



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI( NAIROBI LAW COURTS)**

**Civil Suit 1199 of 2001**

**LAXCON HARDWARE & SPARES LTD.....PLAINTIFF**

**VERSUS**

**PLANTATION FERTILIZERS LTD.....1ST DEFENDANT**

**MUGAMA FARMERS CO-OP UNION.....2ND DEFENDANT**

**J U D G M E N T**

When this case came up for hearing the court indicated that the 2nd defendant was absent though served through the firm of M/s Muraguri & Company Advocates. But on closer examination after the parties had closed the case I did note that the firm of Rachier & Amollo filed a notice of change to act for both 1st and 2nd defendant. That as it may be the case proceeded for hearing with the 2nd defendant not tendering any evidence and in its absence.

P W 1 Patel Chandresh, gave evidence on behalf of the plaintiff. He said that he works as the plaintiff's chief accountant. That the plaintiff was importing fertilizer, and according to plaintiff exhibit No. 1, the 1st defendant was to be the plaintiff's agent, on commission basis. That for one bag of fertilizer the arrangement was that the plaintiff and the 1st defendant would share on 50% basis profit and loss. That the capital for importation was financed by the plaintiff with a letter of credit from the Investment Mortgage Bank. That the plaintiff and 1st defendant got kshs 25/- profit from each bag.

That the transaction between the plaintiff and 1st defendant involved 7, 300 bags of fertilizers for the total price of kshs 8, 614, 000/-. That the plaintiff received kshs 3 million. That the balance owing is kshs 5, 614, 000/-, which is what the plaintiff claims by this suit plus interest at commercial rate, because the plaintiff had to finance the purchase through the letter of credit. That the plaintiff had to pay high interest rates to the bankers. That the relationship between the plaintiff and the 1st defendant was one of agency. That the 1st defendant was the agent of the plaintiff. That the plaintiff raised invoices and delivery notes against the 1st defendant, and that these were acknowledged by the 1st defendant. PW 1 also exhibited delivery note to the 2nd defendant. He said that the 1st defendant acknowledged his indebtedness to the plaintiff for the amount claim herein, by its letter dated 5th January 2000, plaintiffs exhibit NO. 4. That a demand was sent to the 2nd defendant by the plaintiff's advocates and accordingly, that the denial of the debt by 2nd defendant was wrong. PW 1 said that the 1st defendants was sued because it failed to give 'a clear picture' of the amount owed by 2nd defendant to the plaintiff.

In cross-examination P W 1 said that the ration of sharing profit and loss was on a 50% basis between the plaintiff and the 1st defendant. He accepted that what was between the plaintiff and the first defendant was a commercial venture, and that the 1st defendant's role was to facilitate sale as agent. P W 1 said that the delivery of fertilizer to the 2nd defendant was made by the plaintiff, after the 1st defendant had sourced the client. Then P W 1 stated, "Yes our claim is against 2nd defendant." and further said that the

1st defendant was a disclosed agent. On being examined P W 1 said that it was agreed that the 1st defendant was to get orders from clients then the plaintiff was to deliver. That the 1st defendant failed to give an account of the 2nd defendant. He accepted that out of the amount claimed was the 1st defendant's commission at the rate of kshs 25/- per bag.

D W 1, Stephen Kagiri Ngaruia, director of 1st defendant stated; that he did research on fertilizers with a company in Mauritius and came up with a formula. That the 1st defendant approached the plaintiff with a view to them, entering into a joint venture, for the plaintiff to use their formula and import that fertilizer. The imported fertilizer was to be kept in their godown and once the 1st defendant got a client, after marketing, the plaintiff would supply. He said that the agreement was that the plaintiff and the 1st defendant were to share the profit by 50%.

He said in regard to the present claim, the 2nd defendant paid kshs 3 million, which was forwarded to the plaintiff, but failed to pay the balance of kshs 5, 614, 000/-.

He denied that the 1st defendant gave an undertaking to recover the money owed to the plaintiff. He stated that the money owed by the 2nd defendant had not been paid to the 1st defendant.

On being cross-examined D W 1 said that the 1st defendant's role was to look for customers and once found, to introduce them to the plaintiff. That once supplied it was the obligation of the plaintiff to get the payment, and that the 1st defendant would assist in this regard. He explained that the reason why the plaintiff issued the 1st defendant with the invoices and delivery notes was to enable the 1st defendant follow up their commission payable to them. He said that the letter dated 5th January 2000, was written to keep a proper record of their commission. I have considered the evidence adduced by the witnesses. I have considered the exhibits produced before court.

Plaintiff's exhibit No. 1 provides in paragraph 3, that the plaintiff was to supply the fertilizer to the 1st defendant and thereafter the paragraph details the selling price.

In evidence PW 1 said that the fertilizer the subject of the present claim was supplied by the plaintiff, directly to the 2nd defendant. That being the case, as stated by P W 1, the plaintiff's claim against the first defendant both as agent, or in debt, fails.

D W 1 in evidence stated, and as confirmed by P W 1, the relationship of the plaintiff and the 1st defendant was the carrying out of a joint venture, where they shared profit and loss on a 50% basis.

The plaintiffs counsel in his submissions sought that judgment be entered against the 2nd defendant, on the basis that the evidence against it was uncontroverted. On examination of the evidence tendered before me I find as follow; that plaintiff's exhibit No. 3, that is delivery notes, allegedly the acknowledgments by 2nd defendant of supply of fertilizer, do not indicate the price of the supplied fertilizer. They are indeed only delivery notices, nothing more. Further some of those delivery notes were addressed to Muranga Store, and Maragwa Union Store. It was not explained what relationship these two entities have with the 2nd defendant. These delivery notes, amount to the only evidence that the plaintiff offered against the 2nd defendant. In view of the shortcoming of that evidence I find that the plaintiff has failed on a balance of probability to prove its claim against the 2nd defendant.

The parties had filed issues for determination by this court. On the first issue I find that the plaintiff and 1st defendant had a commercial joint venture for the importation and sale of fertilizer.

Issue No. 2; the contract dated 31st March stated the price per bag of the fertilizer; it provided that the fertilizer would be supplied by the plaintiff to the 1st defendant and on receipt of payment of that fertilizer, the 1st defendant was obligated to remit the payment to the plaintiff; that the plaintiff and 1st defendant were to share the profit and loss on 50% basis; and that the 1st defendants were obligated to instruct their bankers to transfer funds in their account into the plaintiff's account.

Issue No. 3; the plaintiff did not in respect of the transaction before court supply fertilizer to 1st

defendant; rather it was supplied directly to the 2nd defendant.

Issue NO. 4; is answered in the negative and I find that there was no relationship, disclosed in evidence, between the 1st defendant and the 2nd defendant.

Issue No. 5, the plaintiff financed the purchase of fertilizer by using letters of credit.

Issue No. 6, the plaintiff imported 7, 300 bags of fertilizer, which it supplied to the 2nd defendant and other entities but the price was not indicated in the delivery notes.

Issue No.7; the plaintiff has failed to prove its case on a balance of probability against both defendants.

Issue No. 8; the plaintiff as stated in previous issue has not proved its case against the first defendants.

Issue No. 9; the plaintiff did not give evidence on the rate of interest applicable to its claim. PW 1 stated vaguely that the plaintiff sought commercial rate of interest. Issue No. 10 and 11; can be considered together; I find that the 1st defendant was not in breach of contract, and the plaintiff accordingly is not entitled to the relief sought hereof.

The end result is that the judgment of this court is that, the plaintiff's case is dismissed with costs to the defendants.

**Dated and delivered this 23rd August 2005.**

**MARY KASANGO**

**JUDGE**