



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 116 OF 2007**

**NYANZA ENTERPRISES LIMITED .....PLAINTIFF**

**VERSUS**

**MIWANI SUGAR COMPANY (1989) LIMITED**

**(UNDER RECEIVERSHIP ..... 1ST DEFENDANT**

**KENYA SUGAR BOARD ..... 2ND DEFENDANT**

**JUDGMENT**

The Plaintiff's claim against the Defendant is for a sum of Kshs.28,919,788/08, costs of the suit and interest at market rates.

The claim is vehemently opposed.

Briefly the Plaintiff's case is that on 25th June 1999 it entered into an agreement with the 1st Defendant by which it was to pay money in advance to the 1st Defendant to finance its operations and to receive and distribute sugar for and on behalf of the 1st Defendant. It is also the Plaintiff's case that it was a term of the agreement that interest on outstanding balances on any sums advanced to the 1st Defendant would be paid at the prevailing market rates and was to be calculated on a reducing balance basis. The Court heard that pursuant to that agreement (exhibited and produced as EXB.P.1) the Plaintiff advanced a sum of Kshs.28,919,786/= to the Plaintiff but no sugar was supplied. Satish Maranathas Bhayani (PW1), a Director of the Plaintiff Company, told the Court that they continued with this arrangement where the Plaintiff would pay money in advance to the 1st Defendant for its operations and in return it would supply them with sugar to distribute until early 2001. However in early March of 2001 the Plaintiff learnt that the 1st Defendant had been put under receivership. The plant was even closed temporarily and there were many problems between it and its workers and cane farmers. PW1 testified that around the same time and more specifically by a letter dated 1st March 2001 (EXB.P3) the 1st Defendant acknowledged in writing that it owed the Plaintiff the sum of 28,919,786/=. The Plaintiff contacted the management of the 1st Defendant who promised to sort out the issue saying they were negotiating with the receivers. Thereafter when the Plaintiff learnt through the media that the Ministry of Agriculture had authorized the Kenya Sugar Board (2nd Defendant), the Debenture Holder, to enter into negotiations with the 1st Defendant's creditors and suppliers they contacted a Mr. A. O. Otieno its Chief Executive Officer who promised to look into their matter. Nothing however came of it despite payments being made to other unsecured creditors such as Ragbir Singh Chattee by the 2nd Defendant. The Plaintiff wrote several letters to the Chief Executive Officer of the 2nd Defendant whose response was that he would refer the matter to the receiver manager. Todate, and this despite demand an notice of intention to sue, the Defendants have not paid the sum owed. The Plaintiff now urges this court to find that it is entitled to be paid as was Surjit Singh who was paid despite being an unsecured creditor.

To support its case the Plaintiff produced an agreement dated 25th June 1999, their own statements of accounts and with attendant letters of acknowledgment by the 1st Defendant. These are dated **30/6/1999, 31/7/1999, 31/8/1999, 30/9/1999, 30/10/1999, 30/11/1999, 31/12/1999, 31/1/2000, 29/2/2000, 31/3/2000, 30/4/2000, 30/5/2000, 30/6/2000, 31/7/2000, 30/9/2000, 31/10/2000, 30/11/2000, 31/12/2000, 28/2/2001, 3/3/2001** and a letter by the 1st Defendant acknowledging a balance of account of Kshs.28,919,786/= as at February 2001. Also produced are a demand letter from Jane Ondieki & Company Advocates to the Receiver Manager of the 1st Defendant dated 3rd August 2007, letters from A. O. Otieno, Chief Executive Officer of Kenya Sugar Board (2nd Defendant) dated 14th August 2007, 12th August 2004, 14th September 2007, a demand letter from Jane Ondieki & Company Advocates to the Chief Executive Officer Kenya Sugar Board (2nd Defendant) dated 3rd August 2007, an Agreement between the 2nd Defendant and one Surjit Singh/Malkit Singh and Oriental Commercial Bank Limited and a document containing the Stakeholder Claims as at 31st March 2003 (EXB. P.1-12). Also tendered was an agreement between the 1st and 2nd Defendant dated 31st 2006 (EXH.P15) in regard to farmers arrears.

The Defendant called one witness Patrick Opetu who is in-charge of IT and who is charged with the custody of records including those of financial transactions. His evidence was that he does not know the Plaintiff; That the 1st Defendant has not crushed sugar since 2001 and that they do not have any evidence of the Plaintiff having had dealings with Miwani Sugar Company or anything showing that the alleged monies were ever advanced. He contended that no unsecured creditors for debts that arose prior to the receivership were paid and further that the 1st Defendant has no control of transactions between the Sugar Board (2nd Defendant) and other companies. He explained that money to pay the workers salaries and co-operative dues came from the 2nd Defendant as a good will gesture. He denied that the 1st Defendant was party to the agreement for payment of Six Hundred and Eighty Million Shillings between the 2nd Defendant and Malkiat Singh and Oriental Commercial Bank. He further stated that the accuracy of the Plaintiff's claim was queried in the Stakeholders Claim document (EXB.12) and that as at the date he was testifying he had not received anything to support the Plaintiff's claim. He pleaded ignorance of a written agreement between the 1st Defendant and the Plaintiff and urged this Court to dismiss this suit.

The 2nd Defendant did not call any witnesses.

Summing up was by way of written submissions with Counsel for the Plaintiff stating that the Plaintiff and the 1st Defendant did in fact enter into an agreement which was preceded by various discussions and subsequently reduced into writing on 25th June 1999. He submitted that although the 1st Defendant denied this agreement both in its written statement of defence and in the testimony of its witness there is proof in the **Stakeholder's Claims** (EXB.12) prepared by the Receiver Managers way back on 31st March 2003 that the 1st Defendant was aware of this debt and that in paragraph 4 "Other loans" it is shown that the Plaintiff is owed Kshs.29,256,854/10. He submitted that it is evident that all along and since the demand notices were sent, the 1st Defendant was aware of the Plaintiff's claim but decided to hide the records, and the defence is evasive and a mere denial hence inadmissible. On this he relied on **Makunga General Stores V. Pepco Distributors Limited [1987] 2 KAR**. He wondered how the Receiver Managers who do not work in the Plaintiff's office could have come up with the debt if it did not exist. He stated that the 1st Defendant's defence raises no reasonable defence and is a sham and the claim that the 1st defendant has not crushed sugar since 2001 is immaterial as the debt relates to a period prior to that. Relying on the evidence Counsel further submitted that there were instructions to the Chief Executive Officer, Kenya Sugar Board (2nd Defendant) to negotiate with creditors of the 1st Defendant whereafter the 2nd Defendant gave money to the Receiver Managers of the 1st Defendant to pay all debts and Claims. He contended that as a creditor the Plaintiff must also be considered for payment.

In regard to the 2nd Defendant the Plaintiff's Advocate submitted its defence too is a mere denial and does not sufficiently controvert the Plaintiff's claim and is therefore wholly inadmissible. That moreover as the 2nd defendant did not call witnesses what is contained in its defence are mere allegations and the Plaintiff's evidence against it is credible and should be acted upon by this Court. He relied on **Linus Nganga Kiongo & 3 Others V. Town Council of Kikuyu [2012]eKLR**. Quoting Denning J in **Miller V. Minister of Pensions [1947] 2 ALLER P. 372** Counsel submitted

that as the Plaintiff had discharged the burden of proof this Court should order the Receiver Managers of

the 1st Defendant to pay the Plaintiff immediately.

Counsel for the 1st Defendant began his submissions by stating that this Court had no jurisdiction to hear this case as the claim which lies in contract was time barred under Section 4 of the Limitation of Actions Act. He submitted that assuming that the cause of action arose out of a chain of transactions occurring over a period of time the last one being the letter by the 1st Defendant dated 1st March 2001 then this suit was filed beyond the six years limitation for contracts. He stated that by its own particulars filed on 19th March 2003 the Plaintiff confirmed that the suit was filed out of time. Referring to the letter (EXB.10) written by the Chief Executive Officer of the 2nd Defendant to the Advocates for the Plaintiff undertaking not to plead limitation he submitted that the same was not binding on the 1st Defendant or on the Court. He contended that limitation is an issue of jurisdiction and as the 1st Defendant had pleaded limitation as required under the then O.VI Rule 4 of the Civil Procedure Rules (now repealed) this case ought to be dismissed for want of jurisdiction.

On the merits of the case Counsel for the 1st Defendant submitted that the Plaintiff did not prove its case on a balance of probabilities or at all. Quoting the agreement produced as EXB.1 verbatim he stated that the same was not an admission of liability but an arrangement in which the Plaintiff would also owe the 1st Defendant on account of sugar distributed on its behalf. He contended that whereas the only way the Plaintiff could prove it paid the 1st Defendant 28,919,786/= was by production of receipts, cheques, bank transfers etc. it produced nothing. Further that there was no explanation for the discrepancy between the 29,584,931/85 it claimed by its letter dated 3rd August 2004 (EXB. 5) and what it is claiming in the Plaintiff. He submitted that the statements produced by the Plaintiff did not explain anything and that no effort was made to explain their contents and how they support the Plaintiff's case.

As for the Plaintiff's averment that the 1st Defendant paid other unsecured creditors and hence should pay the Plaintiff, it was his submission that this was not proved as the Plaintiff itself admitted that the payment was made by the 2nd Defendant and that in any event since that would have been an offence under the then Companies Act by asking the 1st Defendant to pay it the Plaintiff was asking the 1st Defendant to breach the law.

On the submission that the 1st Defendant's indebtedness to the Plaintiff is acknowledged in the Stakeholder's Claims (P EXH.12) he wondered where that interpretation came from and submitted that to the contrary a reading of paragraph 4(11) (page 38) confirms the 1st Defendant's position that **“there is no single piece of evidence to prove the Plaintiff's claim”**. Referring to the letter produced as P EXB 3 he submitted that the only sensible meaning that can be attached thereto is that it is the Plaintiff who owed money to the 1st Defendant for sugar it had distributed on the 1st Defendant's behalf. He contended that this suit is an attempt to defraud the 1st Defendant which must be stopped. He urged the Court to dismiss the suit with costs to the 1st Defendant.

On behalf of the 2nd Defendant it was submitted firstly that this suit was time barred and must therefore fail; Secondly that the 2nd Defendant was not a party to the agreement dated 25th June 1999 and neither was it in-charge of Miwani Sugar Limited (1989) Limited prior to the company being put under receivership in 2001, and the said agreement is hence not binding on it. That moreover a claim by an unsecured creditor for payment from another creditor is illegal and unfeasible as it would amount to a secured creditor being victims from holding a debenture. Counsel urged the Court to take judicial notice of the government's strategy to redeem debentures intended to free the 1st Defendant from its debt so that it could be sold to investors a move that would boost and revive the Sugar Industry. Counsel submitted that the Plaintiff's case is hopelessly bad in law and discloses no cause of action and must be dismissed with costs.

This matter was concluded on 12th May 2016 but it took a while for the Advocates to file their submissions. It was then fixed for Judgment on 27th October 2016 but come that day the Judgment was not ready due to pressure of work and as the Court was proceeding on its annual leave it was deferred to 26th January 2017. However it had to be postponed again as the Judge had to attend an Election Disputes Resolution training from 25th January 2017 which had not been foreseen. This delay is nevertheless regretted.

As required under the old rules the Plaintiff filed a statement of issues as follows:-

- “1. Whether there was an Agreement between the Plaintiff and the 1st Defendant and the terms of the same, if any.***
- 2. Whether there was a breach by any party of the Agreement, if any, between the Plaintiff and the 1st Defendant.***
- 3. Whether the Plaintiff paid Kenya Shillings Twenty Eight Million, Nine Hundred and Nineteen Thousand, Seven Hundred and Eighty Six (Kshs.28,919,786/=) in advance to the 1st Defendant.***
- 4. Whether the 1st Defendant supplied sugar to the Plaintiff to the tune of Kenya Shillings Twenty Eight Million, Nine Hundred and Nineteen Thousand, Seven Hundred and Eighty Six (Kshs.28,919,786/=).***
- 5. Whether the 2nd Defendant is the Debenture Holder over the assets of the 1st Defendant.***
- 6. Whether farmers, former employees and one Surjit Singh have been paid.***
- 7. Whether the Defendants actions amount to fraud.***
- 8. Whether this suit has been brought in contravention of the Companies Act.***
- 9. Whether the sum Kenya Shillings Twenty Eight Million, Nine Hundred and Nineteen Thousand, Seven Hundred and Eighty Six (Kshs.28,919,786/=) as due and owing to the Plaintiff from the Defendants.”***

The 1st Defendant's issues were framed as follows:-

- “1. Did the 1st Defendant enter into an agreement with the Plaintiff on or around 25th June, 1999 whereby the Plaintiff would pay in advance, receive and distribute sugar for and on behalf of the 1st Defendant who was to ensure that the same sugar was supplied?***
- 2. If the answer to Issue No. 1 is in the affirmative, did the agreement contain a term as to payment of interest on the advance payments and if so, what were the terms?***
- 3. If the answer to Issue No. 1 is in the affirmative, did the Plaintiff pay the 1st Defendant Kshs.28,919,786.00 pursuant to the agreement?***
- 4. If the answer to Issue No. 3 is in the affirmative, has the 1st Defendant admitted indebtedness to the Plaintiff?***
- 5. What is the order of payment of debts by a company in receivership?***
- 6. Has the 1st Defendant paid farmers, former employees and one Surjit Singh who are unsecured creditors Kshs.47,400,067.00, Kshs.20,841,915.00 and Kshs.330,000,000.00 respectively and if so, does the Plaintiff fall in the same category thereby entitling it to be paid?***
- 7. If the 1st Defendant did the acts referred to in Issue No. 6, are such acts fraudulent and illegal? If so, what are the particulars of such fraud?***
- 8. Has this suit been brought in contravention of the Companies Act, Cap. 486 Laws of Kenya and the Companies (High Court) Rules made under Section 344 of the said Act?***
- 9. Is the Plaintiff's claim against the 1st Defendant time barred?***

**10. Has there been a previous suit or proceeding or is any such suit or proceeding pending between the Plaintiff and the 1st Defendant regarding the same cause of action?**

**11. Does this Court have jurisdiction to entertain the Plaintiff's claim?**

**12. Who should bear the costs of this suit?"**

The 2nd Defendant does not seem to have filed a statement of issues.

Having perused the testimony of witness for the Plaintiff (recorded by my sister Aroni J), and heard that of the 1st Defendant's witness and perused the submissions of the learned Advocates for all the three parties I find that the real issues in controversy here are:-

- **ISSUE NO. 1: Whether there was an agreement between the Plaintiff and the 1st Defendant;**
- **ISSUE NO. 2: What were the terms of that agreement and did the Plaintiff pursuant to that agreement advance to the 1st Defendant a sum of Kshs.28,919,786/=?**
- **ISSUE NO. 3: Whether the 1st Defendant's letter dated 1st March 2001 and Paragraph 4(11) of the 1st Defendant's Stakeholder Claims (EXB.P 12) is an admission of the 1st Defendant's indebtedness to the Plaintiff entitling it to judgment for the sum claimed;**
- **ISSUE NO. 4: Whether the 2nd Defendant was obligated to pay the Plaintiff as it did Surjit Singh/Malkiat Singh and Oriental Bank Limited;**
- **ISSUE NO. 5: Whether this suit is time barred under the Limitation of Actions Act and consequently whether this court had jurisdiction to hear it;**
- **ISSUE NO. 6: Who bears the costs of the case.**

## **DETERMINATION**

### **ISSUE ONE:**

The genesis of the Plaintiff's claim is the letter dated 25th June 1999 which on the face of it originated from Miwani Sugar Company (1989) Limited which when admittedly put under receivership became Miwani Sugar Company (1989) Limited Under Receivership now the 1st Defendant in this case. The letter confirms an agreement to appoint the Plaintiff as its sole distributor upon terms that I shall refer to shortly and requests the Plaintiff to confirm the agreement by signing and returning a copy thereof. That letter is in the letter heads of the 1st Defendant a fact which was not denied. It is my finding that the letter, the statements and letters produced as EXB. 2-10 prove on a balance of probabilities that there was in fact a contract between the Plaintiff and the 1st Defendant.

### **ISSUE TWO:**

The Plaintiff and the 1st Defendant both give a different interpretation to the agreement dated 25th June 1999. According to the Plaintiff by that agreement it was to pay money to the 1st Defendant in advance and in return the 1st Defendant was to supply it with sugar. This fact is vehemently disputed by the 1st Defendant which contends that if there was any agreement it did not provide for payment of money to the 1st Defendant by the Plaintiff. Under Section 97 (1) of the Evidence Act this Court can look no further than the agreement for its interpretation. It was after all the testimony of the Plaintiff's witness that all prior discussions between the parties were reduced into this agreement. So what were the terms of the agreement between the parties. It is necessary at this juncture to reproduce the terms and conditions of the agreement here:-

***“1. That on mutually agreed limits you will render payments to us in respect of sugar distributed or to be distributed by you on our behalf.***

***2. All transport or sugar from our factory will be your responsibility.***

***3. All sugar will be delivered to our customers as and when required through your transport***

*facilities.*

**4. The price of sugar sold or to be sold by you shall be strictly on prices recommended by us and we shall be deemed to be vendors of the said sugar.**

**5. Regular checks in respect of sale by you of our sugar will be maintained.**

**6. All payments due to us for sale of sugar will be received by you on our behalf and remitted to us as agreed. Full supervision and accounting systems in the matter will be maintained by us in respect of each transaction by you.**

**7. In respect of the services to be rendered by you to us as our distributor you will be paid marketing charges at the rate of 5% (plus VAT) on the sale of sugar. This charges will be paid to you on monthly basis.**

**8. Interest shall be paid at the market rate on the outstanding balance to be calculated on reducing balance basis. Such interest shall be paid in form of extra discount (plus VAT).**

**9. This agreement shall bind the parties until terminated by either party by giving a written notice of 30 days to the other party and shall come into effect from 1st July 1999.”**

The wording of those terms and conditions is plain and obvious. Its language is so plain that it requires no other interpretation than its literal meaning. Indeed it applies accurately to the facts of this case as evidenced by the statements and letters produced as P EXB. 2-10. According to **condition 1** the Plaintiff, which was to be the sole distributor of the 1st Defendant's sugar, would pay the 1st Defendant for any sugar distributed or to be distributed on its behalf meaning the 1st Defendant. **Condition 2** – the Plaintiff would be responsible for the transportation of the sugar from the 1st Defendant's factory. **Condition 3** – the Plaintiff would using its own vehicles deliver the sugar to the 1st Defendant's customers. **Condition 4** – The price of the sugar would be determined by the 1st Defendant. **Condition 5** – the 1st Defendant required that regular checks in respect of sale of its sugar be maintained. **Condition 6** – The Plaintiff would receive payments for the sugar from customers which it would remit to the 1st Defendant as agreed and the 1st Defendant would maintain supervision and accounting systems in respect of each transaction by the Plaintiff. **Condition 7** – As a distributor the Plaintiff would receive a marketing fee of 5% (plus VAT) on a monthly basis.

**Condition 8** – For any outstanding balance/amount not paid an interest to be calculated at the market rate would be levied and such interest would be paid in form of extra discount (plus VAT). **Condition 9** - Either party could terminate the agreement upon giving a 30 days written notice and the agreement was to commence on 1st July 1999.

Nowhere does this agreement state that the Plaintiff was to advance money to the 1st Defendant as avered in the Plaintiff and as alleged by PW1. My understanding of the agreement is that the Plaintiff would collect sugar which it would sell or distribute on behalf of the 1st Defendant, collect payment for the sugar from the customers which it would then remit to the 1st Defendant as provided in Condition 6. For its trouble the Plaintiff would be paid a marketing fee. Any amount outstanding, and this I opine by either side, would attract an interest at market rates and which interest would be calculated on a reducing balance.

The statements produced by the Plaintiff which I agree with Counsel for the 1st Defendant were just thrown to the Court and were never explained confirm that there were sugar sales and that payments were made but some payment remained outstanding. The letters written by the 1st Defendant indicate that the statements were accurate and that the Plaintiff's account had been debited to that extent. This would only mean that the indebtedness was on the part of the Plaintiff but not the 1st Defendant. Neither the statements nor the letters are proof that the Plaintiff advanced money to the 1st Defendant. Again I agree with the Advocate for the 1st defendant that such advances if they took place could have been proved by production of cheques, bank transfers or even bank statements but not by the statements tendered. There

was no evidence at all that the Plaintiff paid money to the 1st Defendant. In his testimony PW1 stated that the money was paid in lumpsum in cash or cheque as at 28th February 2001. The letter dated 1st March 2001 is a confirmation of the balance of the Plaintiff's account and is by no means an admission that 1st Defendant owes the Plaintiff. It is instructive that the letter to which this letter responded was not produced.

**ISSUE THREE:**

The Plaintiff's Advocate submitted that paragraph 4(11) of the Stakeholder's Claim (P EXB. 12) acknowledges the 1st Defendant's indebtedness to the Plaintiff. With due respect that is far from the tooth. The said paragraph clearly states that the claim by the Plaintiff could not be verified. Counsel also wondered how the Receiver Manager could have known about this debt to include it in the Stakeholder's Claims if it did not exist. By its own letter to the Chief Executive Officer of the 2nd Defendant dated 1st July 2007 and in the testimony of its own witness the Plaintiff had not only severally written to the Receiver Manager on this matter but had visited their offices. It is not therefore surprising that it was raised as one of the Stakeholder's Claims. However, as I have stated earlier the claim's genuineness and accuracy was put to doubt. I have already dealt with the letter dated 1st March 2001 in the preceding paragraph and stated that it too is not an admission of indebtedness.

**ISSUE FOUR:**

Having come to the conclusion that there was no evidence of the 1st Defendant's indebtedness to the Plaintiff I find that the 2nd Defendant was under no obligation to pay it as it did other creditors and indeed the 2nd Defendant gave a reasonable explanation of who paid the other creditors and why.

**ISSUE FIVE:**

The cause of action in this case arises from a series of transactions that occurred between 25th June 1999 and 1st March 2001. This suit was filed on 7th September 2007 six years after the period of limitation for suits based on contract which period lapsed in February 2007. The 1st Defendant pleaded limitation at paragraph 13 of its defence and clearly therefore this claim was caught up by limitation.

**ISSUE SIX:**

Costs follow the event and as I have found there is absolutely no evidence to support the Plaintiff's claim against the Defendants and that in any event this suit was time barred I order that the costs thereof be borne by the Plaintiff. Judgment accordingly.

**Signed, dated and delivered at Kisumu this ...9th... day of ...February.... 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

N/A for the Plaintiff

Mr. Otieno D. for the 1st Defendant

N/A for the 2nd Defendant

C/A: Serah Sidera