parties to think well in advance about the usefulness of ADR as a complimentary system or alternative to litigation, I wish to echo the wise words of Lord Justice Ward in the case of ***BURCHELL v BULLARD (2005) EWCA Civ 338***:

"**The profession must, however take no comfort from this conclusion Halsey has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its valuer. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention moreover to paragraph 5.4 of the pre-action protocol for Constitution and Engineering disputes – which I doubt was at the forefront of the parties minds – which expressly requires the parties to consider at a preaction meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. The defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives".**

I would strongly urge the bar to embrace alternative methods and to be more innovative in drafting the commercial contracts and in handling disputes.

This brings me to one more point. Although counsel are aware of the reasons for the delay in finalizing this matter and are therefore not complaining or blaming the court for the delay it also brings into focus the need for embracing case management in litigation, and for the court to adopt an interventionist approach to the matters before it and the need to ensure flexibility in designing a procedure suitable to each dispute and to give a time schedule of activities. Had this been done when the matter was first filed, the advantages in terms of costs and finality are now by hindsight obvious. The outcome of this case although contractually correct must in future, lead to a more realistic approach and recognition of the overriding principle.

This then explains why I have in exercise of my discretion disallowed any costs to the defendant.

Orders shall Issue as earlier given in favour of the Defendant.

DATED and delivered at Nairobi this 1st day of March, 2007.

J.G. NYAMU

JUDGE