



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 685 OF 2010

HEIFER PROJECT INTERNATIONALPLAINTIFF

VERSUS

FOREST CITY EXPORT SERVICES LIMITED.....1ST DEFENDANT

ELATT LIMITED2ND DEFENDANT

JUDGMENT OF THE COURT

Introduction

1. The plaintiff filed this suit on 14th October, 2016 against the defendants jointly and severally on the basis of an agreement made on or about 13th February, 2009 under which the 1st defendant is alleged to have agreed and undertook to sell and deliver to the plaintiff eleven (11) generator sets for its **East Africa Dairy Development Project** at a total cost of Kshs. 19,535,344. The 1st defendant is also alleged to have agreed that it would deliver, install, commission and maintain all the eleven(11) generator sets to the Plaintiff's East Africa Dairy Development Projects as follows;

- i. Kibiyet;*
- ii. Lelan;*
- iii. Kieni Dairy Product Ltd (Mweiga);*
- iv. Metkei Multipurpose Ltd (Metkei);*
- v. Sot Cooler – Longisa;*
- vi. Kokiche Dairies Ltd (Cheptalal);*
- vii. Chepkorio Dairies (Chepkorio);*
- viii. Taragoon (Kipkabus);*
- ix. Cherobu Dairies (Cheborgei); and*

x. *Kaptumo*

2. It is alleged that the 1st defendant was bound by contract to deliver and install one generator to each of the Plaintiff's Dairy Projects with the exception of Cherobu Diaries, where the 1st defendant was to deliver and install two (2) generators. To do the above, it is alleged that the 1st Defendant exclusively and unilaterally appointed and authorized the 2nd Defendant to take delivery of the generator sets from the point of entry into Kenya, Mombasa and to deliver and install the generator sets on the 1st defendant's behalf. The 2nd defendant was to handle, on behalf of the 1st defendant, the eleven (11) generator sets from the time of their arrival at the Port in Mombasa, including the clearing procedures, handling, installation, commissioning and their maintenance throughout their effective life.

3. The Plaintiff avers that the 2nd defendant was the sole and exclusive agent of the 1st defendant and the 1st defendant is, therefore, vicariously liable for the actions of the 2nd Defendant.

4. The plaintiff states that on 11th May, 2009, the plaintiff in pursuance of the said agreement honoured its contractual obligations by paying to the 1st defendant Kshs. 19,535,344 being the total cost of the eleven (11) generator sets and the 1st defendant acknowledged receipt of the moneys. However, and contrary to the expressly agreed terms, the defendants jointly and severally installed only seven (7) generator sets to Kibiyet, Lelan, Kieni Dairy Products Ltd (*Mweiga*), Sot Cooler- Longisa, Kokiche Dairies Ltd (*Cheptalal*), Cherobu Dairies (*Cheborgei*) and Kaptumo. The defendants jointly and severally, in a flagrant breach of their contractual duty owed to the plaintiff, failed, refused and neglected to deliver and install as agreed the four (4) generator sets for Metkei Multipurpose Ltd (*Metkei*), Chepkorio Dairies (*Chepkorio*), Taragoon (*Kipkabus*) and Kaptumo Dairies Ltd. The plaintiff states that the 1st defendant is vicariously liable for the acts and defaults of the 2nd defendant. The particulars of the undelivered generator sets are as set below:

Project	KVA	Cost of the generator set (Kshs.)
Cherobu	60	1,548,111
Kaptum Dairy	60	1,548,111
Metkei Dairy	100	2,038,924
Taragoon Dairy	100	2,038,924
Total Cost		7,174,070

5. Arising from the foregoing the plaintiff claims to have suffered loss and damage and claims against the defendants jointly and severally as follows:

a. *Kshs. 7,174, 070 being the cost of the four (4) generator sets.*

b. *General damages for breach of Contract.*

c. *Costs of this suit and interests on (a) and (b) at Court rates from the time of breach until payment in full.*

6. The 1st Defendant denied the plaintiff's suit vides a defence filed herein on 26th July, 2011. While admitting that it entered into a contract with the plaintiff to manufacture and supply to the plaintiff eleven (11) generator sets at a cost of Kshs. 19,535,344, the 1st defendant denies that it carries on business of

installing, commissioning and maintaining generator sets as alleged by the Plaintiff and avers its business is to manufacture and sell generators. The 1st Defendant also provides after sale service as separate contracts with individual purchasers but limited only to the supply of any spare parts that may be required for purposes of regular servicing or for repair where necessary, and to co-ordinate any action that may be required under warranty in conjunction with the 1st Defendant's major component suppliers. The 1st defendant's case is that it supplies any technical literature or data that may be required after purchase of its generator sets. The 1st defendant denies that the 2nd defendant was the duly appointed and authorized agent of the 1st defendant for the purposes of selling, distributing, installing, commissioning and maintaining its generator sets in Kenya as alleged or at all and put the plaintiff to strict proof thereof. To the contrary, the 1st defendant avers that the 2nd defendant was at all material times appointed by the plaintiff.

7. The 1st defendant avers that the contract entered into with the plaintiff was limited to manufacture and delivery to the plaintiff by shipment up to Mombasa Port on Cost and Freight (C&F Mombasa) basis and that the invoices issued by the 1st defendant and the payment made by the plaintiff was strictly on C&F Mombasa basis. The 1st Defendant also denies ever entering into a contract with the plaintiff to install, commission and maintain the eleven (11) generator sets. The 1st defendant maintains that its obligations under the contract with the plaintiff ended upon delivery of the generator sets by shipment to Mombasa Port and as a consequence denies liability under contract for delivery and installation of generator sets to individual Dairy Projects as set out in paragraphs 6 and 7 of the Plaintiff or at all. The 1st defendant maintains that although it has authorized the 2nd defendant to install, commission and maintain generator sets manufactured by the 1st defendant, it did not in this case contract it to install, commission and maintain the eleven (11) generator sets purchased by the plaintiff as set out in the Plaintiff. The contract entered into between the plaintiff and the 2nd defendant was separate and distinct and the 1st defendant is wrongly enjoined in the dispute relating to installing, commissioning and maintenance of the generator sets after delivery of the manufactured generators. The 1st defendant avers that the plaintiff upon purchase of the said generator sets specifically instructed the 1st defendant to forward the shipment documents to the 2nd defendant. The 1st defendant avers that upon arrival of the generator sets at Mombasa Port, the plaintiff by a formal letter dated 1st July, 2009 duly instructed the 2nd defendant to release relevant clearing documents for the said generator sets to the plaintiff's appointed clearing agents, **M/S Orient Benko Freighters Limited** to clear the generators from the Port. The 1st defendant denies the plaintiff's claims and states that any claims if at all, should be directed to the 2nd defendant.

8. To this end the 1st defendant filed a Notice of Claim against a Co-Defendant (*the 2nd defendant herein*) on 17th August, 2011 claiming;

- a. That it is entitled to indemnity from the 2nd defendant against the claim filed against it.*
- b. That the 1st defendant is not liable to the plaintiff in the circumstances of this case as pleaded in the 1st defendant's Defence and any liability to the plaintiff, it at all, lies, as against the 2nd defendant wholly.*
- c. That the issue of the 1st defendant's liability vis-a-vis the 2nd defendant's liability should properly be determined on the earliest.*

9. The 2nd defendant also controverted the plaintiff's claim vide its defence filed herein on 7th December, 2010 in which the 2nd defendant denied the existence of an agency relationship between it and the 1st defendant. It further pleaded that the plaintiff appointed, by a letter dated 1st July, 2009, a third party (*Orient Benko Freighters Ltd*) to clear the generator sets and that subsequently the third party only delivered seven (7) of the generator sets and alleged that the rest were stolen while in the third party's warehouse.

10. While the 2nd defendant in its defence indicated that it would apply to have the third party enjoined in the proceedings and subsequently sought adjournment on account of the intended application for joinder of a third party this joinder never materialized.

11. Parties complied with pre-trial directions and hearing was conducted between 28th January, 2015 and 20th May, 2016. With the leave of court, parties filed submissions.

The Hearing

12. The 1st plaintiff called one witness, **Mr. Moses Nyabila (PW1)**, who was the Regional Director of the plaintiff's East African Dairy Development Project at the time when the generator sets the subject matters of this suit were procured. The witness adopted his witness statement filed in court on 27th March, 2012. In brief examination in chief, the witness testified that when they were sourcing for a supplier of the generator sets they required that the supplier has an agent in Kenya who would handle the generator sets on behalf of the supplier to ensure that they were properly handled, installed, commissioned and the necessary certification done for purposes of claiming the applicable warranties. This is what led to the communication exchanged on **6th May, 2009 via e-mail whose subject was "Elatt as an Agent of Forest City"**. (At page 5 of the plaintiff's bundle of documents). In this e-mail, Mr. Lamb, the 1st defendant's Managing Director, confirmed that the 2nd defendant was its agent in the East Africa region and its preferred company to handle the generator sets from the time of arrival at the Port of Mombasa including clearing procedures and delivery, installation and commissioning of the generator sets. Once this confirmation was received, the plaintiff proceeded to make the necessary payment on or about the 11th of May, 2009 (e-mail correspondences at page 6 of the plaintiff's Bundle of documents) and the generator sets were shipped into the country. PW1 testified that the 1st defendant, on its own motion, sent via courier the shipping documents (bills of lading) directly to the 2nd defendant and only informed the plaintiff of this fact on 19th June, 2009 (as per the e-mail at page 7 and 8 of the Plaintiff's bundle of documents).

13. Once the generator sets arrived at the port of Mombasa, the 2nd defendant's director, **Mr. Kipkore**, who had already received the bills of lading from the 1st defendant went to the plaintiff's offices and requested for a letter authorizing a sister company, Orient Benko Freighters Ltd, to clear the generator sets. This letter was issued on 1st July, 2009. The circumstances surrounding the issuance of this letter were explained by a **Mr. Julius Ayenga** through an e-mail at page 9 of the plaintiff's bundle of documents addressed to **Mr. Nyabila** and copied to other employees of the plaintiff. The e-mail correspondence was exchanged in the ordinary course of business long before this dispute arose.

14. Orient Benko cleared the generator sets, transported them to Nairobi and handed them over to the 2nd defendant as per the letter of 31st July, 2009 at page 3 of the plaintiff's supplementary bundle of documents.

15. PW1 testified that on diverse dates the plaintiff requested the 2nd defendant to transfer the generator sets to its offices in Kilimani Estate but the 2nd defendant assured the plaintiff that they would be stored, transported and installed on demand as part of the agency arrangement between the 1st defendant and the 2nd defendant. There was, however, a disagreement as to the cost of installing the generator sets with the 2nd defendant quoting Shs. 1.4 million forcing the farmers (on behalf of whom the plaintiff had procured the generator sets) to opt for competitive service providers who had issued quotes for Shs. 400,000. **With this development, the plaintiff informed the 2nd defendant that its role would be limited to delivery and certification of the installed generator for purposes of warranties as agents of the 1st defendant. It is important to note that the plaintiff did not pay a cent for the delivery and certification of the seven (7) generator sets.**

16. PW1 testified that on 15th December, 2009, upon request by the Plaintiff to the 2nd defendant, **Mr.**

Kipkore confirmed that the 2nd defendant had “*as the official representatives of our Principal Manufacturers, MS Forest City Export Services Ltd (the 1st defendant) received the eleven (11) generator sets*”. Of these, three (3) had been delivered to various sites and plans were at an advanced stage to deliver, install, test and commission the remaining generator sets to the other plants. Further he confirmed that since the generator sets were still under warranty, the 2nd defendant would deliver, install, test and commission as scheduled and hand them over to the plaintiff with the necessary documentation. Four other generators were delivered to various sites bringing the total delivered to seven (7). The last four (4) generators were, however, not delivered. (*This e-mail is at page 11 of the Plaintiff’s bundle of documents*).

17. PW1 testified that **Mr. Kipkore** subsequently became elusive and continually lied about the deployment and installation of the four (4) generators thus prompting the plaintiff to lodge a complaint with the 1st defendant on 22nd January, 2010, as the 2nd defendant’s principal. The 1st defendant subsequently wrote an e-mail to Mr. Kipkore requesting for full details of the situation that had led to the complaint and an indication as to when the situation would be rectified. These correspondences are at pages 13-17 of the Plaintiff’s bundle of documents.

18. PW1 testified that after a lot of assurances from the 2nd defendant to the 1st defendant that the matter was under control and no tangible result in terms of the deliveries being evident, the plaintiff wrote to the 1st defendant seeking to cancel the order on the basis of the non-delivery. It is at this point in time, for the very first time, that the 1st defendant informed the plaintiff that the 2nd defendant was not its exclusive agents in the East Africa region. The 1st defendant subsequently purported to avoid liability over the loss of the four (4) generator sets, a loss occasioned by its agents leading to this suit.

19. The 1st defendant’s case is that it was only contracted to supply eleven (11) generators on Costs & Freight terms Mombasa. The generators sets were delivered to Mombasa and duly acknowledged and that the 1st defendant fully performed its obligations under the agreement. The 1st defendant called one witness, **Mr. Andrew Lamb (DW1)** who testified via Skype from Stockport, in the United Kingdom. The witness adopted his statement filed in court and was cross-examined by the plaintiff and the 2nd defendant. DW1 denied that the 1st defendant appointed the 2nd defendant as an agent in this transaction.

20. While the witness maintained that the 2nd Defendant was not the 1st defendant’s appointed agents for purposes of receiving and handling the generator sets from the time of arrival at the port of Mombasa until their commissioning and certification, the witness nonetheless conceded that the 1st defendant paid the 2nd defendant a commission of GBP 17,780 for the first lot of five (5) generators as per the account sheet at page 4 of the 1st defendant’s bundle of documents and a further GBP 21,838 for the second batch of six (6) generator sets as per the account sheet at page 6 of the bundle of documents. These payments amounting to about Shs. 5 million at the exchange rate applicable then was meant to cover the local expenses of the 2nd defendant relating to the delivery of the generator sets.

21. The witness confirmed that it relied on agents to deliver, install and commission generator sets, and had indeed relied on the 2nd defendant to do so in Kenya.

22. The 2nd defendant called one witness. **Mr. Kipkore (DW2)**, one of its directors. The crux of his testimony was that the plaintiff, by the letter of 1st July, 2009 appointed a third party (*M/S Orient Benko Freighters Ltd*) to clear the generator sets from the port and transport them to Nairobi after which the plaintiff’s representative inspected them at the third party’s premises. He testified that the third party only delivered seven (7) of the generator sets and alleged that the rest were stolen from its warehouse. DW2 testified that if the plaintiff had any claim it was against the said Orient Benko.

23. DW2 confronted with his e-mail at page 11 of the plaintiff’s bundle of documents (*in which he confirmed having received the 11 generator sets*) could not explain the contradiction in his testimony. He

also denied having received the commission from the 1st defendant and that the plaintiff had not paid for the delivery and certification of the seven (7) generator sets. He would, however, not explain why he had not filed a counter-claim for the alleged unpaid dues or pursued the plaintiff for payment of the same unless it was an afterthought.

Issues for Determination

24. The plaintiff listed 25 issues for determination in its statement of issues filed on 21st May, 2012. However in its submissions the same were reduced to seven as follows;

(i) *Whether the 1st defendant agreed to manufacture, deliver, install and commission the eleven (11) generator sets to the plaintiff's EADD Project at various sites.*

(ii) *Whether the 1st defendant appointed the 2nd defendant as its agent for purposes of taking delivery at the Port of Mombasa and to deliver and install at the various sites appointed by the plaintiff, and if so, whether the 1st defendant was vicariously liable for the actions of the 2nd defendant.*

(iii) *Whether the plaintiff's claim should lie against **Orient Benko Freighters Ltd** in view of the letter of 1st July, 2009.*

(iv) *Whether the defendants are jointly and severally liable.*

(v) *Whether the plaintiff is entitled to damages for breach of contract and loss of business opportunity.*

(vi) *Whether the 1st defendant is entitled to indemnity from the 2nd defendant.*

(vii) *Costs.*

Submissions and the law

25. The plaintiff submitted that there is no single contractual document from which one can infer the terms of sale of the generators the subject matter of this suit. The terms of engagement can, however, be inferred from the e-mail correspondences and documents exchanged between the parties prior to the sale of the generator sets and in the events that followed culminating in the filing of this suit. The plaintiff cited the Bill of Lading and submitted that the Bill of Lading, has been held to be contract of bailment.

Strond's Judicial dictionary, 4th Edition has a quotation from the case of **Mason v. Lickbarrow 1 BI.H. 359 in which Loughborough CJ** said.

“A bill of lading is the written evidence of a contract for the carriage and delivery of goods, sent by sea for certain freight. The contract, in legal language, is a contract of Bailment... in the usual form of the contract the undertaking is to deliver to the order or assigns, of the shipper ... the endorsement of the bill of lading is simply a direction of the delivery of goods.”

26. The plaintiff submitted that the 1st defendant having been contracted to deliver the generator sets to Kenya, the applicable law is therefore, Kenyan law, in this case the **Sale of Goods Act (Cap 31). Section 22** of the **Act** provides that risk *prima facie* passes with property. The property in the generator sets, therefore, only passed to the plaintiff upon delivery at the various sites as identified by the plaintiff. Before then, the risk was with the 1st defendant and at a subsequent date the 2nd defendant who was handing the generator sets on the 1st defendant's behalf. The plaintiff submitted that it ordered eleven (11) generator sets from the 1st Defendant and fully paid for the same. The 1st defendant also undertook, through its agent, 2nd defendant, to deliver, install and commission the generators. It is for this reason that the 1st defendant paid the 2nd defendant a commission of GBP 39,618 which was to cater for local

expenses incurred in the handling of the generator sets. It was submitted that if the agency relationship was not there as alleged, then why would the 1st defendant make such hefty payment to the 2nd defendant?

27. The 1st defendant, therefore, had an obligation to ensure that all the generator sets were safely delivered to the plaintiff's appointed sites.

28. The Defendants breached their obligation to deliver generator sets to the plaintiff as ordered. Even after a letter of demand and notice of intention to sue was issued, they failed to honour the demand thus necessitating the filing of this suit. The plaintiff urged the court to allow the suit as prayed and award costs and interest to the plaintiff.

29. On their part the 1st defendant in their submissions raised only two issues for determination;

i) Whether the 1st defendant is a necessary party in these proceedings, and,

ii) Whether there is an agency relationship between the 1st defendant and the 2nd defendant

30. The 1st defendant submitted that it did not at any one time appoint the 2nd defendant as its agent with regard to the generator sets purchased by the Plaintiff in this case. It was submitted that no material has been exhibited by the Plaintiff to show an agency relationship between the 1st and 2nd defendant with regard to the clearing and delivery of the generator sets. It was submitted that the 2nd defendant was at all material times appointed by the Plaintiff after the generators were received at Mombasa port, and that the plaintiff entered into a separate and distinct contract with the 2nd defendant once the goods had been shipped to Mombasa. The payment of necessary commission fees was agreed upon between the plaintiff and the 2nd defendant and the 1st defendant was not privy to the contract between the plaintiff and the 2nd defendant. The 1st defendant submitted that the contract entered into between the plaintiff and the 2nd defendant was separate and distinct from the importation contract which did not have a clearing and forwarding component. In the premises, the 1st defendant is wrongly enjoined in the dispute relating to clearing, transportation and delivery of the generators from Mombasa Port.

31. It was further submitted for the 1st defendant that a consideration of the two Bills of Lading used in the shipment shows that in one Bill of Lading, 5 packages of generator sets are indicated and in the other Bill, 6 packages are indicated. Since the Plaintiff admits having received seven (7) generator sets, it follows that both consignments were received and cleared from the port. As delivery of seven (7) generators is admitted, it follows that even the remaining four (4) were received and cleared jointly with the rest.

32. The 1st defendant relied on the admission by the 2nd defendant that eleven (11) generator sets were delivered and received.

33. There is exhibited in the Supporting Affidavit, admission by the 2nd defendant that the eleven (11) generators were delivered and received by the Plaintiff's appointed clearing agent **M/S Orient Benko Freighters Limited** and that the 2nd defendant witnessed the inspection of the imported generators at the plaintiff's Upper Hill office (*See para. 2 of the Witness Statement by the 2nd defendant's Wesley Kipkor*). This confirms that the generators were duly received in Nairobi. The 2nd defendant further in paragraph 10 of its defence clearly indicates that upon receipt of the eleven (11) generators, seven (7) were installed and that the remaining four (4) generators were stolen. It was submitted that this was after the 1st defendant had already fulfilled its part of the contract to manufacture and ship the generators to Mombasa. It was submitted that it is therefore not necessary to retain the 1st defendant as a party in this case.

34. On their part the 2nd defendant identified the following issues for determination;

- a. Was there contract between the plaintiff and the 1st defendant and 2nd defendant and what was the nature of the contract.
- b. Which party was to do clearing upon the generators arriving at the Port of Mombasa.
- c. Were the generators inspected and confirmed upon clearing/arrival.
- d. Were there any delivery notes confirming receipts upon delivery.

35. The 2nd defendant submitted that the plaintiff in his evidence confirmed that the 2nd defendant was the preferred Agent not only to deliver, install, test and commission the eleven (11) generators as ordered by the Plaintiff, but also they could do clearing and deliver the generators from the port of Mombasa as a result the clearing documents were sent to the 2nd defendant by the 1st defendant. Upon the receipt of the clearing documents by the 2nd defendant the plaintiff by their letter dated 1st July, 2009 requested the said documents to be handed over to their agents M/S Orient Benko Freighters Limited whom the plaintiff selectively chose not to call as a witness. The 2nd defendant confirmed receipt of seven (7) generators which they duly proceeded to deliver install, test and commission in their respective Dairies as advised by the plaintiff. The remainder four (4) generators were not in custody of the 2nd defendant. The 2nd defendant submitted that they were not liable as claimed by the Plaintiff, and the 2nd defendant discharged its obligations to the plaintiff when the plaintiff and/or its agent handed over a total of seven (7) generators for installation, testing and commissioning in their respective dairies.

36. It was submitted for the 2nd defendant that the 2nd defendant's contract with the plaintiff was precisely limited to installing, testing and commissioning generators which the 2nd defendant discharged upon receipt of the seven (7) generators. The 2nd defendant was not privy to the contract between the plaintiff and M/S Orient Benko Limited to do clearing and delivery of eleven (11) generators on their behalf. It was submitted that the plaintiff failed to establish on a balance of probability that the 2nd defendant is liable to warrant the prayers sought, and that the plaintiff's suit should be dismissed with costs.

Determination

37. I have considered the submissions. In my view the following issues, which summarize all the several issues put forth for determination, are the issues to be determined by this court.

- i) Whether there is an agency relationship between the 1st defendant and the 2nd defendant.
- ii) Whether the Plaintiff's claim should lie against Oreint Benko Freighters Ltd in view of the Letter of **1st July, 2009**.
- iii) Whether the defendants are jointly and severally liable or whether the 1st defendant is entitled to indemnity from the 2nd defendant.
- iv) Whether the plaintiff is entitled to damages for breach of contract and loss of business opportunity.

38. The plaintiff submitted on the issue of the Bill of Lading and the contract of carriage, and emphasized that the property in the generator sets passed to the plaintiff only upon delivery at the various sites as identified by the plaintiff. However, according to the evidence before the court the contract between the plaintiff and the 1st defendant ended at the delivery of the goods at the port of Mombasa. The clearing, delivery, installation, testing and commissioning of the generators was to be done by someone else, allegedly, appointed by the 1st defendant or by the plaintiff. So the issue here is not whether or not there was a breach of contract of carriage. The issue is simply about the loss of the four (4) generator sets, and

who is to blame for the same. In equal measure, the 2nd defendant's submissions that its contract with the plaintiff was precisely limited to installing, testing and commissioning the generators is not in doubt. What is in doubt is who caused the loss of the four (4) generator sets, and whether or not the loss took place while in possession of the 2nd defendant as agent of the 1st defendant.

39. In my view, however, the issue of agency does not arise. What is the issue is simply the nature of the contract. When did the contract start, and when did it end? It is the plaintiff's case that the 1st defendant was bound by the contract to deliver and instal the said generators, while it is the 1st defendant's case that the contract was limited to manufacture and delivery to the plaintiff upto Mombasa Port on Cost and Freight (C&F Mombasa), basis and that the invoices issued by 1st defendant and payment made by the plaintiff was strictly on Cost and Freight Mombasa basis. This position of the 1st defendant appears to be supported by the two Bills of Lading issued on 3rd June, 2009. The two Bills of Lading identify the port of Discharge as Mombasa. This appears to be in tandem with the 1st defendant's defence that they were not responsible for clearance and installation of the generators. Indeed, there appears to have been a clear division of labour in this regard. What is clear is that upon entering into the contract of manufacture and sell of the generators to the plaintiff, the 1st defendant also agreed to identify the 2nd defendant as capable agents to clear, deliver and install the generators. This is clear from Account Sheet records dated 26th March, 2009 where the 2nd defendant was paid Commission of GBD 17,780 and 21,838. The two Account Sheet records show how the entire purchase price was arrived at, which included the commission paid to the 2nd defendant by the 1st defendant. The issue then is, why was commission paid to the 2nd defendant by the 1st defendant? The simple answer is that it was paid so that the 2nd defendant could clear, deliver and install the said generators. The interest the 1st defendant had in ensuring that the 2nd defendant performed its duty was not merely to satisfy the plaintiff, but more so, to protect their business reputation. Indeed this is the reason why they preferred the clearing, delivery and installation to be done by the 2nd defendant, and they made sure that the commission due to the 2nd defendant was duly paid. If the above observation is correct, which I think it is, then the issue is now to look into the ways in which an agency relationship can be created, and especially viewed from the perspective of the plaintiff, whether there was an agency relationship between the 1st and 2nd defendants.

40. The 1st defendant's Managing Director, Mr. Lamb, through an e-mail of 6th May, 2009 confirmed that the 2nd defendant was its local agent and preferred company to handle its generator sets from the time of arrival until commissioning of the same. He proceeded to send clearing documents to the 2nd defendant and only informed the plaintiff of this after the fact. When it came to procuring an agent for purposes of clearing the goods, the plaintiff was constrained to appoint the 2nd defendant's sister company – Orient Benko - as the plaintiff felt that it would not want to force the 2nd defendant to work with another company and probably mess up the generator sets. The 2nd defendant confirmed through the e-mail of 15th December, 2009 that it had received the generator sets as the official representative of the 1st defendant. It further confirmed that it would store, deliver and install on demand in accordance with the agency arrangement between it and the 1st defendant. When four (4) generators were not delivered and the 2nd defendant became elusive, the plaintiff sought the assistance of the 1st defendant and the 1st defendant proceeded to call for reports on the situation, and subsequently instructed the 2nd defendant to proceed to deliver and install the generator sets. In the various correspondences, Mr. Lamb refers to Elatt as "*our agent*". In the opinion of this court, the plaintiff acted on this representation by the 1st defendant, and was indeed forced to work with the 2nd defendant owing to its position as the agent of the 1st defendant even when its terms were not agreeable and even when its charges for installation proved exorbitant. The plaintiff still allowed the 2nd defendant to play the role of delivery (*to ensure proper handling*) and certification (*to avail the plaintiff of the requisite warranties as agent of the 1st defendant*). In view of all this, can the 1st defendant turn back and dispute the agency relationship?

41. An agency relationship is created in several ways. It can also be construed from the conduct of the parties.

42. According to *Halsbury's Law of England 4th Edition Volume 1(2) para 19 and 20* a principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties.

43. According to *Cheshire and Fifoot, the Law of Contract, 5th Edition page 386-394*, agency can be created in various ways. These include agency by Estoppel. The quote therein by *Lord Cransworth* is important in demonstrating how this form of agency is created:

“No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him... this proposition, however, is not at variance with the doctrine that where one has acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that the other person is about to act on that behalf, then unless he interposes, he will in general be stopped from disputing the agency, though in fact no agency really existed....”

44. The e-mail of 6th May, 2009 confirms that the 2nd defendant was an agent of the 1st defendant. The sending via courier of the bills of lading to the 2nd defendant was a clear manifestation of the 1st defendant's intention that the 2nd defendant be involved in the process of handling the generator sets as its agents for purposes of ensuring proper handling and installation of the generator sets.

45. Alternatively, if there is doubt as to the express appointment, the 1st defendant, throughout the transaction held out the 2nd defendant as its agent and this explains why the plaintiff, believing this to be the case wrote to the 1st defendant when a dispute arose owing to the non-delivery of the four (4) generator sets and even sought a refund of its money from the 1st defendant when it became obvious that the generator sets had been converted. Indeed, the reaction of the 1st defendant to the demand by the plaintiff shows clearly how the 1st defendant valued the demand. By e-mails found at pages 16 and 17 of the 1st defendant's Bundle, the 1st defendant reacted very angrily to the demand, drawing its anger and ire to the 2nd defendant and advising the 2nd defendant to take full responsibility of the matter. In an e-mail dated 24th August, 2010 addressed to the 2nd defendant, **Mr. Andrew Lamb** of 1st defendant stated;

“we are extremely concerned to have received a letter... we will not under any circumstances accept any responsibility or liability for your failure to comply with your contractual obligations in Kenya as we have certainly fulfilled our contract to supply these generators on C&FICD Nairobi basis, from which point the responsibility for completion of the supply contract with Heift Project International became solely that of Elatt Ltd”

46. In a letter addressed by the same **Mr. Lamb** dated 25th August, 2010 to Elatt, the 1st defendant writes in part:

Paragraph 3

“...As you are aware we...were contracted to supply these generators sets on a C&FICD Nairobi basis, from where you were contracted to arrange the necessary customs, clearance, consignment release, delivery to each applicable installation site and any installation, commissioning and maintenance as agreed between yourself and your clients”

47. Clearly, there was a close relationship between the 1st and 2nd defendants, and while the 1st defendant manufactured and sold the generators, the 2nd defendant was its preferred agent in Kenya to install and

maintain the same. This is clearly visible in the way the 2nd defendant was proposed by the 1st defendant and how its commission was paid. An agency relationship as has been stated above, can be interred from the conduct of the parties. It therefore means that the 1st defendant is a necessary party in these proceedings. The 2nd defendant's case is that M/S Orient Benco were appointed agents by the plaintiff directly, and that being so, the four (4) generators were lost in the hands of M/S Orient Benco who should answer to the claims by the plaintiff. This allegation is absurd. It is clear that M/S Orient Benco were introduced to the picture by the 2nd defendant. Further, correspondences between the 2nd defendant and the 1st defendant show that it was the 2nd defendant who was given the agency to clear and install and commission the generators. Payments of the commission were made to the 2nd defendant and not to Orient Benco. In any event, if the 2nd defendant had a case against Orient Benco, why did they not join Orient Benco as a Third Party?

48. While it is true that the plaintiff instructed the 2nd defendant to release the bills of lading to the clearing and forwarding company, this authority was limited in scope as it was only for purposes of clearing the generator sets and handing them over to the 2nd defendant. The third party did so and confirmed this through the letter of 31st July, 2009. The 2nd defendant subsequently confirmed that it had received the eleven (11) generator sets and was storing them as per an e-mail sent on 15th December, 2009. In the period between January, 2010 and August, 2010 when the plaintiff tried in vain to obtain delivery of the last four (4) generator sets, the 2nd defendant never once informed the plaintiff or the 1st defendant, both of whom were exerting pressure for the delivery, of the fact that the same were in the custody of a third party. Indeed the issue of the third party must have been an afterthought.

49. It is instructive to note that while the 2nd Defendant indicated in its defence that it would be making the necessary application to enjoin Orient Benko freighters Ltd in these proceedings, it never got to do so.

50. In the end, I have answered the issues raised herein, and that is, that the agency relationship between the 1st and 2nd defendant is established on a balance of probability. It is also the finding hereof that the 1st and 2nd defendants had breached the contract they had with the plaintiff leading to the loss of the four (4) generator sets. Further, the 1st defendant is a necessary party to these proceedings, and is vicariously liable for the acts of the 2nd defendant. The 1st defendant is however entitled to be indemnified by the 2nd defendant.

Damages

51. The issue of damages flowing from breach of a contract was discussed by J. Nyamu in the case of *PIL Kenya Vs. Joseph Oppong [2009] eKLR* as follows:

“The circumstances of this appeal and in terms of reasoning, I adopt as good law the principle in the case of *Compania Navifra Maro PA SA v. Bowaters Lloyd Pulp and Papers Mills [1955] OB 68, 98-9* where the court stated: “Whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach? If not, they are too remote... The question is one of causation, if the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the defendants would be relieved from the liability which would otherwise have fallen on them.”

52. In this case, the defendants failed to deliver all the generator sets as contracted. The plaintiff spent considerable effort trying to resolve this issue and eventually had to source for funds to purchase other generators for the Farmer Cooperative Societies it had procured them for in order to mitigate the farmer's losses.

53. The plaintiff is, therefore, entitled to damages for breach of contract and for the lost business

opportunity. The court hereby assess that damage, and limits it to the value of the lost generators, noting that it has taken the plaintiff over eight (8) years to conclude this matter, and during which time the plaintiff has suffered loss of business on account of the breach of contract.

54. The upshot is that the court finds that the plaintiff has proved its case on a balance of probability and judgment is hereby entered for the plaintiff against the defendants jointly and severally in the following terms;

a. Kshs. 7,174,070 being the cost of the four (4) generator sets.

b. General damages for breach of contract assessed at the value of the said four (4) generators thus Kshs. 7,174,070.

c. Interests on (a) above from the date of filing the suit.

d. Interest on (b) above from the date of this judgment.

e. The 1st defendant shall be fully indemnified by the 2nd defendant from liability in this judgment. However, that shall not stop the plaintiff from executing the decree or judgment against the 1st defendant.

That is the Judgment of the court.

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

LADY JUSTICE G. NZIOKA

JUDGE