



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil suit 814 of 2002**

**TRADE AGRAIN LTD .....PLAINTIFF**

**VERSUS**

**LE MONDE FOODS (T) LTD .....1ST DEFENDANT**

**NGIGE MONDO .....2ND DEFENDANT**

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

There are two paragraphs in the plaint that capture the plaintiff’s claim.

Paragraphs 4 and 5 of the plaint state as follows: -

“(4) On diverse dates between the 30th day of May 2000 and 1st day of July, the defendant jointly and severally ordered for the Supply of machinery from the plaintiff which were delivered to the defendant who acknowledged receipt on the 10th day of November 2000.

(5) The plaintiff’s claim against the defendants jointly and severally is for payment of the balance of US \$ 569. 75, which is equivalent to kshs 1, 850, 225. 38 at the current exchange rate being the cost of the machinery, finance, stock, and services which were supplied to the defendants by the plaintiff.” (Underling mine). One needs to have those paragraphs in mind as we go through the examination of the evidence presented before court.

P W 1 MERVYN KENMURE MELVILLE a director of the plaintiff gave evidence in chief as follows; that the plaintiff company was a brokerage firm for agricultural produce. That the plaintiff entered into a joint venture with the 1st defendant; that by agreement dated 1st May 2000, the plaintiff was to buy rice produce and would market the same in Kenya and other countries; that the purpose of the business venture between the plaintiff and the 1st defendant was that they were both to manage a commodity business. The witness read paragraph 4 of the agreement, which provides: -

“THE BUSINESS

4.1 The parties shall procure that the business related to in this agreement shall be the acquisition, milling and selling of rice and such similar commodities.

4.2 The business shall be conducted in accordance with good and commercial business practices and subject thereto, in accordance with the business plan from time to time adapted by the companies.”

P w. 1 further said that the plaintiff, under that agreement, was to supply the capital for that business. That, that business was to be managed in Tanzania by the 2nd defendant, together with another gentleman

called, Justine Mayhuw.

Plaintiff stated that although the business started, it did not proceed smoothly. As consequence of this outcome, P W 1 said that, the plaintiff stopped funding the business. He attributed the ending of the funding to 'grey and dark areas on how the funds were being utilized.'

P W 1 produced a schedule, prepared after an audit was undertaken, which showed that the plaintiff funded the business to kshs 3, 750 US dollars.

The schedule showed money used by the 2nd defendant to buy spare parts, to pay office, house rent and hotel bills, and an amount of US dollars 11, 957. 00, paid by the plaintiff for the purchase of rice by the defendant for marketing. P W 1 said "We never saw the rice."

P W 1 said that the 2nd defendant acknowledged indebtedness of the 1st defendant to the plaintiff for the total of kshs 1, 850. 22. 38 which amount the plaintiff sought that judgment be entered as against both defendants.

On being cross-examined P W 1 stated that the plaintiff was to recoup the money injected in the business from the profit realized, but that did not occur because the funds were misappropriated. He said that the source of the funds injected to the business was loan obtained by the plaintiff.

P W 1 accepted that the plant to do the milling of the rice was to be supplied by the 1st defendant.

P W 1 denied that it was part of the agreement that the plaintiff's funds were to be utilized to pay for car hire, hotel bills and rent etc.

P w 1 stated that the 1st defendant only supplied 80 tons of rice, to the plaintiff, for marketing.

D W 1 was the 2nd defendant, namely Ngige Mondo. He described himself as a businessman dealing with commodities and international trade. He said the 1st defendant specialized in agricultural goods and materials. The 1st defendant at one time manufactured textiles for U S A markets and also at another time operated an air cargo airline to international destinations.

Before proceeding further I need to mention that the 2nd defendant, in his examination in chief, stated matters that were not put to the plaintiff in crossexamination.

The plaintiff, was accordingly, not accorded an opportunity to give evidence on those statements. The court cannot accept that evidence and at best, it is treated as an after thought. In any case that evidence does not accord with the defences on record for the defendants.

That evidence which will not be the subject of my consideration in his judgment is that, the plaintiffs interest in the business were undertaken by Timothy Justine Robert May who was a resident in Tanzania; that the transport cost seen in schedule, related to transport of spare parts; that the rent of house reflected in the schedule was for a house which the 2nd defendant shared with Melvile; that the hotel costs were incurred by Melvile when the 1st defendant's guest house was full; that the cheques were co-signed by plaintiff's representative, namely Justine; that it was the plaintiff's failure to collect the rice that led to failure of business; that 2nd defendant was informed that the plaintiff could not send further funds, because of disagreement between the plaintiff's directors.

As I begin to consider the final judgment of this court it is important to deal with an issue raised by defence counsel in submission that needs clarity. The defendant's counsel was wrong to say that the plaintiff "sneaked stock and services in paragraph 4 which were not in the original plaint." That statement is incorrect. I have examined the original plaint and those words are there.

The plaintiff's submission, that the 1st defendant did not file a defence is equally wrong. The 1st defendant filed on 25th September 2002 its defence.

Having considered the evidence adduced before court by the plaintiff I find that the plaintiff on a balance of probability has failed to prove its claim. Reverting to the paragraphs quoted hereof, the plaintiff stated that the claim against defendant was for supply of machinery. The plaintiff then pleaded its claim is for kshs 1, 850, 22. 38. The plaintiff fails to give facts in the plaint, which support the claim for finance, stock and services. The facts in the plaint only relate to supply of machinery. Having in mind that, that is the finding of this court the oral evidence does not support the plaint at all. The plaintiff's witness accepted in cross-examination that the plant, if it can be considered to be the machine, belonged to the 1st defendant.

The plaintiff's witness gave various sums as the amount injected into the business. At one time he said that plaintiff put in US\$3,750. At another point he mentioned US\$11, 957. He eventually stated that the plaintiff was claiming kshs 11, 850, 225. 38. Plaintiff's exhibit shows that the 2nd defendant acknowledged that the 1st defendant was indebted to the plaintiff for US\$23, 569. 75.

The court is therefore confronted by three figures above.

Despite the above shortcoming in the plaintiffs oral evidence and pleadings, the 2nd defendant did admit that as a director of the 1st defendant, owing the plaintiff US\$23, 569. 75. On the basis of that admission alone I will enter judgment for the plaintiff for that amount against the 1st defendant. There is no evidence capable of sustaining a judgment against the 2nd defendant.

The judgment of this court is: -

- (1) That judgment is entered in favour of the plaintiff as against the 1st defendant for kshs 1, 850, 225. 38 with interest at court rate from the date of the plaint till payment in full.
- (2) The plaintiff is awarded costs of the suit against the 1st defendant, which costs shall be at subordinate court rate.
- (3) The case against 2nd defendant is dismissed, and costs of the suit are awarded to the 2nd defendant as against the plaintiff. Those costs shall be at subordinate court rate.

**Dated and delivered this 16th day of November 2005.**

**MARY KASANGO**

**JUDGE**