



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

civ case 99 of 99

AUTONOME EXPORT GMBH PLAINTIFF

VERSUS

**PRIME AUTO PARTS & MACHINERY LIMITED) DEFENDANTS KURIA GIKONYO
)**

J U D G M E N T

In the Plaint dated 26th February 1998, and filed into the court on 27th February 1998, the Plaintiff Autonome Export GMBH sued the First Defendant Prime Auto Parts & Machinery Ltd and Second Defendant Kuria Gikonyo seeking judgment to be entered against the two Defendants jointly and/or severally for:

- (a) DM 50,733.07 Equivalent of K.shs. 1,677,976 at the exchange rate of 33.0746 as at 24.2.98.
- (b) Costs of the suit.
- (c) Interest on (a) and (b) above at the rate of 12.5% from the date of filing hereof till payment in full.
- (d) Any other and or further relief as this Honourable court may deem fit and just to grant in the circumstances of this case.

The Plaint states in brief that this claim is based on an agreement and/or understanding entered into between the Plaintiff and the Defendants (with the 2nd Defendants acting through the First Defendant or holding out to act as such) under which the Plaintiff supplied to the two Defendants spare parts upon the request of the Defendants. The Defendants in breach of the terms and conditions of the and/or understanding the Defendants failed to make the payments as agreed and fell into arrears in the sum of DM 50,733/07. There is also interest at 12% and 12.5 p.a. as agreed between the parties.

The Defendants filed one Statement of defence in which the First Defendant admits having been supplied with spare parts by the Plaintiff but says it has fully paid for the same spare parts. It claims that the Plaintiff has failed to acknowledge receipt of all payments made to it. Second Defendant however denies having entered into any agreement at all with the Plaintiff and denies having been supplied with the alleged spare parts. First Defendant and Second Defendant both deny allegations at paragraphs 5, 6, 7, 8 and 9 of the Plaint.

At the hearing each party called one witness and each party filed written submissions as well as oral submissions highlighting the same written submissions.

PW1 MRS ELSBETH FLOETHER is the proprietor of the Plaintiff Company which she said is called Floether Autonome Export GMBH.

Defendants are former clients of her company. The Defendants visited one of her factories during a trade fare in Germany. She wrote a letter to the Defendants in 1987 offering the services of her Company to them and a relationship then ensued. The said letter was produced as exh.1. The Defendants then made an order and the business between them started. Initially payment was to be made in advance. That was during the first year but later payment was made against documents. Later however, the payments slowed down and later there was debt in her favour. She acknowledged the payments by sending regularly statements of accounts to the Defendants. She produced copies of the same statements of accounts as Exh.2. She was being charged interest and so she asked the Defendant to pay back the same interest and that was agreed. There were exchanges on the same which she produced as Exh.3 (a) and 3(b). She kept Defendant informed of interest by sending Debit notes every six months to the Defendant and the same Debit notes indicated interest. She produced copies of Debit notes as Exh.4. (They were 15 pages). She made the last delivery to Defendant on 11.12.95 and Defendant made last payment to her on 21.11.95.

They are, according to this witness, all shown in the statements of accounts. Defendants wrote numerous letters promising to settle the outstanding account but never did so. She then approached German Embassy which also exchanged letters with the Defendants Exh. 5(a) and 5(b) but the defendants have not paid any money to date of giving the evidence. The amount outstanding as on the date of filing the suit was Germany DM 50,733.07. In cross examination she said she sued both First and 2nd Defendants because all documents were signed by the second Defendant. She said there was no written agreement as such and the relationship was based on inquiries, orders and supplies. She had no agreement with Kuria Gikonyo, the Second Defendant but according to her if one makes an order for goods and goods are shipped to the person there is an agreement and invoices are made to the person who ordered the goods. Shown two invoices i.e. Nos. 88.102 mfi D1(a) and 89.010 mfi D1(b) she admitted that those two invoices were issued to Messrs Auto Parts & Machinery Limited. She was also shown invoice No. 89.017 and 89.071 and she admitted that these were addressed to Messrs Auto Parts & Machinery Limited. However she also admitted that Invoices Nos. 89.106, 89.116, 89.137, 89.143, 89.153, 89.223, were in the name of Auto Parts & Machinery but letters were written in the names of Clutch Centre Limited, whereas invoices No. 90.015, 90.035, 90.057, 90.087 were all in the name of Clutch Centre Limited. Further invoice No.90.130 and No. 90.136 were in the names of Clutch Centre. Also invoices forming the entire mfi D1 (d) were in the name of Clutch Centre. The invoices marked as mfi D1(e), D1(f) were in the name of Prime Auto Parts of Machinery Ltd and invoice marked as mfi D1(g) made out to Prime Auto Parts & Machinery Ltd, whereas invoice dated 3.7.92 mfi D1(j) is addressed to Clutch Centre Ltd. After the invoices, she made a summary of the payment and made debit notes which were only for interest. Shown debit No. 439 of 31.12.89 she agreed it was made to Clutch Centre. Also Debit Note 511 dated 30.6.90 for D.M. 703.73 was addressed to Clutch Centre Limited. Debit Note No. 439 is for DM 642.57. She was also shown Debit Note No. 53 of 31.12.90 for DM 1,425.19. That was also addressed to Clutch Centre and signed by her company. Debit Note dated 30.6.91 of DM 1871/10 is also invoiced to Clutch Centre Ltd. She was shown several debit notes which she admitted were in the name of Clutch Centre and there are yet others also which were in the name of the First Defendant Company. They are all in the evidence i.e. her answers in cross examination. She admitted that the orders made by Prime Auto & Machinery Ltd were twelve in all and these were marked mfi D2 (a) (b) (c) (d) (e) (f) (g) (h) (j) (k) (l) (m). She confirmed that she had other orders in the name of Clutch Centre and that the Second Defendant Kuria Gikonyo did not make any orders. No invoice has been made out to Kuria Gikonyo. She was referred to page 2 of invoice No. 88.102 and accepted that the invoices there were made to Clutch Centre. She also confirmed that the amount being claimed from Clutch Centre Limited is including the claim for DM 50, 733.07 but stated that the amount in the statement in respect of the Clutch Centre has all been paid.

The amount in respect of Prime Auto Parts Machinery is what has not been paid and the claim is for what has not been paid. There is on page 6 of mfi D1(a) entry dated 5.11.93, invoice Number 93.131 which is Max Baussan. She said that by December 1992, there were no debits owed and after that no deliveries were made to Clutch Centre at all, and thereafter Clutch Centre Ltd had no monies due from them as no deliveries were made to them. She admitted she did not raise any payments to Gikonyo. There was only

one payment by Gikonyo but it was not relevant. All other payments were made by Bank transfers, Advice etc. She agreed there may be other amounts paid but she had to check the other documents to confirm the same. Payments were made by various people and not necessarily the people who had placed the orders.

In the re-examination, she said that in most cases she would get a phone call of the payment to be made prior to the payment being made. Clutch Centre paid in full. All that she wanted was payment from Prime Auto Parts.

Second Defendant Kuria Gikonyo is also a director of the First Defendant. He gave evidence covering both the first Defendant and himself. He stated that Prime Auto Parts & Machinery was incorporated in June 1980. He was one of the first subscribers together with Mrs Jane Kiano. Later Jane Kiano dropped out and Allan Mburu took her position as the other subscriber. He produced as Exh. D1 Articles of Association. Returns of the company from 1983 to 1993 were produced as exh. D2(a) and D3(b), respectively and produced audited Reports of the company as D3(a) and D3(b). Allan Mburu was the chief executive of the Company and he was so appointed vide letter of appointment – exh.D5. There were other members of staff, but the witness was in charge of Import licences procedures, import declaration, Procurement and sourcing of supplies overseas. He was not involved in the day to day running of the company. He was sent to Europe to attend Frankfurt Motor show in 1987 – 1988. He went there and met the Defendant Company and developed interest in procurement of what they were manufacturing. When he came back to Kenya, he made inquiries and the same inquiries were forwarded to Germany. Plaintiff then got in touch with first Defendant as a Company – through a letter exh.D6 (a) and a Proforma Exh.D6(b). After receipt of the letter the two companies then started transacting business. They did not personally know each other as they were exchanging correspondence at first by telex and later by fax. He produced as exh.D7(a) to D7(a)(b) letters exchanged between the parties and stated that all the letters written to the Plaintiff by the defendant were in company's letter heads and were signed by him as a Director of the Company. No letter was addressed to him in his personal capacity. The Plaintiff communicated to his company (First Defendant) for his attention just as he also communicated to her company for her attention. Goods ordered from Plaintiff were kept at the First Defendant's premises at Mfangano Street. He was not supplied goods in his personal capacity. He was also director of Clutch Centre Limited, and Hibiscus Beating Products Ltd, and Kuria Investment Limited. These companies also transacted business with the Plaintiff and the Plaintiff did not run an individual account for each of them so that the system maintained by Plaintiff company were all mixed up with one running account being maintained for all the companies. He ended his evidence in chief by saying he did not in his personal capacity owe the Plaintiff any money.

In cross examination he stated that he was giving evidence as the second Defendant but being a director of the first defendant, he was also giving evidence for the first Defendant. On his personal capacity he did not owe money to the Plaintiff but on his capacity as director of the first Defendant all he could say is that the statement sent by the Plaintiff/Supplier does not show any money owing. He however did not know if first defendant owes any money to the Plaintiff. He said he used Clutch Centre letter heads and admitted that the letter heads of the other companies may or may not have been used in the transaction as transaction between the parties was rare. Initially they were four directors but later there were changes. He maintained that there was no agreement between the Plaintiff/Defendants at all and the transaction that took place between Plaintiff and these Companies were an order, an account, supply, sent statements and receipt of funds. His role was to source goods. He agreed that he signed a letter exh. 5(a) & (b), dated 18.8.97 although he cannot recollect when the payment was made to Plaintiff and he cannot be certain that First Defendant owes any money to the Plaintiff. After August 1997 he did not place any orders from the Plaintiff. He stated further that Plaintiff used to send a statement as acknowledgement if payment was made by First Defendant. He said that the Plaintiff's accounts was mixed up because it did not indicate what money was owed if any and by whom it was owed. There may have been times when Kuria Investments did make orders for goods from the Plaintiff but some goods were supplied to Kuria Investments. He never sent an order to Plaintiff on his own as Kuria Gikonyo. Although First Defendant was (at the time he gave evidence) not trading it had not been wound up. He agreed that he had met the Plaintiff's proprietor face to face and that the same PW1 was not meeting any other Director except himself. Offices of the First defendant were at Mfangano street same as the offices of Clutch Centre,

while the offices of Kuria Investments Ltd were at Lenana road. He denied a suggestion that he wanted to confuse the Plaintiff by use of various letter heads.

In re-examination, he stated that he was the one signing letters concerning supplies in all the Companies. When Kuria Investments makes any Orders for any goods it is the same Kuria Investments Ltd which paid for the same goods. First Defendant and Clutch Centre shared the same offices and there was one accountant, but files were separate. These were the facts of this case as can be adduced from the evidence given by the two witnesses in the case. From the same evidence it is not in dispute that the Plaintiff company and the First Defendant were carrying out business transaction between them whereby the first Defendant was ordering spare parts from the Plaintiff and the Plaintiff was supplying the same to the first Defendant. It is also not in dispute that the First Defendant undertook to pay for the same goods supplied. Further it is not in dispute that the 2nd Defendant was a director of the First defendant company and his evidence that he was engaged in sourcing the same goods that were supplied by the Plaintiff to the First Defendant has not been challenged. It would appear also that there were other entities, namely Clutch Centre, Kuria Investment Ltd and Habiscus Ltd which were also making orders from the same Plaintiff. The 2nd Defendant admits that he was a director of each of these other entities.

I have noted during cross examination of the Plaintiffs witness several documents were referred to. These were mainly Debit notes, invoices and letters annexed to the same invoices. They were marked for identification as mfi D1(a) to mfi D1(j). However during the Defendants case these documents were not produced as Exhibits and although I have referred to them in this judgment when summarising the facts of the case as was developed in evidence before the court, I will not treat them as evidence. Lastly on the preliminary points, it is not in dispute that there was a contract created between the Plaintiff and the First defendant though there was no written agreement as such between the two. One can see clearly that there was an implied contract between the two as the Plaintiff was admittedly supplying goods to the First Defendant while First Defendant was accepting the same goods having ordered them from the Plaintiff and was paying for the same. The Plaintiff alleges at paragraph 4 of the Plaint that it was supplying to First and Second defendants either jointly or severally at different times spare parts upon Defendants request. The defendants in their Defence at paragraph 2 state that in “regard to paragraph 4 of the Plaint, the first defendant admits having been supplied with spare parts by the Plaintiff for which it has fully paid” These pleadings in themselves without anything more do in my mind establish that as between the Plaintiff and the First defendant there existed a contract and whether this was breached is a matter for further consideration in this judgment.

As the Defendants’ defence (though in one statement of defence and though only one witness gave evidence for their Defence) are different, I will consider the case against each defendant separately. I will begin by considering the case against the 2nd defendant. The Second Defendant, as I have said above is a Director of the first defendant. That is accepted and is not in dispute. It is also accepted that he was the person who did sign all the letters to the Plaintiff throughout the entire transaction and he also admits that fact. He however maintains that he did so in his capacity as director of the First defendant in all cases where First Defendant was concerned and never did so in his personal capacity whereas he is now sued in his personal capacity. The learned counsel for the Plaintiff says in his submission that as the 2nd defendant was mixing up the letter heads used for paying debts owed to the Plaintiff, the “2nd Defendant intended to act in person as well as for the Company in creating the said transaction and confusion”. I was referred to an extract in the case of Swan (1968) Lloyds Rep 5 (which was not availed to me as a whole) for the proposition that under the law of agency, it is the law that an agent is liable personally if in fact he intended to undertake personal liability. The 2nd plaintiff however maintains that throughout the transaction he acted as Director and no more. I was referred to the case of Solomon vs. Solomon for the proposal that at law the company is different from the subscribers and that the subscribers as members are not liable for the Companies liabilities. I think, to decide whether or not the second defendant should have been sued in the first place, I will consider the evidence of the Plaintiff’s only witness and the exhibits produced by both parties and the right exhibit to start with is Exh.1 produced and not disputed by Defendants. It is a letter dated 8th October 1987 and from the Plaintiff’s evidence, it was the very first communication between the parties. That letter, though marked attention Eng. K.M. Gikonyo, Director, is addressed to Messrs Prime Auto Parts & Machinery Ltd. It is signed by E. Floether the Plaintiff’s witness. It is marked attention Eng. K.M. Gikonyo Director. Further the Plaintiff did confirm through its witness

that no invoice was made out to the Second defendant and no payments were made out to the Second defendant. A letter dated 5th August 1997 from the German Embassy is addressed to Prime Auto parts and Machinery Limited attention Kuria Gikonyo. It is conveying to the First defendants the complaints received from the Plaintiff. That was in 1997. The reply to the same letter is addressed to the same Embassy by a letter which is letter headed Prime Auto Parts & Machinery though signed by K.M. Gikonyo. The Plaintiff's witness further confirmed that the Plaintiff never entered into any agreement with the Second Defendant.

It is clear to me that from the very commencement of the transaction between Plaintiff and First defendant Plaintiff knew very well that it was dealing with the First Defendant. It knew that Gikonyo, the Second Defendant was only a director and therefore did not at the very start of their relationship treat him as a party in the transaction. It is also clear to me that even at the very end of their business when the Plaintiff sought the help of their embassy, it was clear that it was still dealing with the First defendant. The Plaintiff's counsel says the second Defendant's behavior in using various letter heads meant he intended to act in person creating the said transaction and confusion. He also says the Second Defendant committed fraud in that he admitted deliberately using different letter heads in communicating with the Plaintiff and in paying for the goods. I do not agree first that the Second defendant in his evidence admitted deliberately using different letter heads. Court records show that what he (Second defendant) said was:

"I did admit that I used Kuria letter heads to write to Plaintiff. That is because these companies did order goods. There may be time when Kuria Investments raised an order but such orders were supplied to Kuria Investment". There were times when communications may have been sent on Kuria Investment letter heads but no payment was made for First defendant's debts using Kuria Investment letter heads".

Earlier in his evidence in cross examination he did state that the various letter heads may not have been used as the transaction between the companies were rare. I have no record that he admitted deliberately using different letter heads. Secondly, fraud was not pleaded nor was any attempt made to prove it. Even if the second Defendant used different letter heads in communicating with the Plaintiff, that alone could not amount to fraud as Plaintiff had her records and knew very well what each company did owe to Plaintiff. This is clearly demonstrated by the statement of account exh. 2 in which the Plaintiff has clearly itemised the Debit in respect of each company and the credit in respect of each company.

I do not see any good reason why I should lift the director's veil and hold the Second Defendant liable for the Debts of the First Defendant company. In my mind he acted all through as a director of the first Defendant Company. It is true that he did mix up the use of the letter heads in respect of these companies. This was perhaps because he was director of all of them and was also dealing with a Supplier to all of them but I cannot read any fraud or bad faith in this action such as to lead me into reading his intention to act in person at any time. The part of Swan case to which I was referred is clearly distinguishable from the matter before me in that there a company director who was in fact the owner of the Boat which the company had hired from him clearly fraudulently ordered repairs of the same boat using his position of a director. Here there is no allegation that the order made by each company were not identifiable and paid for separately. Indeed the Plaintiff's witness says towards the end of her cross examination as follows:

"I can show that statements to Clutch Centre were paid By December 1992, there was no debt owed and after that no deliveries were made to Clutch Centre at all so thereafter Clutch Centre had no monies due to them as no deliveries were made to Clutch Centre".

I do find that the Second defendant is not liable and should not have been sued as he was no more than a director of the First Defendant but had no debt personally owed to the Plaintiff. The suit as against him is dismissed with costs to him.

I now turn to the first defendant. As I have stated above there is no dispute that there was a contract between the Plaintiff and the First Defendant. The First defendant admits that goods were supplied to it by the Plaintiff but it says in the statement of Defence that it has paid for the same goods supplied. It has not shown by way of receipt that it has paid the same. The Plaintiff produced statement of accounts which

showed the amount due and how it is made up. The First defendant's reaction to the same is as follows:

"I do not know if First defendant owes any money to the Plaintiff".

and shown Defence statement paragraph 2 he said in evidence that he said he was not aware whether the First Defendant owes the Plaintiff any money. This is not a denial of indebtedness by the First Defendant. As if that was not enough, in the letter to the German Embassy dated 18th August 1997, the First defendant states at the penultimate paragraph as follows:

"Autonome has reminded us on numerous occasions to settle the outstanding debt. We have explained our situation and pleaded with them to give us more time whilst we look for another alternative of funding to facilitate the settlement".

This letter was produced as exh.5(b). It was in reply to exhibit 5(a) – a letter dated 5th August 1997 from the Germany embassy which was addressed to First defendant and which as on that date put the amount at DM 47744.77.

Since that date when First defendant admitted that debt and pleaded for time to look for another alternative funding to facilitate settlement, there is no evidence that it has been settled. The Plaintiff's witness said that the Plaintiff supplied goods lastly in 1995. In her evidence in chief she said:

"I made the last delivery to the Defendant on 11.12.95. Last payment was on 21.11.95".

Clearly the amount of DM 47744.77 in 1997 could have increased due to interest to the amount claimed in the Plaintiff. I do agree that there was confusion in the accounts and the documents produced by the Defence did show some confusion in the accounts but the Plaintiff's evidence that the amount now being claimed did not include the amounts incurred by other companies which had been paid fully has not been rebutted. Further the admission I have referred to in the letter dated 18.8.97 has not been explained and in my mind remain unequivocal. It would not be fair to state as the learned counsel for the Defendants states that the Plaintiff was unable to apportion the debt. Her answer above that the debt in question was only in respect of First Defendant as Clutch centre Limited had paid what it owed the Plaintiff was not rebutted. Interest has been proved but as to whether the rate was 12% or 12.5 is not made clear.

I do find that the first defendant has been proved within the standard of probability to be indebted to the Plaintiff. There shall be judgment for the Plaintiff against the first defendant in the sum of DM 50,733.07 (K.shs 1,677,976 as the exchange rate at 24.2.98). Interest payable on the same will be 12% (as paragraph 7 of the Plaintiff is confused). The First Defendant will pay costs of the suit to the Plaintiff and interest on the same costs at court rates. Judgment accordingly.

Dated and delivered at Nairobi this 18th day of January, 2002.

ONYANGO OTIENO

JUDGE