



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

**CIVIL SUIT NO. 1180 OF 2001**

**MAKSAM PIONEER SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL.....DEFENDANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED.....THIRD PARTY**

**JUDGMENT OF THE COURT**

**The Background**

1. The suit herein commenced by way of a Plaint dated **8<sup>th</sup> November, 1999**, which in the cause of time was amended and Further Amended on **21<sup>st</sup> January, 2014**. The plaintiff's claim is set out in the Further Amended Plaint aforesaid. The purpose of the Further Amendment was to substitute the name of the defendant from the defunct Nairobi City Council to its successor in law The Nairobi City County. The Plaintiff's claim as set out in the Plaint is that it delivered 4 Hanomag wheel loaders to the Defendant (then Nairobi City Council) in the month of February 1998 on the undertaking by the Defendant that it would pay to the Plaintiff the sum of Kenya Shillings Sixty Million (Kshs.60,000,000/=) immediately on delivery. The Defendant paid the sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/= only) in February and undertook to pay the balance of the purchase price for the Hanomag wheel loaders in the sum of Kenya Shillings Thirty Five Million (Kshs.35,000,000/=) to Oraro and Rachier Advocates as instructed by the Plaintiff.
2. The Defendant neglected and/or refused to make the payment of the said balance of Kenya Shillings Thirty Five Million (Kshs.35,000,000/=) either to the Plaintiff or to the firm of Oraro and Rachier Company Advocates as instructed by the Plaintiff.
3. On 2<sup>nd</sup> March 1998 the Plaintiff through its Advocates notified the defendant that the outstanding balance of Kshs.35,000,000/=would accrue interest at the rate of thirty six percent (36%) p.a. until payment in full for the duration that the Defendant would be in default.
4. The Plaintiffs claim against the Defendant is therefore the principal sum of Kshs. 35,000,000/= being the unpaid balance of the purchase price for the 4 Hanomag wheel loaders supplied to the defendant with interest thereon at the rate of 36% p.a. from 2<sup>nd</sup> March 1998 until payment in full. The Plaintiff also claims the cost of the suit.

5. The Plaintiff's claim is controverted by the Defendants vide its Further Amended Statement of Defence and Counterclaim dated 23<sup>rd</sup> May, 2014. The Defendant admits that 4 Hanomag wheel loaders were delivered to it but denies that it undertook to pay the purchase price of Kenya shillings Sixty Million (Kshs.60,000,000/=) to the Plaintiff immediately. At paragraph 3A of the Defence and counterclaim the defendant admits that it paid the sum of Kshs. 25,000,000/= to the Plaintiff but denies that it undertook to pay the sum of Kshs.35,000,000/= to Oraro and Rachier Company Advocates in the month of March on the instructions of the Plaintiff. The Defendant further denies that it neglected and/ or refused to make payment to the Oraro & Company Advocates as directed by the Plaintiff and further denies being notified that interest would be charged for non-payment upon delivery at the rate of 36% p.a. The Defendant therefore denies being liable to the Plaintiff for payment of the principal sum of Kshs.35,000,000/= being the outstanding balance to the Plaintiff and simple interest thereon at the rate of 36% p.a. from 2nd March 1998 until payment in full. The defendant also denies notice of intention to sue and puts the Plaintiff to strict proof. The Defendant states in the alternative that the transaction involving payment of Kshs.60,000,000/= was fraudulent. On fraud, the defendant gives particulars as follows:

(i) The Plaintiff did not disclose that the wheel loader it supplied had been attached by Kenya Commercial Bank through a Notice of appointment of receiver on 3<sup>rd</sup> April 1995 and ruling in Civil Application No. Nai 316 of 1997 delivered on 16th January 1998.

(ii) That the Plaintiff sold to the Defendant the same wheel loaders it had paid for in 1994 and which were the subject matter of HCCC No. 635 of 1995 Kwanza Motors Limited versus Nairobi City Council.

(iii) That the Plaintiff did not disclose that it was associated to Kwanza Motors Limited.

(iv) That the transaction and payment of Kshs.60,000,000/= was not authorized by the Defendant's Finance Committee and its contrary to the Repealed Local Government Act.

6. The Defendant further states that there was no undertaking as to the time limit within which to finalize the transaction and that time was not of essence in the transaction. The Defendant further avers that there was no agreement to pay interest or any penalty whatsoever. In any event the defendants avers that the full purchase price of Kshs.60,000,000/= was paid to the Plaintiff before the filing of the claim.

7. The Defendant further states that the payment of Kshs.60,000,000/= to the Plaintiff was illegal as the contract was null and void *ab initio* and the Defendant counterclaims for the said amount of Kshs.60,000,000/= plus interest and costs.

8. The Defendant further avers that the balance of the purchase price in the sum of Kshs.35,000,000/= was paid in August 1999. In the same vein the defendants states that three of the wheel loaders had been paid for by the defendant in the sum of Kshs. 46,000,000/= sometime in 1995 and the same were not delivered and that the directors of Kwanza Motors Limited under Receivership dishonestly introduced the Plaintiff as a party to the sale transaction without disclosing the relationship between the Plaintiff and Kwanza Motors Limited.

9. The defence then reiterates that the contract was fraudulent and void *ab initio* and further illegal, irregular and against public interest. The Defendant claims that the sum of Kshs.60,000,000/= paid to the Plaintiff be refunded to the Defendant plus interests at commercial rates.

10. Between 1999 and 2014 there were a number of interlocutory applications which were heard and determined. Among them was one by the Defendant who issued a Third Party notice dated 3<sup>0th</sup> January, 2001 by which it joined the Kenya Commercial Bank Limited to this suit claiming indemnity from the Third Party on the alleged premise that the defendant paid the principal sum of Kshs.35,000,000/= claimed by the Plaintiff from the defendant through the third party as chargees of Kwanza Motors Limited who happened to be the legal owners of the 4 Hanomag wheel loaders.

11. The third party in a short statement of defence filed on 27<sup>th</sup> March, 2001 stated that it granted the defendant a loan of Kshs.35,000,000/= through an offer letter dated 9th July to purchase 4 Hanomag wheel loaders.

12. The Third Party stated that it was an express term of the said letter of offer that the loan proceeds would be credited to kwanza motors Limited and that Kwanza Motors Limited in turn instructed the third party to utilize the proceeds to liquidate liabilities that were outstanding in the Third Party's books from:

- (a) Kwanza Motors Limited.
- (b) Geoffrey Makana Asanyo.
- (c) Makana Transporters Limited
- (d) Wakam Enterprises Company Limited.

13. The third party avers that it fulfilled the terms of the borrowing contract between it and the defendant and had no obligations whatsoever in law to indemnify the defendant and puts the defendant to strict proof. The third party prays for dismissal of the defendant's claim against it with costs.

14. Parties complied with pre-trial directions, and filed Witness Statements and Bundles of documents which are on record. The hearing of the suit commenced on 12<sup>th</sup> June, 2014 and was concluded on 12<sup>th</sup> July, 2016 when the court reserved the delivery of the judgment for 29<sup>th</sup> September, 2016, which, however, did not happen due to the heavy workload on the part of the Judge.

### **The Hearing and Submissions**

#### **Facts and Evidence**

15. The Plaintiff called two witnesses in support of its case. PW1 was **Stephen Musyoka Makau** a Civil Servant and Engineer at the Ministry of Transport and infrastructure who worked on secondment at the Nairobi City council between 1987 and 2000 and personally dealt with certain relevant aspects of the transaction between the Plaintiff and the defendant that is the subject of this suit. PW2 was **Sam Nyangatare Nyabiba** the Managing Director of the Plaintiff Company who personally handled the transaction between the Plaintiff and the Defendant.

16. PW1 adopted as his evidence his witness statement dated the 26th of October 2012 signed by him and filed herein. He testified that he worked as a transport manager at the Nairobi City Council between 1987 and 2000 and his duties were to operate and maintain a fleet of vehicles for the council. He was based at the Defendant's central workshop in Dar-es-Salaam Road Industrial Area. He recalled that sometime in early 1998 he was instructed by his boss *City Engineer Chiuri* to inspect certain wheel loaders which were to be delivered to the City Council workshop and take charge of them if they were okay. The witness testified that 4 Hanomag wheel loaders were delivered at the workshop by one Sam Nyabiba and a Mr. Sagini. He inspected and found them to be okay and took charge of them. The Hanomag wheel loaders delivered already had Green Council number plates. They were registration numbers KAH 028Y, KAH 029Y, KAH 030Y AND KAH 031Y. The witness acknowledged that he and his fellow examining officer Eliud Ndung'u signed the delivery notes presented to them by Mr. Sam Nyangatare Nyabiba. Copies of the said delivery notes were presented in evidence at pages 39-42 of the Plaintiff's bundle for the four (4) Hanomag wheel loaders respectively.

17. The witness concluded that the said wheel loaders were immediately put to use and were performing well by the time he left the council in the year 2001. He estimated that the machines had a functional life span of about 15 years. He reiterated his evidence in cross examination and confirmed that he received the wheel loaders on 2<sup>nd</sup> February 1998. He further stated that nobody lodged any claim in respect of the wheel loaders delivered by the Plaintiff to the Nairobi City Council. The said wheel

loaders were new and had not been put to use before. He further stated that the council previously had 3 other wheel loaders of the same make from a different source but could not remember their registration numbers or date of purchase. The other 3 wheel loaders had been supplied to the Council by Kwanza Motors Limited. The council therefore acquired a total of 7 Hanomag wheel loaders. He was firm that he took delivery of the four Honomag wheel loaders KAH 028Y - KAH 031Y for and on behalf of the Nairobi City Council and they were registered in the Council's name.

18. The Plaintiff's 2<sup>nd</sup> Witness PW2 was Sam Nyangatare Nyabiba. He is a businessman and the Managing Director of the Plaintiff Company. He stated the Plaintiff Company was incorporated sometime in 1995 for import and export, clearing & forwarding, sale of machines, spare parts and property. The Plaintiff had business in Nairobi and Mombasa with their office at protection house in Nairobi and Funzi Road in Industrial Area. He referred to his written Statement dated 26<sup>th</sup> October 2012 which he adopted as his evidence.

19. PW2 testified that they supplied the Defendant with 4 units of wheel loaders in February 1998. The Plaintiff had purchased the 4 wheel loaders from mechanized Clearing and Forwarding Company Limited vide a sale agreement dated 31<sup>st</sup> October 1997 produced at page 5 of the Plaintiffs bundle for Kshs.45,000,000/=. Having purchased the wheel loaders the Plaintiff made an offer to the defendant vide its letter of 5<sup>th</sup> November 1997 offering to sell the 4 wheel loaders to the Defendant for Kshs.60,000,000/=. The offer letter is at page 8 of the Plaintiff's bundle. PW2 stated that he delivered it personally to the City Engineer called *Chiuri*.

20. The Defendant discussed the Plaintiff's offer at its Chief Officer's meeting of 18<sup>th</sup> November 1997 and resolved to accept the Plaintiff's offer. *See Page 9 of the Plaintiff's bundle*. The Defendant then issued a local Purchase Order (L.P.O) No.23363 to the Plaintiff. *(See page 10 of the Plaintiff's bundle ordering the supply of 4 wheel loaders offered by the Plaintiff at the price of Kshs. 60,000,000)*.

21. PW2 testified that the L.P.O followed a visit by three City Council officers who inspected the machines on offer at the plaintiffs' premises. They included the then City Engineer a Mr. Chiuri. Following the Agreement with the said Officers PW2 procured the registration of the wheel loaders in the Defendant's names and delivered them on 2<sup>nd</sup> February 1998 to the Defendant workshops at Dar es Salaam road where they were inspected, received by Engineer Makau and one Ndung'u on behalf of the Defendant. PW2 stated that he was in the company of his clerk one Sagini at the time of delivery.

22. PW2 produced delivery notes appearing at page 39-42 of the Plaintiff's bundle and which were signed by a Mr. Sagini on behalf of the Plaintiff and PW1 Engineer Makau and one Ndung'u for the defendant as proof and acknowledgement of delivery of the 4 wheel loaders.

23. The witness further testified that the Defendant paid the Plaintiff Kshs.5 Million on 3rd February 1998 and subsequently made further payments totaling Kshs.20,000,00/= in instalments of Kshs.5,000,000 each. The total part payment received by the Plaintiff is Kshs.25,000,000 and the details of the payments and cheque numbers appear at *page 78 of the copies of pleadings* as the particulars supplied by the Plaintiff in answer to a request for particulars.

24. PW2 testified that he obtained the logbooks of the four (4) machines and delivered them to Mr. Chiuri the City Engineer. Copies of the logbooks were produced in evidence at page 19-25 of the Plaintiff's bundle for the 4 wheel loaders registration number KAH 028Y-KAH 031Y together with copies of registration fees payment receipts which are at page 11-18 of the Plaintiff's bundle of documents. An official search conducted by PW2 in the year 2011 confirmed that the 4 wheel loaders are still registered in the defendant's name. *(See page 27-38 of the Plaintiffs bundle)*.

25. PW2 concluded by stating that the Defendants had failed to pay the balance of Kshs.Kshs.35,000,000/= to the Plaintiff despite demand and notice of intention to sue. The Plaintiff therefore claims the balance of Kshs.35,000,000 together with interest at the rate of 36% p.a which was the commercial rate at the time of the subject contract on borrowed funds. The notice for

charging interest and demand letters are produced at page 44 (a) and (b) of the Plaintiff's bundle.

26. PW2 stated that there had never been any dispute on the ownership of the wheel loaders that the Plaintiff supplied to the Defendant and the Defendant had never informed the Plaintiff that there was ever any claimant other than the Plaintiff.

27. PW2 produced a Certificate of Incorporation of the Plaintiff Company and Bank Statements and prayed for judgment and costs of the suit.

28. In cross-examination PW2 stated that there were two shareholders and directors of the Plaintiff Company being himself and one Geoffrey Makana Asanyo with each holding 50% shareholding. The company was incorporated in 1995 and he knew Mr. Asanyo at about the same time. He knew of Kwanza Motors Limited but had never dealt with it or been concerned with its business. PW2 stated that he did not know the shareholders or directors of Kwanza Motors Limited prior to these proceedings. PW2 compared the schedule of items to the Agreement of Purchase of the wheel loaders between the Plaintiff and mechanized Clearing and Forwarding Company Limited with a schedule to the Chattels Transfer appearing at page 5 of the defendant's bundle and acknowledged that the chassis numbers for the wheel loaders purchased by the Plaintiff from mechanized Clearing and Forwarding Company Limited were similar to those of the chattels charged by Kwanza Motors Limited to Kenya Commercial Bank Limited the third party herein.

29. PW2 stated that the Plaintiff purchased the wheel loaders from the yard of M/s mechanized Clearing and Forwarding Company Limited in Industrial Area and the machines were new as confirmed by the Plaintiffs technicians. PW2 stated that the Plaintiff sold the wheel loaders after about 3 months from the date of purchase.

30. The witness further testified that Oraro and Rachier Advocates acted for the Plaintiff in other transactions concerning property. It is in this regard that the Plaintiff directed that the balance of Kshs.35,000,000/= be paid to Oraro & Rachier Advocates but the money was never paid by the defendant.

31. PW2 was taken through and shown copies of court proceedings between the Directors of Kwanza Motors Limited Geoffrey Makana Asanyo and Tabitha Moraa Makana and Kenya Commercial Bank Limited the Third Party herein. He was informed the court proceedings show that the wheel loaders acquired by the Plaintiff from mechanized Clearing and Forwarding Company Limited and sold by the Plaintiff to the Defendant were the subject of court proceedings between the directors of Kwanza Motors Limited and Kenya Commercial Bank Limited. The High Court and Court of Appeal proceedings are produced in the Defendant's bundle of documents at pages 37-235.

32. The proceedings concerned a contested Receivership of Kwanza Motors Limited by Kenya Commercial Bank and the directors' of Kwanza motors limited in which the assets in which the debenture was to crystallize would include the 4 wheel loaders.

33. In re-examination PW2 stated that the Plaintiff did due diligence before purchasing the Hanomag wheel loaders. He stated that the seller mechanized Clearing and Forwarding Company Limited had all the import documents necessary to confer title. They had proof of ownership. There was no indication of any interest that the third party (KCB) had on the goods. PW2 confirmed that he personally undertook the registration of the machines in the defendant's name after the City Council Engineer Mr. Chiuri executed the registration forms. All the requisite documents were verified at the Registrar of Motor vehicles and the registration approved. The Plaintiff was therefore entitled to payment of the balance of the purchase price of Kshs. 35,000,000.

34. PW1 testified that the Plaintiff Company did not participate in and had no knowledge or interest in the HCCC N0.248 of 1997 between the Directors of Kwanza Motors Limited and Kenya Commercial Bank Limited and the subsequent Appeal proceedings emanating therefrom. The witness stated that he could not respond to issues concerning the said suit. He concluded that the Plaintiff was claiming for the

principal sum of Kshs.35,000,000/= and interest thereon at 36% p.a which was the prevailing rate in the market at the time of transacting. He also prayed for costs of the suit and closed the Plaintiffs case.

35. The Defence presented its evidence through Karisa Iha the Director of Legal Services Nairobi City County Government. He relied on his witness statement filed on 1<sup>st</sup> October 2012. He confirmed that the defendant transacted business with the Plaintiff.

36. He stated that the Plaintiffs shareholding was 50% Mr. Nyabiba and 50% for Geoffrey Asanyo. He knew Mr. Asanyo was also the Director of Kwanza Motors Limited.

37. DW1 testified at length on the basis of the court documents and proceedings in the HCCC. No. 248 of 1997 which was a suit between Tabitha Moraa Makana, Geoffrey Makana as Directors of Kwanza Motors Limited and Kenya Commercial Bank Limited over the Appointment of a Receiver to Kwanza Motors Limited on 3rd April 1995 by the third party which have nothing to do with the Plaintiffs claim.

38. Through the said record and documents DW1 testified that the defendant purchased three loaders from Kwanza Motors Limited sometime in 1995. The Receivers later offered the remaining wheel loaders to the defendant. The witness testified that while negotiations were still on, the Receivers were removed from the affairs of Kwanza Motors Limited by the directors through a court order. Once the Receivership had been set aside by the court the directors of Kwanza motors approached the defendant and proposed the sale to the Defendant of the 4 wheel loaders at Kshs.15,000,000 each. He referred to the Chief Officer's minutes appearing at page 13 of the Defendant's bundle as proof of this. The minutes however contradict his testimony as it is recorded that the Plaintiff Maksam Pioneer Services Limited made the offer.

39. The witness confirmed that the 4 wheel loaders offered to the defendant by the Plaintiff also appear on the schedule to the chattels mortgage between Kwanza motors limited and the third party. The wheel loaders according to the defendant were also the subject of a Court of Appeal Ruling in Civil Application No.316 of 1997 instituted by the third party against the decision in the High Court in favour of the directors of Kwanza Motors Limited where the Court of Appeal reinstated the Receivers with power Limited to selling four Hanomag wheel loaders that were the only remaining tangible property of Kwanza Motors Limited in receivership. DWI pointed out that Mr. Asanyo was a director of both the Plaintiff Company and Kwanza Motors Limited. DWI testified that from the record of court proceedings it is apparent that the Plaintiff acquired the wheel loaders at a time when the Receivers had been removed by the court from the management of Kwanza motors limited and while the said company was being run by Mr. Asanyo and his wife.

40. DW1 testified that once the Receiver was reinstated, the Receiver wrote to the Defendant on 6th February 1998 warning them of the purported purchase of the wheel loaders on which the debenture had purportedly crystallized. By this point the Defendant was already in possession of the wheel loaders which had been sold to it by the Plaintiff and had made part payment of the purchase price of Ksh.5,000,000/=. The wheel loader had also been registered in the Defendant's name.

41. DW1 noted and acknowledged the letters of demand written to the Defendant by the Plaintiff's lawyer Konosi & Company Advocates demanding Kshs.35,000,000 and directing that the said amount be paid to Oraro & Rachier Advocates. He confirmed that the Defendant did not honour the said letters.

42. He then testified that the Defendant took out a facility letter of Kshs.35,000,000 and the debit note show that the same was placed in a fixed account in the name Kwanza Motors Limited and the proceeds thereof later credited to three different accounts as shown by credit notes at page 27 of the Defendant's bundle.

43. DW1 stated that the Plaintiff at inception of the suit only sued for interest of Kshs.17,850,000/=. In a subsequent application to strike out the defence for being frivolous and vexatious the Judge ruled on 22<sup>nd</sup> March 2000 that the Defendant had a good defence raising triable issues and was entitled to defend the

suit.

44. DW1 testified that the payment of Kshs. 35,000,000/= was made to Oraro and Rachier Advocates. He stated that even going by the Plaintiffs letter of demand the payment had to be made to Oraro and Rachier Advocates.

45. DW1 in cross examination stated that he joined the Local Government in 1995 and was initially posted to Mombasa. He was posted to Nairobi in the year 2001 as the Chief Counsel in charge of litigation. He stated that he had no personal knowledge of the transaction leading to this suit but only derived his testimony from the paper trail and documents in his official custody.

46. He acknowledged that the suit herein emanates from a transaction that started by an offer by the Plaintiff to the defendant which culminated into a Local Purchase Order (L.P.O) No. 23363 of 23<sup>rd</sup> January 1998 by the defendant to the Plaintiff to supply it with 4 Hanomag wheel loaders for the price of Kshs. 60,000,000. He acknowledged that the wheel loaders were subsequently delivered by the Plaintiff who had registered them in the Defendant's name, an official search done on 8<sup>th</sup> April 2011 confirmed that they were still in the Defendant's name. He stated that the Plaintiff received part payment of Kshs.25,000,000 from the Defendant and stated that the balance of Kshs.35,000,000 was paid to Oraro & Rachier Advocates by money transfer on 13<sup>th</sup> August 1999. However upon further cross examination DW1 admitted that the Kshs.35,000,000/= was never paid to the Plaintiff or Oraro & Rachier Advocates as had been directed by the Plaintiff.

47. DW1 admitted receiving the Notice of Demand for the balance of Kshs.35,000,000/= from Plaintiff's lawyer Konosi & Company Advocates. The Demand further stated that interest at 36% p.a. would be levied if the demand was not honoured. He stated that the defendant did not honour the demand. He acknowledged that the transaction between the parties was commercial but contended that interest would not be applicable automatically unless agreed upon in advance.

48. He acknowledged that it was a term of the Agreement that payment would be made upon delivery of goods and contended that they complied with this term by paying Kshs.25,000,000/= to the Plaintiff and the balance of Kshs.35,000,000/= to Oraro and Rachier Advocates. On further cross-examination he admitted that the Kshs.35,000,000/= was never paid to Oraro and Rachier Advocates, it was instead placed by the third party in a suspense account in the names of Kwanza Motors Limited and subsequently applied to the account of Kwanza Motors Limited and Wakam Enterprises Company Limited (see page 27 Defendant's bundle).

49. DW1 accepted on cross-examination that contrary to what the Defendant stated in its Defence the wheel loaders supplied to the Defendant by the Plaintiff in 1998 were not the same ones sold to the Defendant by Kwanza Motors Limited in 1994. He noted the different chassis numbers. He admitted that there must have been a transaction between the Defendant and Wakam Enterprises Limited for it to warrant the payment. He further agreed that the defendant had no reason to pay Kwanza Motors Limited.

50. Regarding the court case, documents and proceedings in Nakuru HCCC No. 248 of 1997 and the subsequent Court of Appeal Civil Application No. 316 of 1997, DW1 acknowledged that the Defendant was not a party to the court proceedings and had no role in them. No Order directed to the defendant or the Plaintiff was made in the said court cases. He agreed that he had no knowledge of the dispute between the directors of Kwanza Motors Limited and the third party beyond what was on record in the proceedings exhibit.

51. He stated that he brought the proceedings to demonstrate that Kwanza Motors Limited was already in Receivership by the time the Plaintiff sold the wheel loaders to the defendant and that the Plaintiff therefore had no capacity to transfer the machines to the Nairobi City Council and referred to the letter dated 6<sup>th</sup> February 1998 written by Oraro and Rachier Advocates to the Defendant.

52. He acknowledged the separate legal personality of Kwanza Motors limited and the Plaintiff Company both of which dealt separately with the defendant in independent business transactions for supply of

wheel loaders on two distinct occasions in 1994 and 1998 respectively.

53. He admitted that though the Plaintiff lodged the suit for interest only initially on the premise that the principal sum of Kshs.35,000,000 had been paid to Oraro and Rachier Advocates, it was subsequently granted leave to amend the Plaintiff in a considered decision of the court and allowed to claim both principal of Kshs.35,000,000/= and interest thereon at rate 36% per annum.

54. DW1 testified that the Defendant only enjoined the third party to this suit so that Kenya Commercial Bank could confirm that they disbursed money to Kwanza Motors Limited and agreed that the third party had not breached any of its obligations.

55. The Third Party witness *Mohamed Musa* confirmed that he worked with the third party and had custody of the documents concerning this case though he had no personal knowledge of the facts. He confirmed that the third party appointed the Receiver over Kwanza Motors Limited and testified on the basis only of matters apparent from the documents on record. His main testimony was that the third party had honored his obligations to the defendant and was therefore not liable in any way.

### Submissions

56. **Mr. Koyyoko**, Counsel for the plaintiff submitted that from the evidence presented, the following facts are not in dispute: The Plaintiff through a letter dated 5<sup>th</sup> November 1997 got the Defendant to purchase its 4 wheel loaders at the price of Kshs.60,000,000. The Chief Officers of the Defendant discussed the offer at their meeting of 18<sup>th</sup> November 1997 and it was resolved that the defendant should purchase the four wheel loaders offered by the Plaintiff at the sum of Kshs.15,000,000 each. The Defendant therefore issued an official Order Number 23363 dated the 23<sup>rd</sup> January 1998 to the Plaintiff ordering the supply of 3 model 44D Hanomag wheel loaders and 1 mode 35 Hanomag wheel loaders at Kshs.15,000,000 each making the total order price Kshs.60,000,000. Mr. Koyyoko submitted that the Plaintiff supplied the 4 wheel loaders on 2nd February 1998 as testified by PW1 *Stephen Musyoka Makau* who was an employee of the Defendant at the said time as a transport manager and who personally received the wheel loaders which were new at the Defendant's central workshop in Dar-es-Salaam road and executed the delivery notes produced by the Plaintiff at *page 39-42 of the Plaintiff's bundle*. This testimony was uncontroverted. The defendant made part payment of the purchase price in the sum of Kshs.25,000,000/=. This payment was remitted by way of instalments the particulars of which are in the Bank Account statement of the Plaintiff exhibited at pages 9 & 10 of the Plaintiffs bundle. However, the Defendant delayed in making payment of the balance of Kshs.35,000,000/=. The Defendant undertook to pay the said sum to Oraro and Rachier Advocates but did not make the payment leading the Plaintiff to issue notice of interest and demand for payment of the said sum. The Defendant's undertaking to pay the sum of Kshs.35,000,000= to Oraro and Rachier Advocates was vide a letter dated the 10<sup>th</sup> February 1998 appearing at *page 54* of the copies of pleadings and page 38 of the third party's bundle. The Plaintiff commenced suit on 8<sup>th</sup> November 1998 suing for interest of Kshs.17,850,000 on the basis that the Defendant had remitted the sum of Kshs. 35,000,000/= to Oraro and Rachier Advocates. The Plaintiff was later amended with leave of court granted in a ruling on 11<sup>th</sup> December 2000 against opposition by the Defendant. The ruling was not appealed. Counsel submitted that the Defendant's witness DW1 owned up on cross examination that the said balance of the purchase of Kshs.35,000,000 was never paid to the Plaintiff nor to Oraro and Rachier Advocates as directed by the Plaintiff despite the Defendants undertaking of 10<sup>th</sup> February 1998.

### Interest

57. On the issue of interest, Mr. Koyyoko submitted that following default by the defendant to settle the purchase price on delivery of Hanomag wheel loaders the Plaintiff issued a notice of payment of interest on 2<sup>nd</sup> March 1998 notifying the defendant that interest would accrue on the balance outstanding at the rate of 36% p.a. the defendant has opposed both the payment of interest and the rate.

58. The Plaintiff submitted that transaction between the parties herein was commercial in nature. This

position was reiterated by the Plaintiffs' advocate's letter of 2<sup>nd</sup> April 1998. The said letters did not elicit any response or objection from the Defendant. The plaintiff submitted that the rate of interest claimed at 36% p.a. was the applicable commercial interest rate at the time. The evidence of this is apparent from the Bank loan offer letters annexed to the third party bundle. The 1st letter dated 3<sup>rd</sup> December 1994 appears at *page 1 of the Third Party bundle*. The rate of interest charged is 22.5% with an additional 15% in the event of default making for an interest rate of 37.5% p.a.

59. The second letter pertains to a loan taken by the defendant on 9th July 1999 from KCB. The rate of interest indicated is 24% with an additional 12% in the event of default making for an interest rate of 36% p.a.

60. Counsel submitted that the Plaintiff is thus entitled to payment of the unpaid balance of Kshs. 35,000,000/= with interest thereon at commercial rates applicable at the time being 36% p.a. from 2<sup>nd</sup> February 1998 until payment in full.

61. **Mr. Kinyua**, Counsel for the defendant submitted that the transactions giving rise to this suit were surrounded with a lot of mystery and that the defendant found itself embarrassed at times with lack of various crucial documentations and witnesses to help it propagate its Defense and Counterclaim effectively. The Defense relied heavily on evidence of the Third Party on transactions that took place before the contract between the Plaintiff and the Defendant that gave rise to this suit. The defendant submitted that whilst the genesis of this suit is a contract of sale of machinery by the Plaintiff to the Defendant in transactions that took place between January and February 1998, a sneak preview of events happening way earlier in which the interests of the Third Party in the said machinery becomes crucial.

62. Mr. Kinyua referred the court to Interrogatories filed on 30/01/2003 where it is to be noted that there was an exchange of letters between Kwanza Motors Limited and Kenya Commercial Bank during the period March 1993 and August 1994 (see pages 22-30) in which the said Kwanza Motors Limited, a motor dealer, sought for a credit facility to import 15 units of Hanomag Wheel Loaders Trucks from a company in Germany known as Hanomag Aktiengesellschaft Hanover (see also Third Party's Bundle at pages 7-15). From the said communication, it is noted that Kenya Commercial Bank appears to have only financed importation of 7 of the trucks. These heavy machines it would seem from the said communications were to be sold to local authorities. Counsel submitted that the court is not shown any import documents but it can be seen later that an instrument of Chattels Transfer between the said Kwanza Motors and Kenya Commercial bank is created and registered on the 6th February, 1995 (*see the Defendant's Bundle of Documents at page 5-12*). At page 12 is a list of seven (7) machines fully described with the details of Model numbers, Chassis numbers and Engine numbers for each as is listed below;

<u>Model</u>	<u>Chassis No.</u>	<u>Engine No.</u>
HAN 35D	373322850	U856228Y
HAN 35D	373322851	U856229Y
HAN 35D	373322852	U856291Y
HAN 44D	377625278	10693019
HAN 44D	3777624838	10691867
HAN 44D	377625324	10693066
HAN 44D	377624694	10691695

63. Counsel submitted that it is not clear when the trucks arrived into the country from Germany but in

the Third Party's answer to Interrogatories aforesaid, the Third Party enclosed a letter from the Defendant dated 02/11/1994 seeking a loan of Kshs. 40,000,000 to enable it purchase three wheel loaders to be used in garbage collection (*see pg. 31 of the defendant's Bundle and also page 16 of Third Party's Bundle*). This loan was approved. There is a Facility Offer Letter dated 03/12/1994 from Kenya Commercial Bank confirming approval of the facility as was requested by the Defendant, and a letter from the Defendant requesting the Third Party to release the funds to Kwanza Motors Limited, the suppliers of the machines.

64. It would seem there was delay in releasing the said funds prompting the suppliers to move the court in Nairobi HCCC 635 of 1995. Counsel submitted that the description of the three machines match those appearing in the list of the Chattels Transfer instrument at number 1, 2 and 4 save that by this time they had been registered as KAB 325Q, KAB 326Q and KAB 327Q respectively. However, during the pendency of this suit, the supplier, Kwanza Motors Limited, was placed under receivership by the Kenya Commercial Bank.

65. The directors of the suppliers, Kwanza Motors Limited, put up a spirited fight against the receiver managers appointed by Kenya Commercial Bank Limited in bid to regain control of the company. This tussle played out in the High Court in Nakuru HCCC 248 of 1997 and later the Court of Appeal in Nairobi Civ. Appl. Nairobi No. 316 of 1997.

66. At page 151 of the Defendant's Bundle of Documents is a letter dated 28/04/1995 from Messrs Githongo & Company, the official receivers of Kwanza Motors Limited giving an initial report upon assuming receiver management of the said company on 03/04/1995. In the report, the receiver says on paragraph 4 "... *the assets found on the premises were seven new Hanomag wheel loaders (three already registered for sale to Nairobi City Council...* " "At page 156 is the receiver's 2nd report dated 11/-8/1996 in which he states at paragraph 4 "***the seven Hanomag wheel loaders that we mentioned in our last report are still at the premises. There are three of model 35D and four of model 44D turbo. Three were already earmarked for selling to Nairobi City Council and had been given registration number KAB 325Q, KAB 326Q and KAB 327Q...*** " "... *we are in constant touch with Nairobi City Council with a view of selling to them the three loaders which were already earmarked for them. They have shown interest in finalizing the transaction and we have booked a meeting with the city treasurer for early next week. We are optimistic that they will take the three machines for Kshs. 40 million. In this respect we have asked Oraro and Rachier Advocates to contact Konosi and Company Advocates of Nakuru to terminate the case filed by Kwanza Motors Limited against Nairobi City Council...*" Mr. Kinyua submitted that indeed the receiver followed this up with a letter to the Defendant dated 11/08/1995 (see page 106 of the Defendant's Bundle of Documents). Eventually payment was made and it can only be taken that the said suit Nairobi HCCC 635/1995 on the three wheel loaders aforesaid was settled out of court.

67. This left out four Hanomag wheel loader machines in the hands of the receiver managers of Kwanza Motors Limited who tried to market the same to various organizations (pages 106 - 149 of the Defendant's Bundle of Documents) and more keenly to Nairobi City Council as can be seen in correspondences at pages 143 - 149 thereof.

68. Mr. Kinyua submitted that there was an interesting turn of events in the courts. On 24.10.1997, the Honourable Justice D. M. Rimita J. (as he then was) delivered ruling in Nakuru HCCC 248 of 1997 allowing the Application by the directors of Kwanza Motors of 28/05/1997 effectively reinstating the directors of Kwanza Motors Limited into management of the company and suspending the receiver managers (*pages 187 - 196 of the Defendant's Bundle of Documents - specifically page 196*).

69. On the 28.10.1997, the Receiver Managers applied for stay of the said orders but in a ruling delivered by the same judge on 11.12.1997, the application was dismissed (pages 223 - 229 Defendant's Bundle of Documents specifically page 229). The only option left was to seek intervention of the ***Court of Appeal in Nairobi Civ. Appl. No. Nai 316 of 1997*** which relief came in the ruling of 16.01.1998 (*see pages 230 -235 of the Defendant's Bundle of Documents*) where the justices of the Court of Appeal Tunoi,

Shah & Pall, JJ.A. (as they were then) noted that: ***"in all the circumstances of this application and the exercise of our equitable jurisdiction under rule 5(2)(b) of the rules of this court the order that commends itself to us is that the receivers and managers be reinstated with powers limited only to the extent of selling and disposing off the four hanomog wheel loaders belonging to the company the proceeds of which selling or disposing off shall be deposited with the bank. We so order... there shall be liberty to apply to the superior court for matter arising out of the orders made by this court."***

70. Counsel submitted that from the foregoing, it is to be noted that there was a brief period between 24.10.1997 and 16.01.1998 that the management of Kwanza Motors Limited had reverted back to the directors. During this period, from the evidence of the plaintiff, it would seem the four wheel loaders changed hands from Kwanza Motors, to Merchandised Clearing & Forwarding Company Limited who later sold to Maksam Pioneer Services Limited (*the Plaintiff herein*). It was the later who offered the four trucks to the Defendant which offer was accepted and trucks delivered. The purchase price agreed was Kshs. 60,000,000.00/= of which 25,000,000.00 was paid leaving a balance of Kshs. 35,000,000.00.

71. The Receiver managers on resuming receivership found out that the trucks had been supplied to the Defendants. In their letter of 06/02/1998 (*see page 21 of the Defendants Bundle of Documents*) the lawyers for Kenya Commercial Bank who were acting for the Receiver managers of Kwanza Motors Limited protested and warned the Defendant against engaging in the transactions of purchasing the four wheel loaders with other parties other than the receiver managers. In the letter, it is also threatened that an action in contempt of court would be taken if the wheel loaders were not surrendered to the receiver managers by 13<sup>th</sup> February, 1998. However, no such action was ever taken even though the trucks were never surrendered as threatened.

72. Mr. Kinyua submitted that it seemed the approach that was adopted was one of negotiations. In a letter dated 23/02/1998, (*see page 75 of the Pleadings Bundle of Documents, also page 58 of the Third Party's Bundle*) the receiver managers writing to the Third Party, their principals, confirm at paragraphs 4, 5, 6, 7, 8, 9 and 10 that even as they had instructions to repossess the wheel loaders, the process of repossession was physically resisted by the Defendant's security. The receiver's opinion therein was that instead of using force to repossess the trucks, diplomacy would be the best option. Paragraph 9 reads ***"we also advise that the repossession instructions are withheld and not be insisted upon since they would sabotage this whole sale to the NCC. Needless to emphasize, we have no possible buyers for these wheel loaders and the deal with the NCC is the only possibility we have for disposing these loaders. It is important we bear this fact in mind that should we antagonize the NCC we would be left in our hands wheel loaders that nobody else desires to buy in the Kenyan Market. If the decision to repossess is still insisted upon, then we believe that another court order and an armed Police escort would be required for that purpose."*** The letter concludes paragraph 10 as follows ***"... we however stress that we now allow cooler heads and a more diplomatic approach to be pursued. If this fails there is still the course threatened in M/s Oraro & Rachier's letter of 6<sup>th</sup> February, 1998 to the NCC."***

73. It is said that a meeting did take place on 03.03.1998 between the Receiver Managers of Kwanza Motors, Mr. Geoffrey Asanyo of Maksam Pioneer Services Limited and The Late Mr. John Ougo of Oraro & Rachier Advocates as can be seen in the letter by the Receiver Managers dated 16.03.1998 addressed to the Defendant (*see page 73 of the Pleadings Bundle and also pages 56, of the Third Party's Bundle*).

74. Counsel supposed that it was in the said meeting that it was discussed that proceeds of the sale of the hanomag wheel loaders was to be paid to M/s Oraro & Rachier Advocates. Indeed the lawyers representing the Plaintiff at the time, Konosi & Company Advocate's letters dated 02.03.1998, 02.04.1998 and 09.10.1999 (*see pages 28, 29 & 30 of the Defendant's Bundle of Documents and also page 44(a) and 44(b) of the Plaintiff's Bundle*) all make mention of the fact that the amount of Kshs. 35,000,000.00 was to be paid to Oraro & Rachier Advocates. Earlier, it would seem the said Mr. Geoffrey Asanyo had also entertained the thought and instructed the Defendant along the same lines as can be seen

in the letter dated 10.02.1998 (*see page 38 of the Third Party's Bundle of Documents*).

75. Mr. Kinyua submitted that it is no surprise that when the defendant applied for a credit facility of Kshs. 35,000,000.00 the Third Party gave out its terms as contained in their Facility Offer letter dated 09.07.1999 and when the Third Party made the loan's drawdown, they disbursed the funds into various accounts purportedly related to M/s Kwanza Motors Limited. The defendant's case is that the suit herein is a hoax, and a result of conspiracy. The defendant had filed a counter-claim. However, there was no attempt by the defendant to prove the said allegation of counter-claim. In fact the defendant never listed counter-claim as an issue.

76. Counsel for the Third Party **Mr. Amoko** submitted that before its sudden and unexplained volte-face claim the Plaintiff originally sued the Defendant for a sum of Kshs.17,850,000/= which it alleged was interest for late payment of the balance of the purchase price for the sale of four wheel – loaders. The Third Party submitted that it was enjoined in these proceedings by the defendant by way of a third Party Notice dated 30<sup>th</sup> January, 2001 claiming that it (the Defendant) ***“is entitled to indemnity on the ground, inter alia, that the Defendant paid the Principal sum claimed through yourselves as charges under a debenture granted to yourselves by Kwanza Motors limited who happened to the legal owners of 4 Hanomag wheel loaders.”***

77. **Mr. Amoko** submitted that however generously the Third Party Notice is construed, it does not disclose any factual and/or legal basis to sustain a claim of indemnity against the Third Party either as sought or at all, and that when questioned, Mr. Karisa Iha (*the Defendants Director of Legal Affairs and its only witness in these proceedings*) readily admitted that the Third Party had not breached any of its obligations with the Defendant and had only been joined in these proceedings so as to cast light on the underlying controversies between the transactions involving the Plaintiff, Kwanza Motors Limited (“KML”) and itself. Counsel submitted that is not a legally recognized basis for joining third parties, let alone a ground upon which indemnity may be sought and obtained. On this ground alone, counsel submitted, the proceedings against the Third Party should be dismissed with costs.

78. On further submissions, Mr. Amoko stated that from the evidence led at the trial of the action, some of the facts are indeed convoluted, and that the confusion was intentionally sowed by the Plaintiff, which it seeks to exploit. It was submitted that Mr. Geoffrey Asanyo, together with his wife, were the two directors of Kwanza Motors Limited (KLM), and Mr. Asanyo was the principal mover behind Kwanza Motors Limited. And despite claims otherwise, it is Mr. Asanyo who, together with Mr. Nyabiba, were the sole shareholders as well as directors of the Plaintiff, and was the Principal mover behind the supposed deals between the Plaintiff and the Defendant. (*See searches carried out by the Third Party, copies of which can be found in its supplementary Bundles of Documents inadvertently described as Supplementary List of Authorities dated 22<sup>nd</sup> July, 2014*).

79. It was submitted that Third Party had extended various facilities to KML as well as companies associated with Mr. Asanyo and obtained various securities including a debenture over its assets. Upon default by KML, the Third Party appointed Mr. Zeprin Simon Muchunguzi and Joseph Muiruri Githongo as its receivers and managers who established that its only tangible assets were seven hanomag wheel loader over which the Third Party also held a Chattels Mortgage. They proposed as receivers and managers of KML to sell them and after actively marketing them deals were struck with the defendant with the first three being sold in June, 1996 while agreement for the sale of the last four were being concluded in October, 1996.

80. The sale of the last four wheel loaders was delayed because at the instance of the directors of KML the receivership was lifted by the High Court at Nakuru when Rimita – J on 24<sup>th</sup> October, 1997 granted a declaratory and Injunctive relief that effectively lifted the receivership.

81. On the application of the receivers and managers (**Civil Application No. Nai 316 of 1997**), by a ruling made on 16<sup>th</sup> January, 1998, the Court of appeal Ordered:

***“In all the circumstance of this application and in exercise of our equitable jurisdiction under***

**rule 5 (2) (b) of the rules of the court the order that commends itself to us is that the receivers and managers be reinstated with powers limited to the extent of selling and disposing of the four hanomag wheel loaders belonging to the company the proceeds of which selling and disposing shall be deposited with the bank.”.**

82. Negotiations between the Defendant and KML (in receivership) resumed and were concluded. One of the four wheel loaders – Hanomag Model 35D had already been sold to the Defendant for 13 million while agreement had been reached for the sale of the remaining Hanomag Model 44D at Kshs. 14.5 million per unit. The Defendant, lacking the funds to make full payment of those units, by its letter of 19<sup>th</sup> August, 1998 applied for a term loan for Kshs.35 million “*for the payment of the balance of 3 (No.) wheel loaders.*”

83. After further correspondence and discussions, the Third Party agreed to grant the term loan of Kshs.35,000,000/= on terms and conditions set out in its letter of offer dated 9<sup>th</sup> July, 1997. The purpose was *for payment of Hanomag machines*. It was also a term in the said letter that the approval was granted subject to the condition that the proceeds of the loan would be credited directly to the account of Kwanza Motors Limited. This letter of offer was accepted and executed on behalf of the Defendant by its authorized signatories on 23<sup>rd</sup> July, 1999.

84. Mr. Amoko submitted that the Third Party discharged its obligation as per the terms of the letter of offer. The loan proceeds were applied to Kwanza Motors Limited’s accounts as demonstrated by the Fixed Deposit Receipt for Kshs.35,000,000/= in favour of the latter on page 67 of the copies of Pleadings filed on 23<sup>rd</sup> February, 2012. Kwanza Motors limited in turn instructed the Third Party to utilize the proceeds to liquidate liabilities which were outstanding in its books. The liabilities were from the following accounts.

- a. Kwanza Motors Limited
- b. Geoffrey Makana Asanyo
- c. Makana Transporters limited
- d. Wakam Enterprises Company limited

85. Counsel submitted that the Defendant’s sole witness accepted that the Third Party had not breached any of its obligations. In his own words:

***“The bank honoured its obligations to give the loan ... Being the bankers of City Council and having disbursed the money to Kwanza Motors Limited, there was need to bring in KCB to clarify that the bank paid Kwanza Motors.”***

86. Mr. Amoko urged the court to view with extreme askance the purported transaction for the sale of four wheel loaders by the Plaintiff to the Defendant which now forms the basis of its suit. From the evidence, on a balance of probabilities, this was a scam orchestrated by Mr. Asanyo (with the possible connivance of some officers of the Defendant) to avoid the inevitable consequences of KML being placed under receivership. Counsel submitted that these are indeed serious charges to make, but that the evidence supports no other conclusions. Counsel referred to the timing. All the relevant dealings – the alleged purchases of the wheel loaders, the alleged negotiation with the Defendant, the alleged delivery of the wheel loaders and so on. Their registration in the name of the Defendant, the alleged initial payments of Kshs.25 million – took place between end of October, 1997 and January, 1998. This is the precise period (give or take a couple of days) during which the Receiver- Manager had been removed by the High Court at Nakuru (24<sup>th</sup> October 1997) and their reinstatement by the Court of Appeal – 16<sup>th</sup> January, 1998.

87. Then there is the alleged purchase of the wheel loaders for an aggregate sum of Kshs.45 million from Mechanized Clearing & Forwarding Company Limited under an agreement supposedly dated 31<sup>st</sup>

October, 1997 (some seven days after the Receiver- Managers were removed). Under that agreement, the Plaintiff was to pay Kshs.45 million upon execution of the agreement and vendor was to provide import Declaration documents for the four wheel loaders. Mr. Amoko observed that Mr. Nyabiba, PW1 when questioned on the source and evidence of payment of this substantial sum as well as the IDF forms was mute, resolutely refusing to answer these questions despite the Courts intervention.

88. Mr. Amoko submitted that as the ownership was in dispute, the source of funds for their purchase as well as the IDF documents were clearly evidence which the plaintiff was reasonably expected to lead, for the same machines were the subject of a previous chattels mortgage executed by KML in favour of the third Party who had financed their purchase. As it failed to so do, counsel submitted, an adverse inference should be drawn that evidence of payment by the Plaintiff and IDF documents showing importation by Mechanized clearing & forwarding Company Limited do not exist. Counsel cited section 112 of the Evidence Act as well as the case of *Serraco limited v Attorney General [2014] eKLR* for this proposition.

89. Counsel also referred the court to Mr. Nyabiba's testimony that within six (6) days of purchase of the wheel loaders, he struck a deal to sell them to the Defendant for Kshs.60 million. Put differently his investment of Khss.45,000,000/= earned daily returns of Khss.2,500,000 over next six days. Counsel also referred the court to Mr. Nyabiba's inconsistent testimony on when and how they were paid Kshs. 60,000,000 for the wheeler loaders, and his inconsistency on payments by instalments.

90. Mr. Amoko also submitted on the Kshs.35,000,000/= that was to be paid to Messrs Oraro and Rachier Advocates. The proposed payment makes its appearance in a letter from the then Defendant's Town Clerk writing to Mr. Asanyo as the Executive Chairman of the Plaintiff that "*with reference to your letter dated 9<sup>th</sup> February, 1998, the council will remit Kshs.35 million to Messrs Oraro and Rachier, Advocates as per your instructions and in accordance with the schedule of payment which is yet to be agreed.*" It is clear from this letter that this sum was to be paid pursuant to Mr. Asanyo's instructions on behalf of the Plaintiff: a person who Mr. Nyabiba claims was not involved in the transaction at all. Mr. Amoko submitted that the sum was not to be paid to Messrs Oraro & Company to discharge some unidentified as undisclosed transaction which that firm was handling on the Plaintiffs behalf as Mr. Nyabiba's airily claimed. It was to settle sums due to the Third Party for despite the order of the court of appeal, the receiver – managers were trying to avoid risking limb and life to retrieve the four wheel loaders from the Defendant's yard. They therefore sought to make arrangements with the Plaintiff through Mr. Asanyo, as Executive chairman of the Plaintiff, on how best to address the matter. In their words.

***"We refer to our previous discussions in connection with the above matter and advise that on March 3, 1998 we the receivers of Kwanza Motors Limited on behalf of Kenya Commercial Bank Limited met Mr. Geoffrey Asanyo of Maksam Pioneer Services limited to discuss payment of the amount due to Kenya Commercial Bank Limited who have a line over the four wheel loaders recently acquired by the Nairobi City Council.***

***At the meeting, Mr. Asanyo stated that he had already informed Nairobi City Council that a sum of Kshs.35 million being part of the selling price for the four wheel loaders was to be paid to Kenya Commercial Bank Limited as a lump sum in March, 1998. During the discussion that took place in the presence of our lawyer Mr. John Ougo or Oraro & Rachier Advocates, we as the receivers representing the bank's interest in the wheel loaders informed Mr. Asanyo that the amount that is payable to Kenya commercial Bank Limited is Kshs. 38 Million and not Kshs. 35 Million. Mr. Asanyo undertook to inform the Council of this development and should have advised you of this in the starting March 9, 1998.***

***Please note the above and kindly remit a total sum of Kshs, 38 Million to M/S Oraro & Rachier Advocate for the account of Kenya Commercial Bank Limited to reach them not later than March 31, 1998. This should be done before any further payments are made to Maksam Pioneer Services Limited. By a copy of this letter Mr. Asanyo is requested to facilitate the Council's remittance of the funds to Oraro & Rachier Advocates as agreed at our meeting of March 3, 1998."***

91. Mr. Amoko submitted that in the end, this did not work out. It was for Mr. Asanyo to facilitate payments of Kshs.38 Million to Messrs Oraro & Company for the account of the Third Party to reach them not later than March, 31, 1998. No money was paid to Messrs Oraro & Rachier so as to clear KML's indebtedness to the Third Party. In the end, this sum was lent by the Third Party to the Defendant and applied to clear that indebtedness as agreed.

92. On the defendant's claim against the Third Party, Mr. Amoko firstly submitted that the Plaintiff does not have a viable claim against the Defendant. Should the court so conclude, then of course, the Defendant's claim against the Third Party is redundant. However, even if the court were to find the Defendant liable, Mr. Amoko submitted, with the court agreeing with him, that the defendant is not entitled to indemnity from the third Party whether in terms of the Notices or at all.

93. Third Party proceedings fall under Order 1 Rule 15 of the Civil Procedure Rules, 2010 as a means of determining the questions between the defendant and the third party on the liability of the third party to make a contribution or indemnity (***Commissioner of Transport v. F. O. Boero (1954) KLR***). It is incumbent upon the Defendant to demonstrate a violation of its rights by the Third Party in relation to the Plaintiff's claim against him, the breach of which sustains the claim for indemnity or contribution. The Defendant's witness testified in cross-examination, on 23<sup>rd</sup> November, 2015, that the Defendant only enjoined the Third Party in the suit so that it could confirm that it disbursed the loan proceeds to KML. He further agreed that the Third Party honoured its obligation under the Letter of Offer dated 9<sup>th</sup> July, 1999 to give the loan to the Defendant.

94. It is the judgment of this court that the Third Party proceedings herein are defective and must be dismissed as against the Third Party, having been brought for a purpose not recognized under the law. The purpose of these proceedings against the Third Party has unequivocally been admitted by the Defendant, and it is certainly not for a trial of the questions between the Defendant and the Third Party as to the liability of the third Party to make a contribution or indemnity.

95. In this particular case, any right to indemnity would primarily arise from the Letter of Offer, as such right is given by the original bargain between the parties. The case of ***Birmingham and District Land Company v London and North Western Railway company [1887] 34 CH D 261*** expounds as follows:

***“A right to indemnify arises from contracts, express or implied, but it is not confined to cases of contracts. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnity arising from an assumed promise by a person to do that which, under the circumstances he ought to do. The right to indemnity need not arise by contract, it may (to give other instances) arise by statute: it may arise upon the motion of request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him: it may arise (in case of a vendor and purchaser) in cases in which the court will independent of contract raise upon his [the purchaser's] conscience and obligation to indemnify the vendor against a personal obligation of the vendor.”***

96. However, the defendant's claim against the Third Party is not only legally unattainable, it is also factually unsound. As we shall see later in the determination of issues between the plaintiff and the defendant, the alleged Kshs. 35,000,000/= balance was already paid to agents of the plaintiff. So even the defendant, as we shall shortly see, is not liable for the same. In fact at the onset of the suit herein, there was common ground that the amount Kshs. 35,000,000.00 had been settled, and there is a Ruling on record delivered on 22.03.2000 in which it was held that “*the whole of the purchase price was paid before this suit was brought to court*” (see page 195 of the Pleadings Bundle).

### **Issues for determination**

97. The defendant has correctly in my view identified issues to be determined by this court. These are:

- i. Was there a valid contract between the Plaintiff and the Defendant for supply of 4 Hanomag wheel loaders between January and February 1998;
- ii. Whether or not the Defendant paid the Plaintiff Kshs. 25,000,000.00 being part payment of the purchase price for the four Hanomag wheel loaders;
- iii. Did the Defendant apply for and obtain a credit facility from the Third Party for payment of the balance of purchase price of Kshs. 35,000,000.00;
- iv. Whether there was a valid agreement that payment of the balance of the purchase price of Kshs. 35,000,000.00 should be paid to Oraro & Rachier Advocates;
- v. Was there a valid agreement that proceeds from the loan granted by the Third Party would be paid into the account of Kwanza motors Limited;
- vi. Whether or not the Defendant paid to the Plaintiff the balance of Kshs. 35,000,000.00 being the balance of the purchase price for the 4 Hanomag wheel loaders;
- vii. Was time of the essence;
- viii. Was there agreement that that the Defendant would be charged interest at a rate of 36% p.a. on the unpaid balance of the purchase price if payment was not made immediately upon delivery;
- ix. Whether or not the Plaintiff is entitled to its prayers as sought in its Further Amended Plaintiff;
- x. Whether the Defendant is entitled to indemnity by the Third Party pursuant to payment of the amount of Kshs. 35,000,000.00 by the Defendant through the Third Party as chargees of Kwanza Motors Limited.

### **The Determination**

98. From the pleadings and submissions, the following facts are not disputed. Sometime in the beginning of the year 1998, the Plaintiff and the Defendant entered into a contract for the supply of four Hanomag Wheel loaders at a total cost of Kshs. 60,000,000.00. The four wheel loaders were delivered to the Defendant by the Plaintiff. Prior to this transaction, the four wheel loaders were the subject of litigation between directors of Kwanza Motors Limited and the Receiver Managers for Kwanza Motors Limited pursuant to a debenture that had crystallized. The High Court suspended the receiver managers and reinstated the directors of Kwanza Motors Limited on 24.10.1997 only for the Court of Appeal to reinstate the Receiver Managers upon a Ruling delivered on 16.01.1998. There was a window period of close to three months between mid-October 1997 and mid-January 1998 when management of Kwanza Motors Ltd was in the hands of its directors. During that period, Kwanza Motors Limited had capacity to sell the four wheel loaders during this window.

99. The Receiver managers on regaining control of Kwanza Motors Limited (Under receivership) found out that the sale transaction had taken place already between the plaintiff and the Defendant and threatened the Defendant with action for contempt of court but chose instead to use diplomacy to settle the dispute.

100. Under the said sale part payments totaling Kshs. 25,000,000.00 were remitted to the Plaintiff by the Defendant pursuant to a Local Purchase Order on 23.01.1998. There was convergent of views between the Kenya Commercial Bank the Third Party (through the official receiver managers of Kwanza Motors Ltd), Mr. Geoffrey Asanyo, (a director of Marksam Pioneer Services Ltd) the Plaintiff and Mr. John Ougo of Oraro & Rachier Advocates that the balance of Kshs. 35,000,000.00 be paid to Oraro & Rachier Advocates.

101. The Defendant then applied to the Third Party for a loan facility for Kshs. 35,000,000.00. The loan

was taken out for the purpose of payment of the four Hanomag wheel loader machines.

102. The Facility Offer Letter contained a term to the effect that "approval of the loan is granted subject to the proceeds of the loan being credited direct to the account of Kwanza Motors Limited.

103. There was a meeting held on 03.03.1998 between a Mr. Geoffrey Asanyo of Marksam Pioneer Services Ltd (the Plaintiff) the receivers of Kwanza Motors Limited and Mr. John Ougo of Oraro & Rachier advocates. The meeting resolved that the balance of the purchase price should be paid to the firm of Oraro & Rachier Advocates. In the letter by the Receiver Managers of Kwanza Motors to the Defendant (at page 56 of the Third Party's Bundle) the receivers seek to clarify at paragraph 2 that the amount payable to the Third Party is Kshs. 38,000,000.00 and not Kshs. 35,000,000.00 and goes ahead to say at paragraph 3 ***"Please note the above and kindly remit a total sum of Kshs. 38,000,000.00 to Oraro & Rachier Advocates for the account of Kenya Commercial Bank Limited to reach them not later than march 31, 1998. This should be done before any further payments are made to Marksam Pioneer Services Limited."***

104. The Plaintiff at pages 44(a) and 44 (b) of their bundle of documents and the Defendant at page 28, 29 and 30 of the Defendant's Bundle of Documents enclose numerous letters by the advocates acting for the Plaintiff Messrs Konosi And Company whose contents confirm that it was agreed that the amount of Kshs. 35,000,000.00 be paid to Oraro & Rachier Advocates. It is clear therefore that there was a consensus that the amount of Kshs. 35,000,000= should be paid to the firm of Oraro & Rachier Advocates on behalf of the Third Party. Interestingly, in the meeting that came up with such resolution, the Defendant, who was a necessary party to the transaction and directly affected by such resolution was nonetheless unrepresented. What happened later is that proceeds of the loan by the Defendant for purchase of the four wheel loaders were disbursed to various accounts related to Kwanza Motors by the Third Party.

105. It is therefore clear that there was a valid consent between the plaintiff and the defendant, even if the terms of the same were not clearly spelt out. Further, the defendant benefited under the said agreement when the said wheel loaders were registered in the name of the defendant. The fact of the existence of the contract was also eloquently conceded to by DW1, the only witness for the defendant. In fact the only issue of contention in this whole affair is the payment of the balance of Kshs. 35,000,000. The mystery was resolved when the defendant applied for loan from the Third Party of Kshs. 35,000,000=. The loan proceeds were applied to Kwanza Motors Limited's account as demonstrated by the Fixed Deposit Receipt of Kshs. 35,000,000 in favour of the latter on page 67 of the copies of pleadings filed on 23<sup>rd</sup> February, 2012. Kwanza Motors Limited in turn instructed the Third Party to utilize the proceedings to liquidate liabilities which were outstanding in its book. These liabilities were from the following accounts –

- Kwanza Motors Limited
- Geoffrey Makana Asano
- Makano Transporters Limited
- Wakam Enterprises Company Limited

106. The plaintiff would want this court to believe that the plaintiff being a limited liability company had no relationship with the holders of the above account. However, it has been amply demonstrated that there was a close nexus between the directors of the plaintiff company and those of the holders of the above accounts. To deny that they received Kshs. 35,000,000/= would amount to the plaintiff stretching its luck too far. Already, it is perceived that the contract before the plaintiff and the defendant could have amounted to a collusion between the officers of the plaintiff and the defendant. That perception would get credibility if the plaintiff insists that it did not give instructions to the Third Party to disburse the said Kshs. 35,000,000/= as aforesaid. Indeed, the disbursement of the said amount was pursuant to negotiations, and there is a Ruling on record that the whole of the purchase price was paid before this suit was brought to court.

107. Indeed, the plaintiff was right when it initially filed this suit to claim only interest since it believed

the principal sum had been paid. Indeed, even while amending its plaint to include the said principal sum, the plaintiff already knew that the said Kshs. 35,000,000/= had been fully paid. However, the plaintiff intended to benefit from the legal confusion of money being paid to a third Party, and continued to feign ignorance. That is what I call utmost bad faith. What was always due to the plaintiff, if at all, was the interest on the balance of the said Kshs. 35,000,000, and that is what this court will now consider.

### **Issue of interest**

108. This court has already established that there was a contract between the plaintiff and the defendant. However imperfect that contract was, it was endorsed by both parties and the parties benefited under it. The defendant under the agreement acquired the four Hanomag wheel loaders and had them registered in its name and had them in their possession. The plaintiff on its part received a down payment of Shs. 25,000,000/= and expected the balance of Shs. 35,000,000/= to be paid in due course. This however, was not to be for quite some time, and when it happened, as will be shown hereunder in a short while, it was under very strange and different circumstances. The plaintiff by its notice of payment of interest dated 2<sup>nd</sup> March, 1998 informed the defendant that the balance of Shs. 35,000,000/= would attract interest at the commercial rate of 36% per annum. The plaintiff submitted that the transaction between the plaintiff and the defendant was commercial in nature. The defendant also through its only witness DW1 admitted that the transaction was commercial in nature, but contends that it was not time specific. In my view, the transaction was commercial in nature, and even if it was not time specific, and there was no clause on interest or applicable rate of interest, the balance was to be paid within a reasonable time to avoid applicability of interest. The plaintiff issued a notice of applicability of interest and rate to the defendant on 2<sup>nd</sup> March, 1998, and reiterated this position by its letter dated 2<sup>nd</sup> April, 1998. The defendant never made any response to the said notice and letter. So, the finding of this court is that this was a commercial transaction, and that the balance of the purchase price was payable with interest at commercial rates prevailing during that time. The plaintiff stated that the relevant commercial rates during that time ranged from 24% per annum to 37.5% per annum inclusive of default penalties. On their part the defendant submitted that there was no agreement on interest or applicable rate, and that if the court were to find that interest was applicable, then the same should be at court rates.

109. In the view of this court, the transaction before the court took place during the time when interest rates regimes reigned highest in Kenya, sometimes going to 60% per annum. In this case, this court will allow commercial interest at 28% per annum with effect from 2<sup>nd</sup> March, 1998 when the plaintiff issued the defendant with notice of applicability of interest upto the time that the balance of Shs. 35,000,000/= was paid by the defendant to the plaintiff on 4<sup>th</sup> April, 2000. Thereafter interest shall accrue at court rates from 5<sup>th</sup> April, 2000 until payment in full.

### **Final Orders**

110. This court finds that the plaintiff has proved its case on a balance of probability that it was entitled to interest at commercial rates on the balance of Kshs. 35,000,000/= which was paid to it on 4<sup>th</sup> April, 2000. Accordingly Judgment is hereby entered for the plaintiff against the defendant, and further orders are made as follows:-

- (a) Subject to any calculation errors to be corrected, the Defendant shall pay the Plaintiff interest on Kshs. 35,000,000/= at 28% p.a. with effect from 2<sup>nd</sup> March 1998 to 4<sup>th</sup> April 2000, that is Kshs. 20,471,111=.**
- (b) Interest shall accrue on (a) above at court rates from 5<sup>th</sup> April 2000 until the same is fully paid.**
- (c) Plaintiff's costs assessed herein at 30% shall be paid by the Defendant.**
- (d) The Plaintiff's claim for Kshs. 35,000,000/= is dismissed.**

**(e) The Defendant's claim against the Third Party is dismissed with costs to be paid by the Defendant.**

**(f) The Defendant's counter-claim is dismissed.**

That is the Judgment of the court.

**E. K. O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2017**

**LADY JUSTICE G. NZIOKA**

**JUDGE**