



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Suit 352 of 1992**

**GEORGE NGATIRI T/A NAIVASHA MILLERS 1987..... PLAINTIFF**

**VERSUS**

**NAPHATALI J. M. MUREITHI.....1ST DEFENDANT**

**KENYA INDUSTRIAL ESTATE LTD.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff alleged in his plaint that by a written agreement dated 23rd October, 1989, he purchased from the first defendant a milling business hitherto carried on by the first defendant under the firm name and style of **Naivasha Millers 1987** which comprised of the following:-

- (a) One complete Posho Mill
- (b) One complete Maize Huller
- (c) One Trolley
- (d) Two Electric Starters
- (e) Two Switches
- (f) One 100 Kgs Salter Scale

The plaintiff further stated that he paid to the first defendant a deposit of Kshs.130,000/- towards the agreed purchase price of Kshs.237,000/- and took over possession of the said business on or about 15th January, 1990. The plaintiff further averred that it was expressly agreed between him and the first defendant that the latter would settle all the debts and liabilities that were owing to the second defendant who had financed the first defendant to purchase the said mill, that the plaintiff was to bear only electricity and telephone bills and the balance of the purchase price for the weighing machine. The plaintiff stated that in 1990 he paid the balance of the purchase price in respect of the said business and settled the sums owing on account of electricity, telephone and the weighing machine.

However, the first defendant breached the said agreement in that he failed to discharge his liability to the second defendant as a result of which the second defendant went to the plaintiff's place of business at Naivasha and repossessed the mill and its components for non payment of the loan, the plaintiff alleged, adding that he suffered great loss and damages. He claimed special damages as hereunder:-

- (i) Value of the milling business and machine installations .....Kshs.237,000/-

(ii) Loss of earnings for 4½ months from 10/2/92 to 26/6/92 at Kshs. 10,000 per month  
.....Kshs.45,000/-

(iii) Cost of weighing machine.....Kshs.11,130/-

**Total.....Kshs.293,130/-**

The plaintiff therefore prayed for general damages against the first defendant for breach of agreement, return of the said posho mill and all its components or alternatively, payment of the sum of Kshs.248,130/- being the value of the posho mill and its components, Kshs.45,000/- being loss of earnings, mesne profits at the rate of Kshs.10,000/- per month from 26th June, 1992 to the date of determination of this suit, interest and costs. The first defendant denied that there was any written agreement between him and the plaintiff and stated that by an oral agreement made sometimes in January, 1990, it was agreed that the plaintiff would purchase the first defendant's business for the sum of Kshs.251,000/- which was to be paid to the first defendant on or before the 31st January, 1991 failing which the plaintiff would be obliged to pay interest at the rate of 13% per annum for the outstanding balance. The first defendant further stated that the plaintiff only paid the deposit of Kshs.130,000/- and a further Kshs.80,000/- and refused or neglected to pay the balance of Kshs.41,000/- plus the said interest. The first defendant denied that he had breached the said agreement and stated that the repossession of the mill was directly attributable to the failure by the plaintiff to pay the sums agreed between them.

The first defendant denied the plaintiff's claim for damages and by way of a counter claim claimed against the plaintiff the sum of Kshs.41,000/- being the balance of the purchase price for sale of the business plus interest at 13% per annum and a further Kshs.11,130/- being the value of the weighing machine which the plaintiff had unlawfully converted to his own use. The first defendant also claimed Kshs.200,000/- being the value of his tractor registration number KUW 665 which he alleged the plaintiff had converted to his own use and/or detained in Naivasha sometimes in 1990. He also claimed damages for loss of business and the unlawful entry into his business premises by the defendant in the year 1990 before a formal agreement was concluded. The plaintiff's advocate verbally indicated that the plaintiff did not wish to proceed with his case as against the second defendant.

During the hearing, the plaintiff referred to a hand written document dated 23/10/89 which contained some scanty information regarding the contract that he alleged they entered into. The same was in the first defendant's handwriting and had his signature at the foot. The said document, D. Exhibit 1, did not have the plaintiff's signature and from the way in which it was drafted, it cannot be said to have formed a written agreement between the parties. The plaintiff produced his bank statement for April, 1990 (P. Exhibit 4) to prove that he paid Kshs.80,000/= to the first defendant. He also produced receipts allegedly issued to him by African Retail Traders (kenya) Ltd. (P. Exhibit 2) as proof of having paid Kshs.11,130/- for the weighing machine but the receipts were in the name of the first defendant and so there was no proof that he had made such payment as he claimed. He blamed the first defendant for the repossession of the posho mill and its components by the second defendant.

The plaintiff further told the court that the business was generating a net profit of between Kshs.5,000/- to Kshs.12,000/- per month but there was no document produced in proof of the said allegation.

In cross examination by Mr. Kimatta for the first defendant, the plaintiff admitted that he had no documents which showed that he ever traded in the name and style of **NAIVASHA MILLERS 1987**. He conceded that the first defendant never signed any document of transfer of the said business to him. It was therefore not correct to state in the plaint that he was trading as **"Naivasha Millers 1987"**.

Before the plaintiff agreed to purchase the said business from the first defendant, he did not bother to find out the extent of the first defendant's indebtedness to the second defendant or whether the second defendant had consented to the sale and transfer of the said business. The plaintiff claimed that as at the time when he filed this suit, the value of the equipment that the second defendant had taken was Kshs.248,130/- and that from the time of repossession of the equipment to the time when he filed the claim, he would have earned Kshs.45,000/- out of the business operations. However, there was no

documentary proof of the plaintiff's oral claims as aforesaid. It is trite law that special damages must not only be specifically pleaded but must also be proved.

The plaintiff also alleged that even after the posho mill was removed, he continued to pay rent for the building which housed the posho mill but again, he could not prove that averment. On his part, the first defendant told the court that he was selling to the plaintiff the trading aspect of his business, Naivasha Millers 1987, which comprised of selling of maize flour and the by-products. He said that he had no capacity to sell the machines as they belonged to the second defendant. The machines were to remain under him until he was through with the second defendant, he said. The first defendant further stated that he was to engage himself in maize milling while the first defendant was to engage in selling the maize flour and its by-products which was being used as cow feed and this is what the plaintiff and the first defendant had agreed upon.

He denied that there was any written agreement between them and said that he only took some personal notes when he discussed the issue of the sale of the business with the plaintiff and he left those notes in his office at Naivasha and the plaintiff's agents broke into his office and gained access to his notes. The notes were to form the basis of an agreement between them but that was not to be as no formal agreement was ever drawn and executed. He said that the plaintiff paid him Kshs.210,000/- out of the agreed sum of Kshs.251,000/- and therefore he did not transfer to him the business name. He would have transferred the same if all the money as agreed had been paid, he stated. The first defendant denied that the plaintiff was entitled to any of his claims as against him. He said that the first plaintiff had taken his weighing machine and a tractor engine which was in the premises at Naivasha. However, that was not proved. I would have expected to see for example a demand letter done to the plaintiff by the defendant demanding return of the said items but there was none.

In cross examination, he said that Naivasha Millers was composed of equipment which belonged to Kenya Industrial Estates as well as a trading component which had a chain of customers and what he was selling was the trading unit. He stated that the weighing machine belonged to him personally and the plaintiff was not entitled to the same. From the summary of the pleadings and the evidence that was adduced by the parties, the main issues that I believe arise for this court's consideration and determination are as follows:-

1. Whether there was any valid contract between the plaintiff and the first defendant.
2. If there was such a contract, whether any of the parties breached the same and if so, whether any damages, general and/or special are payable by the party who was in breach thereof.
3. Whether the parties are entitled to any of the claims as contained in their respective claims.

The document dated 23/10/89 and marked P. Exhibit 1 cannot be described as a binding agreement between the plaintiff and the first defendant. The same was not signed by the plaintiff. It lacks the essential and basic ingredients of a valid contract, one of them being that it must be signed by all the parties to the contract. The terms of the contract must also be clear and must be understood by both parties or as is often stated, there must be a meeting of minds. From the manner in which P. Exhibit 1 was drafted, I agree with the first defendant that those were his personal notes which he took as they discussed the deal and perhaps they were to form the basis of a proper agreement between him and the plaintiff. According to the plaintiff, he was to purchase the whole of the first defendant's enterprise known as "Naivasha Millers 1987" as a going concern and which included the posho mill and all its components and the goodwill and everything else that went with it but according to the first defendant, he was to sell to the plaintiff the trading aspect of the said business only excluding the machines which he could not sell in any event as he had not fully paid for the same.

The plaintiff said he was buying the said business for the benefit of his lady friend who was to operate it and when the deposit of Kshs.130,000/- was being paid he was out of the country. That perhaps explains why a formal agreement was not drawn and executed. The plaintiff is a medical Doctor by profession and

the first defendant is an established businessman, both of them well educated and therefore it is not clear why they could not discuss the deal properly and enter into a binding contract. The plaintiff said that they were great friends with the first defendant and it also appears that the said deal was hurriedly discussed and consummated when there were many loose ends that needed to be tied together by way of executing a formal agreement. However, when two great friends and well educated people for that matter get into a business deal which later on goes sour thus forcing them to go to court, the matter must be resolved according to the law of the land. In **BAKSHISH SINGH BROTHERS VS PANAFRIC HOTELS LTD** [1986] KLR 538 it was held that in order for there to be a good contract, there must be a concluded bargain and a concluded contract which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. And where an agreement between two parties to enter into an agreement in which some crucial point of the contract matter is left undetermined or where there is a provision for the parties to agree on the critical point later and they never do so, there is no contract at all.

I must therefore hold that there was no binding contract between the plaintiff and the first defendant. It is unfortunate that money changed hands in the circumstances as aforesaid.

If the plaintiff believed that what he was purchasing included the posho mill and all its components and he very well knew that the second defendant had a lien over those machines for the reason that it had financed their purchase by the first defendant, the plaintiff should have ensured that there was express consent given by the second defendant over the transaction or alternatively, he should have paid off the outstanding loan to the second defendant before he gave any other money to the first defendant.

Having found that there was no valid and enforceable contract between the two parties herein, it follows therefore that the first defendant cannot be said to have breached a contract that was not there. And the same applies to the plaintiff in so far as his alleged breach of the contract by the first defendant is concerned.

The Court of Appeal also held in the above cited case of **BAKSHISH SINGH & BROTHERS VS PANAFRIC HOTELS LTD** (supra) that a party is entitled to resist an action for breach of contract on any ground that is available even though before the action he gave no reason at all. And I believe in this case both parties were entitled to resist their adversary's claim as raised in the plaint and counter-claim.

I find that both parties herein failed to establish their respective claims and therefore I dismiss the plaint and the counter claim. Each party will bear his own costs.

DATED, SIGNED AND DELIVERED at Nakuru this 20th day of September, 2005.

**D. MUSINGA**

**JUDGE**

**20/9/2005**

Judgment delivered in open court in the presence of Mr. Nyagweso for the plaintiff and in the absence of the defendant.

**D. MUSINGA**

**JUDGE**

**20/9/2005**