



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 2116 of 2000**

**DAVIES MWANGI KINYUA**

**T/A KIAMUNYI TYRE DEALERS & AUTO ACCESSORIES.....PLAINTIFF**

**VERSUS**

**FIRESTONE EAST AFRICA (1960) LIMITED .....DEFENDANT**

**JUDGEMENT**

The Plaintiff brought this present action against the defendant on the basis of a contract where the Plaintiff alleged he was appointed a dealer/distributor of the products manufactured by the Defendant. The Plaintiff pleaded in the Plaint that he would purchase those products either by cash or obtaining on credit. After being appointed as a dealer/distributor the plaintiff painted his business premises with the defendant's colours. Following the appointment of the Plaintiff as aforesaid in 1995, the Plaintiff stated in his Plaint that he devoted all the time in promoting the Defendant's products. That it was through that business the Plaintiff was able to sustain his livelihood from the profit thereof. The Plaintiff stated in the Plaint that he purchased motor vehicles and other equipment for the purpose of that business. He pleaded that it was an implied or express term of the dealership/distributorship contract with the Defendant that the Defendant would deliver all the goods ordered by the Plaintiff whether on credit or by cash. That the Defendant would supply the goods so ordered so long as the Plaintiff did not have overdue or unpaid amounts owing to the Defendant. The purchases made by the Plaintiff were secured by a bank guarantee for Kshs.1 million. The Plaintiff further stated that on divers dates in November 2000 ordered in the normal manner the supply of goods worth Kshs.933,796.20. That the Defendant without giving any reason for so doing failed to deliver the goods to the Plaintiff. That accordingly the Defendant is in breach of the aforesaid implied or express term of the contract. That as a consequence of Defendant's refusal to supply the goods as aforesaid the Plaintiff was unable to meet the demands of his customers and accordingly suffered loss in profit. The defendant by a letter dated 21<sup>st</sup> November, 2000 wrote to the Plaintiff's banker for payment of Kshs.700,939.01 on the strength of the guarantee. That the Plaintiff wrote to the bank on learning of the aforesaid demand and informed his banker that the amount being claimed by the Defendant was disputed. The Plaintiff in the Plaint averred that despite so informing the bankers the amount was paid to the Defendant. The Plaintiff denied being indebted to the Defendant for the amount claimed from his bankers. That upon receiving the aforesaid amount from the Plaintiffs banker the defendant without notice and without giving reason to the Plaintiff continued with its refusal to deal with the Plaintiff as per the distributorship contract. The Plaintiff contended in the Plaint that he was entitled to one year notice of termination that considering his business performance in the previous years the equipment and the motor vehicles and business premises which he had put in order to carry out the said business with the defendant. The Plaintiff finally prayed in his Plaint for a declaration that the Defendant had breached the contract and further that the court would order a refund to the Plaintiff of Kshs.700,939.01 with interest at 24% per annum from 7<sup>th</sup> December, 2000 until payment in full. The Plaintiff further claimed special damages for lost profit at Kshs.14,710,683/= with interest at court rate. The Plaintiff finally prayed for general damages for breached contract. The Plaintiff claim as pleaded was denied by the Defendant and specifically the Defendant denied that the Plaintiff was entitled to one year notice of termination and further denied that the Plaintiff suffered loss of profit as claimed. When

this case came up for hearing the Plaintiff gave evidence. He started by saying that he is in *Jua kali* business. That from 1995 he was selling the defendant's products as a distributor at Kiamunyi Tyre Dealers & Auto Accessories. He said that this company was registered in 1992 at Elburgon Nakuru District. The distributorship through the Defendant at that time was in Elburgon area. The Plaintiff referred to a letter dated 8<sup>th</sup> March, 1996 which he stated appointed him as a distributor for six months. That after the six months period the defendant continued to give him distributorship. Further he stated that after the six months period he qualified as Firestone appointed dealer. He referred to a letter dated 29<sup>th</sup> February, 1996 which letter confirmed him as a fully fledged Firestone dealer. The Plaintiff exhibited a letter dated 5<sup>th</sup> March, 1996 which he said was the contract between himself and the Defendant. In carrying out the distributorship the Plaintiff said that he used two formats. The first was to place an order by telephone where he would indicate the size of the tyres and the tubes that are required. That the Defendant would respond by saying whether the items would be collected or whether they would be delivered to the Plaintiff. The Plaintiff said that he often required the Defendant to deliver the items. The second format was where the Defendant sale representative would visit the Plaintiff's premises once a week and collect the order of the items required by the Plaintiff. He said that the transactions were being paid for by the Plaintiff through banker's cheque once the goods arrived and were verified. The Plaintiff company experienced such growth that it approached the National Bank of Kenya limited for a loan and this was to facilitate the guarantee which the defendant required. PW1 stated that business was going on very well and the Plaintiff even began to tender for Government Ministries contracts. As a result of the growth experienced the Plaintiff Company moved to Nairobi to allow their business to grow widely. He said that the Plaintiff opened a shop at Jogoo road Jechim Centre. That the business at that shop was trading under the Plaintiff's company's name. The defendant at this time required the Plaintiff to supply a bank guarantee since the Plaintiff's business was growing rapidly. That the bank guarantee was at first for Kshs.800,000/= and was later increased to Kshs. 1 million. The Plaintiff referred to the letter of guarantee written by Standard Chartered Bank addressed to Defendant giving a guarantee of Kshs.800,000/=. The Plaintiff said that the purpose of the guarantee was to ensure that the Defendant would give the Plaintiff merchandise worth Kshs.800,000/=. The guarantee for Kshs.800,000/= was later extended for another year. By the year 2000 the plaintiff said that business had expanded greatly and that he had purchased two pick ups and a small station wagon vehicle. During that time the Plaintiff's sale margin was Kshs.10 million. At that time the Defendant had given the plaintiff a target of between 7 to 10 million. The target that the Defendant would set up for the plaintiff were for the period January to June and July to December. The target for January to June, year 2000 was Kshs.21,831,396/=. The Plaintiff was able to accomplish that target and the defendant gave another target for the period July to December, 2000 again for the same amount. The Plaintiff said they again able to make the target. As a consequence of meeting their target the plaintiff was entitled to bonus payment by the Defendant. Because of the good sales that the Plaintiff was undertaking he said that by a letter dated 6<sup>th</sup> July, 2000 the Defendant wrote a letter thanking the plaintiff for attaining the target. However, around October 2000 the Plaintiff said that on going to Defendant's place of business he placed an order for the supply of merchandise when he was informed that the Plaintiff had gone beyond their limit. He was therefore requested to pay cash if he was to receive the items he had placed an order on. He said that at that time they had a pressing order from their customer and accordingly he was ordered by the defendant to pay cash for two invoices. He said that he withdrew Kshs.632,825.20 and proceeded to pay the defendant on 9<sup>th</sup> October, 2000. The Plaintiff received receipts in respect of those payments which he produced to the court. The Plaintiff however, denied having exceeded his limit but said that he decided to pay cash so that he could obtain the merchandise. He reiterated that his credit limit was for Kshs.1 million. The payment that he was being asked to make was for Kshs.600,000/=. He however, made payment because he was informed that if he did not pay he would not be supplied with the goods he needed. He said that he issued a cheque in favour of the defendant for Kshs.387,774.20. That he gave the cheque on 9<sup>th</sup> October, 2000 which was cheque No.1100472. The Plaintiff produced in evidence the receipt of that cheque payment. That despite that payment goods were not supplied to him and when he called for explanation why they were not supplied he did not get that explanation. He confirmed that there was no misunderstanding between him and the Defendant and he concluded that the refusal to supply the goods he ordered was due to malice. That in making further inquiries the defendant's sales manager informed him that there was yet another invoice for Kshs.214,425.25. That on 25<sup>th</sup> November, 2000 he drew a cheque No.100486 for Kshs.214,425.25. For this payment the plaintiff received a receipt which is

exhibited in this court. In view of the fact that after those payments the defendant still did not supply the goods he had ordered for the Plaintiff wrote the letter dated 17<sup>th</sup> November, 2000 requesting for an explanation. Despite that letter the Plaintiff did not receive a reply or an explanation. As a consequence of defendant's failure to supply the goods the plaintiff said that he was unable to meet the customers' orders and so the Government and Parastatal orders. As a consequence of not meeting those orders the Plaintiff's company had to undergo restructuring and proceeded to suspend its staff. That the Defendant in all this time did not give a formal notice of termination of contract. He stated that there is no term of the contract that the Plaintiff had failed to fulfill. It was at this time that he received a call from his banker when he was informed that the bank was being demanded to pay money to the defendant under the guarantee. He told his banker that he was not indebted to the defendant and told them that he needed details of any debt that were being claimed. He followed this up with a call to the Defendant and requested to be told what debt he owed but that they refused to tell him. He said that it had been agreed with the defendant that if they needed to call up the guarantee they would first call the Plaintiff and inform him of the same. That the Defendant failed to make this communication. That it was at this time the Plaintiff filed the present case. He said that Plaintiff suffered loss because the business it was running was a long term investment. He said that further the plaintiff is demanding a refund of the money paid under the guarantee since he did not owe the Defendant any money. He confirmed that the bank eventually honoured the guarantee and released the amount to the defendant. The Plaintiffs referred to a meeting that had taken place in July, 2000 at Serena hotel involving the Defendant's distributors where he said that he approached the Managing director at that meeting and complained to him that the electronic tyre changing machines had not been offered to the distributors. He said that this inquiry made the Managing Director furious since these machines were being kept in the 2<sup>nd</sup> Defendant's store. The following Monday after that distributors meeting the Defendant's sales representative went to the Plaintiff's business premises and asked the Plaintiff why he had reported them to the Management. He however, confirmed that he was offered the said machine on condition that he would pay 10% of the costs plus postdated cheques totaling Kshs.448,400/=. He said that this transaction of electronic tyre changing machine was not in any way connected to his trade of distributorship. Going back to the issue of guarantee the Plaintiff said he can confirm that he had never been informed of any cheque which had been dishonoured. He said that he was upset with the treatment of the defendant since it had affected his long term investment and his operations. That the Plaintiff is entitled to damages which he had suffered as a consequence of the breach of contract and that it was entitled to compensation for the loss suffered. The Plaintiff said that he went to Jowan Associates who prepared accounts showing the projection of the loss the Plaintiff suffered. On being cross examined by the defendant's counsel, he said that he did not give instructions to his banker to pay Kshs.700,000/= to the defendant. He was not sure whether when this case was filed in court the money under the guarantee had been paid. He was referred to his exhibit No.2 which exhibit stated that his appointment as a distributor was as per the letter dated 8<sup>th</sup> March, 1996. On being asked where the said letter was the Plaintiff said that he did not have that letter. He however, said that distributorship was endless and was not renewable. He however, said that the Defendants were entitled to terminate the distributorship in the event that he failed to make payment. He said that he was not indebted to the Defendant and in any case the defendant had not supplied the Plaintiff with the statement. He confirmed that he received from the defendant a refund of Kshs.306,341.14 from the Defendant. He also confirmed that he sold the machines that he had purchased from the Defendant and confirmed that he did not stop the postdated cheques that were in respect of those machines. On being asked that in 1999 what profit the Plaintiffs made, he retorted that he could not remember. He confirmed that he was filing the Plaintiff's returns with Kenya Revenue Authority.

PW2 was John Mwaura who described himself as a professional accountant who qualified in 1997 as a Chartered Accountant. He said that since the time of qualification he has been practicing as auditing, taxation, financial & management consultants. He said that he practices as a sole proprietor by the name of Jowan Associates. That he assisted the Plaintiff to analyze his business from March, 1995 to 31<sup>st</sup> December, 2000. That the purpose of that analysis was to determine his performance as indicated in his contract with the defendant. He said in doing the analysis he referred to original copies of purchase invoices issued by the defendant. He compiled a data of all the plaintiff's purchases and ascertained what was the selling price for the purpose of determining the mark up for the product. Based on the mark up he was able to determine the Plaintiff's performance. Amongst the documents he received from the Plaintiff were cash sales receipts and supplies invoices. Although he said that he did not see all the

receipts of payment he was however, able to confirm payment to invoices stamped by the Defendant. Even if he did not see all the receipts he said that he relied on the invoices that had been stamped as paid by the Defendant. He also examined the purchase documents from the tyre changer and wheel balancing and confirmed that this and the Defendant's dealership were the sole business of the Plaintiff. He said that the purpose of the examination that he was doing was to determine whether the business was growing. He produced his report as an exhibit in court. On being cross examined he gave a background of his experience and confirmed that in respect of some invoices, he was unable to retrieve the sales receipts. He was also able to say that he saw the Plaintiff's banking details which showed what sales the Plaintiff was making. The Defendant did not tender evidence.

Parties filed their written submissions and the court has had the benefit of looking at the same. The Plaintiff's claim is on the basis of the contract of distributorship. In looking at the exhibits before court I find that the only documents that can be regarded as a contract signed both by the Plaintiff and the defendant is the letter dated 5<sup>th</sup> March, 1996. That letter provided that the Plaintiff was being appointed as a distributor of the Defendant for the sale of tyres, tubes, accessories and other products manufactured by the Defendant. What kind of contract was this? The letter dated 8<sup>th</sup> March, 1996 stated that the Plaintiff was appointed as the Defendant's distributor for sale of Defendant's merchandise. The definition of the word distributor is an agent who markets goods. The contract seems to have appointed the Plaintiff to market the Defendant's goods but there was no terms in the aforesaid contract which identified the quantities that the Defendant was to distribute nor was there any obligation towards the Defendant to supply those goods to the Plaintiff on demand. The contract in any case was stated to be on a cash basis. One of the other term of contract was that the Defendant was entitled to 15% discount of those items. The most important term of that agreement to my mind in regard to this case was that payment terms were strictly cash. The contract provided a condition as follows:-

**“In the event of non-compliance with the terms contained in this Agreement, Firestone E. A. (1969) Limited will be entitled to terminate this Agreement forthwith without any prior notice”,**

This contract which the Plaintiff relied upon did not tally with the evidence produced by the Plaintiff and the pleadings. The Plaintiff stated that it was agreed that the terms of receiving merchandise was both cash and on credit. However, it would seem that this contract provided the term of payment by cash only. The Plaintiff gave evidence that sometimes he would make payments by way of cheque. It is clear from this contract that failure to comply with terms of the agreement the defendant reserved itself the right to terminate the agreement without prior notice. The Plaintiff in order to succeed in this case needed to prove that it had complied with the terms of the agreement. By the Plaintiff own testimony he stated that when the defendant failed to honour his order he was made to make payment of invoices that were outstanding. It is pertinent to note that the receipts which the Plaintiff was issued with quoted certain invoice numbers. This would seem to suggest that there were outstanding invoices as at November 2000 that had not settled. If that be the case then the plaintiff was in breach of the contract. Having been in breach the defendant was entitled to invoke the terms of the agreement which gave it the right to terminate without prior notice. The Plaintiff's claim therefore, fails in terms of the prayer for a declaration that the Defendant was in breach of the contract between them.

The Plaintiff denied being indebted to the defendant which indebtedness would have obligated his banker to honour the guarantee. The Plaintiff claimed for a refund of amount allegedly paid to the Defendant by his bankers. The Plaintiff did not produce to this court any evidence of such payment by his banker to the Defendant. His claim that the guarantee did not cover the transaction of purchasing of the wheel balancing and wheel changing machine is not supported by the guarantee itself. Plaintiff exhibit No.4 it is clear that the guarantee was to cover goods that would be supplied to the Plaintiff by the Defendant on credit. The Plaintiff had stated in evidence in respect of the wheel balancing and the wheel changing machine he had issued to the Defendant postdated cheques for payment of the same. The question that the court would need to be answered is whether all those cheques were honoured. The Plaintiff did not prove by evidence that those cheques were honoured and therefore, did not prove to the court that he was not indebted to the Defendant in such terms as to obligate his banker to pay the Defendant in honour of the guarantee. Accordingly the Plaintiff failed to prove on a balance of probability that he is entitled to a refund of the amount of Kshs.700,939.01. The Plaintiff did in any case admit on being cross examined

that he was refunded by the Defendant the amount of Kshs.306,341.14 and it would therefore seem that he was not, if he had proved it, that he was entitled to the refund he seeks. The evidence of PW2, the accountant would only have assisted this court, had the court found that the defendant was in breach of the contract. That has not been the finding of this court and this court would also fault the evidence of that witness on the basis that he failed to produce to this court the documents he relied upon in his analysis of the plaintiff's account such as invoices, sales receipts and banking details. The court has seen the issues that were drafted by the Plaintiff but in view of the fact that the Defendant did not offer any evidence the court is of the view that those issues would not necessary apply to the evidence before court. The court finds that the issues that would have seem to be relevant to be as follows:-

(1) Was there a contract between the Plaintiff and the Defendant? The court responds to this issue is that there was indeed a contract between the parties dated 5<sup>th</sup> March, 1996.

(2) Did the Defendant breach the said contract? The court's response to that issue would be that the Plaintiff failed to prove on a balance of probability that he had performed all the terms of the contract particularly that as at November, 2000 he was not indebted to the Defendant and as a consequence of that finding the court cannot find that the Defendant failure to supply to the Plaintiff the merchandise ordered in November, 2000 by the Plaintiff is evidence of breach of the contract. The Plaintiff failed to show that there was no basis of the Defendant rescinding or terminating the contract. The court cannot therefore, find that the Defendant breached the contract and accordingly the Plaintiff's claim for special and general damages does fail.

(3) Is the Plaintiff entitled to a refund of Kshs.700,939.10? The Plaintiff failed to prove that he was not indebted to the Defendant to so obligate his banker to honour the guarantee. More importantly, however, the Plaintiff failed to prove on a balance of probability that his banker did indeed honour that guarantee. There was no evidence produced before court of such payment.

The Plaintiff has therefore, failed to prove on a balance of probability his case and accordingly this case does fail and is hereby dismissed with costs to the Defendant.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 6<sup>th</sup> day of November, 2006.

**MARY KASANGO**

**JUDGE**