



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL CASE NUMBER 608 OF 2009**

**MFI SOLUTIONS LTD. .... PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL OF KENYA. .... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF STATE FOR DEFENCE. .... 2<sup>ND</sup> DEFENDANT**

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

1. By a Complaint dated 19<sup>th</sup> August, 2009, the Plaintiff alleged that in or about September, 2003, the Defendants requested the Plaintiff to consign to the 2<sup>nd</sup> Defendant certain printers and toners. That pursuant thereto, on 19<sup>th</sup> July, 2004, the Plaintiff delivered to the 2<sup>nd</sup> Defendant 950 free printers and 3800 chargeable toners at a price of Ksh.20,800/- per toner exclusive of V.A.T.

2. The Plaintiff further alleged that, on 4<sup>th</sup> November, 2004, the 2<sup>nd</sup> Defendant awarded the Plaintiff a contract for tender No. DOD/423/(145)2005/2006 for Maintenance, Repair and Overhaul of Mita Photocopiers/Printers for the period ending September, 2006 which also included the price for TK 17 toners. That during the currency of that contract, the 2<sup>nd</sup> Defendant only paid for 130 pieces of toners and 3670 pieces remained unpaid for. The Plaintiff therefore claimed a sum of Kshs.76,336,000/-(exclusive of VAT) being the value of the said 3670 pieces of TK 17 toners plus costs and interest.

3. In their Defence, the Defendants admitted that a total of 3800 TK 17 toners were delivered by the Plaintiff alongside printers but denied having requisitioned or accepted to pay for the same at the time of delivery. The Defendants further admitted that contract No. DOD/423 (145) 2004/2005 for the maintenance, repair and overhaul of Mita Photocopiers for the period ending 30<sup>th</sup> September, 2006 was awarded to the Plaintiff but denied that the same included wholesome purchase of the TK 17 toners delivered into the 2<sup>nd</sup> Defendants store in July, 2004.

4. The Defendants contended that under the aforesaid contract, items including the TK 17 toners were to be procured on the issuance of a Local Purchase Order (LPO) or Local Service Order (LSO). That the said toners would be released based on the LPO/LSOs issued to the Plaintiff and on its authority. That during the subsistence of the said contract a total of 77 TK 17 toners were released from the 2<sup>nd</sup> Defendant's stores on the foregoing basis and the rest remained the property of the Plaintiff. That the Plaintiff was only entitled to payment on the toners issued on the basis of LPOs/LSOs issued. Accordingly, the Defendants denied the Plaintiff's claim in toto.

5. At the trial, the Plaintiff called one witness whilst the Defendants called three (3). PW 1, Danny Solanki the Business Manager of the Plaintiff told the court that on 3<sup>rd</sup> July, 2003, the Plaintiff wrote a

letter to the 2<sup>nd</sup> Defendant to compare the performance of Kyocera Mita printers 1900 and that of HP Printers with a view of cutting on costs; that upon demonstration, the 2<sup>nd</sup> Defendant confirmed acceptance of the Plaintiff's proposal whereupon 950 printers and 3800 chargeable toners were delivered in two containers to the department of Defence Armed Ordinance Depot Kahawa Store. The Plaintiff paid for the clearing charges at the Port of Mombasa.

6. It was PW1's testimony that on 4<sup>th</sup> November, 2004, the Plaintiff was informed of having been awarded contract for Tender No. DOD/423(145)2005/2006 for maintenance, repair and overhaul of photocopiers/printers for the period ending 30<sup>th</sup> September, 2006, including the price for TK17 toners; that at the expiry of the said contract, the Plaintiff had supplied a total of 3800 toners for which the 2<sup>nd</sup> Defendant had only paid for 130 pieces. That a total of 3670 pieces which was still in the 2<sup>nd</sup> Defendants custody valued at ksh.76,336,000/-(exclusive VAT) had not been paid for which sum the Plaintiff was now claiming.

7. PW1 further told the court that the packing list showed that the items ordered by the 2<sup>nd</sup> Defendant was 950 printers with 3800 toners; that the goods delivered to the 2<sup>nd</sup> Defendant belonged to the latter and not the Plaintiff as per the packing list; that the Bill of Lading for the goods showed that the items belonged to the 2<sup>nd</sup> Defendant and they were not vatable. According to PW 1, the goods were ordered by the 2<sup>nd</sup> Defendant to whom they were consigned and that it is the 2<sup>nd</sup> Defendant who was exempted from paying VAT and had received and accepted the goods. The Defendants should therefore pay for them.

8. On cross-examination, PW 1 admitted that the printers were being donated to the Defendants at no Capital Expenditure or conditions; that as at July, 2004 when the toners were being supplied to the 2<sup>nd</sup> Defendant, there was no contract between the Plaintiff and the 2<sup>nd</sup> Defendant; that the contract No. DOD/423 (145) 2004/2005 was not relevant to the claim for the 3800 toners. He further admitted that there was no contract between the Plaintiff and the 2<sup>nd</sup> Defendant prior to the delivery of the 3800 toners. He confirmed that a letter by the 2<sup>nd</sup> Defendant dated 30<sup>th</sup> September, 2003 triggered the Plaintiff to contact the manufacturer and prepare the packing list for the items later on supplied to the 2<sup>nd</sup> Defendant. He however denied that the 3800 toners delivered to the 2<sup>nd</sup> Defendant was part of the donation of the 1900 printers offered by the Plaintiff to the 2<sup>nd</sup> Defendant.

9. DW I, Brigadier Samuel Ng'ang'a Thuita was the Colonel in Charge of Logistics and Supply for the 2<sup>nd</sup> Defendant between 2000 and 2003. He recalled that sometimes in 2003 after some demonstration on the Plaintiff's new Kyocera Printers, the Plaintiff offered to donate to the 2<sup>nd</sup> Defendant printers at no capital expenditure at all or conditions. That the offer was accepted in writing vide a letter dated 30<sup>th</sup> September, 2003. That the 2<sup>nd</sup> Defendant expected the donation to be complete i.e. printers and toners. That the 2<sup>nd</sup> Defendant did not accept purchase of consumables and that is why his letter indicated "no conditions" to the offer. According to PW 2, the contract No. DOD/423(145) 2004/2005 dated 26<sup>th</sup> November, 2004 was for overhaul and repair of photocopiers not for purchase of toners. That if there was to be any purchase of toners, the same was to be through LPOs which never happened in this case.

10. On cross-examination, DW1 confirmed that he briefed his seniors on the cost effective demonstration that the Plaintiff had undertaken with its Kyocera Mita Printers. That to him, the toner was part of the donation as a toner is part of a printer. That when he was writing the letter of 30<sup>th</sup> September, 2003, he had not seen the letter of 3<sup>rd</sup> July, 2003 by the Plaintiff.

11. DW 2 Lieutenant Col. Gitau Kariuki was the Officer in charge of supplies at the Defence Headquarters between 2008 and 2012. He explained the procedure which the 2<sup>nd</sup> Defendant uses in obtaining its supplies. This is, generation of a requirement, calling of bids and ultimate tender for the same. A contract is ordinarily signed after a tender is awarded. The Permanent Secretary of the Parent Ministry ordinarily signs the contract on behalf of the 2<sup>nd</sup> Defendant with the bidder for a binding contract to be said to have been entered with the 2<sup>nd</sup> Defendant. According to DW 2, this process was

never followed in the present case as this was a case of a donation offered by the Plaintiff which was accepted by the 2<sup>nd</sup> Defendant. That the contract No. DOD/423 (145) 2004/2005 dated 26<sup>th</sup> November, 2004 was not in respect of the toners delivered in July, 2003. That since the 2<sup>nd</sup> Defendant received 950 printers, it expected to receive 950 initial toners but instead received 3800 toners. That since the toners at the Armed Forces Ordnance Depot (AFOD) did not belong to the 2<sup>nd</sup> Defendant, each time the 2<sup>nd</sup> Defendant required the same, it issued an LPO to the Plaintiff.

12. On cross-examination, DW 2 told the court that there never was any contract between the Plaintiff and the 2<sup>nd</sup> Defendant for supply of toners; that the only contract in force between the two was contract NO. DOD/423 (145)/2004/2005 which was effective between November, 2004 and September, 2006. That the toners in excess of 950 should have been released to the Plaintiff at the Port. He admitted that although the 2<sup>nd</sup> Defendant received the packing list showing that what was being delivered was 950 printers and 3800 toners the 2<sup>nd</sup> Defendant did not challenge those details. He was unable to explain how the toners were in the custody of the 2<sup>nd</sup> Defendant at AFOD but admitted that, that was a serious irregularity.

13. DW 3 LT. Col. David Kipembi Keter was a Senior Procurement Officer at the Armed Forces at the time he testified. He told the court that the items supplied by the Plaintiff being the 950 printers and 3800 were received and processed at AFOD. That whilst the printers were distributed to the units, the toners were to be requisitioned on need basis. That a total of 150 toners were released to the Plaintiff vide LPOs whilst the rest were lying at the 2<sup>nd</sup> Defendant's warehouse at the time he testified.

14. On cross-examination, DW3 told the court that a civilian is not allowed to remove items from the military and deliver the same to another unit. That contrary to this, the LPOs produced in respect of the toners in question suggested that the Plaintiff was removing the toners from AFOD and supplying them to the various units in the Armed Forces. He contended that the delivery of the toners to AFOD was suspicious. He maintained that the balance of the toners were still lying at AFOD.

15. After the testimonies, learned counsel filed their respective written submissions which were ably highlighted by Mr. Kilonzo Junior for the Plaintiff and Mr. Muiruri for the Defendants. The parties filed an agreed list of issues which they however abandoned. They addressed fresh issues in their submissions which the court has considered. Considering the pleadings in this case, the evidence tendered and the submissions of learned counsel, to my mind the issues for determination are; whether there was a contract between the parties; if so, what were the terms of that contract were; whether there was a contract for sale of 3800 toners between the parties to this suit, whether the award of tender in November, 2004 constituted a contract for the sale of the 3800 toners. Finally, is the Plaintiff entitled to the prayers sought?

16. From the evidence on record, it is clear that before July, 2003 the Plaintiff was a supplier of the 2<sup>nd</sup> Defendant of photocopying papers. In July, 2003, the Plaintiff offered to donate to the 2<sup>nd</sup> Defendant 1900 Kyocera Mita 1010 printers for free save for consumables. Pursuant to that offer, the Plaintiff carried out some demonstrations on the efficiency and cost effectiveness of its said new Kyocera Mita printers at the 2<sup>nd</sup> Defendant's headquarters whereby, the 2<sup>nd</sup> Defendant accepted the Plaintiff's offer. Upon such acceptance, the Plaintiff caused to be imported and delivered to the 2<sup>nd</sup> Defendant 950 Kyocera Mita Printers and 3800 TK 17 toners. The Plaintiff produced, inter alia, a Packing List dated 25<sup>th</sup> March, 2004, IDF No. 2916, Bill of Lading No. PONLRMTM 26001726 and Dispatch Waybill Nos. 22058 dated 19<sup>th</sup> July 2004 (PEXh 1 pages 9-13) showing that 2X40 container No's GLDU 0740939 and OCLV 7010365 containing the said items were delivered to and received at the 2<sup>nd</sup> Defendant's AFOD at Kahawa on 19<sup>th</sup> July, 2004.

17. According to the Plaintiff, the 2<sup>nd</sup> Defendant had ordered, acknowledged receipt or taken possession of, inter alia, the 3800 toners, and kept custody thereof. To the Plaintiff, there was a complete contract in respect of which legal relations flowed. To the Defendants, no contract had been proved to exist.

18. In this case, there was no one single document from which one can point out the existence of the

contract. One has to refer to a milliard of documents and the conduct of the parties to be able to know the intention of the parties. To my mind, the crucial documents at this stage are the offer and acceptance documents. The Plaintiff's offer is contained in the letter dated 3<sup>rd</sup> July, 2003 (PEXh1 page 3). The Plaintiff wrote, inter alia;

***“MFI office solutions Ltd, have a long business partnership with D.O.D going back to over 15 years. In this context, our principals Kyocera Mita Europe NV, have availed packaged priced on the Kyocera Mita Printers 1900, units.***

***MFI Office Solutions Ltd, is subsequently pleased to per(sic) on the pricing benefits to D.O.D as follows: -***

***As part of our mission and vision, to massively cutting down costs, to enhancing productivity, without absolute compromise on quality, we recommend 1900 KM 1010 printers at absolutely no CAPEX save for purchase of consumables.....***

***For demonstration, we have given 1 Mita Kyocera printer FS -1010 to your logistic Department for comparison against other printers at D.O.D.” (Underlining mine)***

19. After carrying out the demonstration and having internal consultation, the 2<sup>nd</sup> Defendant accepted the Plaintiff's offer vide its letter dated 30<sup>th</sup> September, 2003 as follows:-

***“DONATION OF 1900 KYOCERA MITA F5 1010 DESK TOP PRINTERS TO D.O.D***

***We wish to thank you most sincerely for offering to donate 1900 Kyocera (sic) Mita F51010(sic) Desk top Printers to D.O.D. at absolutely no capital expenditure (CAPEX) nor conditions.***

***Please consign the printers as follows: -***

***Department of Defence***

***Armed Forces Ordinance Depot***

***Kahawa.***

***Attention. S.P.O***

***Once again, accept our sincere appreciation for the donation.” (Underlining mine)***

The 2<sup>nd</sup> Defendant's letter was signed by S N Thuita who testified as DW 1.

20. How are these documents to be treated? In the case **of Rose and Frank Co. Vs J.R. Crompton & Bros Ltd (1923) 2KB 262**, Lord Justice Scrutton held at page 288 that: -

***“Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties.”***

At page 293 thereof, Atkin LJ held that: -

***“To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of***

***law as to formation of contracts.”***

21. In the present case, the offer made by the Plaintiff was clear and express. The Plaintiff was offering to donate 1900 Kyocera Mita Printers to the 2<sup>nd</sup> Defendant **“at absolutely No. CAPEX, save for purchase of consumables”**. It is clear that the offer contained a condition that consumables were to be purchased. In its acceptance, the 2<sup>nd</sup> Defendant was categorical. The donation of 1900 Kyocera Mita printers was at **“absolutely no Capital Expenditure (CAPEX) nor conditions.”** The acceptance gave instructions how the printers were to be delivered.

22. From the foregoing, I am satisfied that whilst the Plaintiff’s offer contained a condition that the consumables were to be paid for, the 2<sup>nd</sup> Defendant was categorical in its acceptance, that the donation was to be with no CAPEX nor conditions. DW 1 who was the author of the acceptance letter testified that the words “nor conditions” meant that, the 2<sup>nd</sup> Defendant was not bound to order from the Plaintiff the toners for the donated Kyocera Mita Printers. It would seem that the parties were in agreement that there was to be a donation at no capital expenditure at all. What the parties were not in agreement in is the consumables. Whilst the Plaintiff indicated that the consumables were to be purchased, the 2<sup>nd</sup> Defendant was categorical that the donation was being accepted with no conditions attached. To my mind therefore, it cannot be said that the letters of 3<sup>rd</sup> July, 2003 and 30<sup>th</sup> September, 2003 constituted a complete contract. The parties were in agreement on only one thing, the donation of 1900 Kyocera Mita printers to the 2<sup>nd</sup> Defendant at no Capital Expenditure. I doubt if there was any agreement on anything else.

23. I say so because, the letter of 03/07/03 by Plaintiff had two parts. Firstly, the donation of the 1900 Kyocera Mita printers at no Capex and secondly, purchase of consumables. The consumables in my view will include the TK 17 toners and other repair parts. On the other hand the 2<sup>nd</sup> Defendant’s letter of 30<sup>th</sup> September, 2003 had three parts. Firstly, acceptance of the donation of the 1900 Kyocera Mita Printers at no Capex, secondly, acceptance of the said donation without conditions by use of the words “nor conditions”; and thirdly, directing what was to be consigned and where i.e., the printers at the Department of Defence, Armed Forces Ordinance Depot Kahawa.

24. In my view at best, the letter of 30<sup>th</sup> September, 2003 could be said to have been a counteroffer to the Plaintiff’s offer contained in the letter of 3<sup>rd</sup> July, 2003. This is borne by the 2<sup>nd</sup> Defendant’s use of the additional words “nor conditions” having accepted the offer for donation at no capex in its letter of 30<sup>th</sup> September, 2003.

25. Mr. Kilonzo, learned counsel for the Plaintiff, quite rightly submitted that in order to discern the existence of the contract between the parties, the court needs to look at the intention of the parties. He cited the case of **Grofin East Africa Fund LLC & Anot Vs Joan Traders and Anor HCCC No. 268 of 2008 (Uganda)** wherein the court quoted with approval the dicta of Lord Birmingham of **Cornhill in Bank of Credit and Commercial International S.A (in liquidation) VS Ali (2001) 1 ALL ER 96**. In that case, it was held that: -

***“In construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words he uses the natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the parties.” (Emphasis added)***

26. Looking at the correspondence between the parties herein, their relationship and the surrounding circumstances, was there an intention to enter into a contract for the Sale of 3800 TK 17 toners? Were the parties at ad idem? Reliance was placed on the packing list dated 25<sup>th</sup> March, 2004, IDF No. 2916, Bill of Lading No. PONLRMTM 26001728 and Waybill No. 22058. All these documents show that what was imported, cleared at the Port of Mombasa and delivered to AFOD at Kahawa was 950 Kyocera Mita Copiers and 3800 TK 17 toners. It was submitted for the Plaintiff that these items were received,

acknowledged and kept by the 2<sup>nd</sup> Defendant without question. The toners were never rejected nor returned.

27. Further, the Plaintiff relied on the letters by the 2<sup>nd</sup> Defendant dated 4<sup>th</sup> November, 2004 and 25<sup>th</sup> December, 2014 as well as contract No. DOD 423(145) 2004)/2005 to establish the existence of a contract for sale and purchase of the 3800 TK 17 toners.

28. To begin with, in its letter of 30<sup>th</sup> September, 2003, upon accepting the Plaintiff's offer for a donation of 1900 Kyocera Mita Printers, the 2<sup>nd</sup> Defendant was specific as to what was to be consigned. It specified it to be, the printers and nothing else. The items appearing in the Packing List, the Import Declaration Form and the Bill of Lading were all prepared by the Plaintiff. It was never suggested by PW 1 that the 2<sup>nd</sup> Defendant had anything to do with the order for the goods contained in the said documents. To the contrary, the evidence on record shows that the only role played by the 2<sup>nd</sup> Defendant was receipt and storage of the items at AFOD.

29. The question that arises and which the Plaintiff did not answer is, at what time was it agreed that the 2<sup>nd</sup> Defendant needed or required a total number 3800 TK 17 toners? The first time the quantity of toners surfaced was in the packing list. It was never suggested that the Plaintiff ever informed the 2<sup>nd</sup> Defendant that it required the TK 17 toners and the quantity for the Kyocera Mita Printers that was being donated.

30. As regards the 2<sup>nd</sup> Defendant's letters of 4<sup>th</sup> November, 2004 and 23<sup>rd</sup> December, 2004, the first letter was a notification of tender results to the Plaintiff. In that letter, the 2<sup>nd</sup> Defendant informed the Plaintiff about the award of tender No. DOD/423(145)2004/2005. which was for Maintenance/Repair, overhaul of the Mita Copiers. That contract was made on 26<sup>th</sup> November, 2004 and was executed by the parties. It neither related to the donation of the 950 printers, their maintenance or repair nor the delivery of the 3800 TK 17 toners. That agreement stated in its recital clause for supply and delivery as follows: -

***"1. The contractor hereby agrees with the Government to supply and deliver the articles specified and at the time or times set out in the following documents annexed hereto.***

***REF: OUR NOTIFICATION LETTER DATED: 4<sup>TH</sup> NOVEMBER 2004 FOR THE MAINTENANCE/REPAIR/OVERHAUL OF THE MITA PHOTOCOPIERS – ARMED FORCES***

***DURATION: FOR THE PERIOD ENDING 30<sup>TH</sup> SEPTEMBER, 2006"***

31. To my mind, in its plain natural and ordinary meaning, that contract was clearly for maintenance, repair or overhaul of Mita photocopiers. There was no reference whatsoever to either the printers or the 3800 TK 17 toners already delivered over four (4) months earlier i.e. July, 2004. If it was in the contemplation of the parties that that contract would extend to cover the delivery of the said toners, nothing would have been easier than to expressly say so in the contract. I think it is none of the business of the court to make contracts for parties. A court cannot read terms into a contract of the parties unless from the dealings between the parties and the relevant facts surrounding the transaction, such a term is implied. This case is not one of such instances where the court can imply any such terms.

32. As regards the letter of 23<sup>rd</sup> December, 2004, that was an internal communication by one of the officers of the 2<sup>nd</sup> Defendant to the various formations and/or units of the Kenya Defence Forces on how the donated printers were to be distributed. It was contended by the Plaintiff that the said letter indicated that the Plaintiff's offer had been accepted. I have carefully scrutinized that letter. In paragraph 1, the letter is generally informing about the donation. In paragraph 2, it alludes to the acceptance of the donation. It also indicates that the said 950 printers and 3800 TK 17 toners had been received at AFOD. In paragraph 4, the letter indicates that the maintenance and repair of the printers and supply of the toners was to be at the cost of the 2<sup>nd</sup> Defendant. It stated clearly that the toners were to be released on need basis and through Local Purchase Orders (L.P.Os). In my view, there is nothing in that letter to suggest

that there was any contract for the supply of the 3800 TK 17 toners.

33. In any event, DW 2 narrated in court the procedure to be followed when the 2<sup>nd</sup> Defendant enters into contract for the supply of goods or services. Those strict procedures were never followed in this case by the Plaintiff. DW 2's view was, and I think quite correct, that there may have been an attempt by some personnel at the 2<sup>nd</sup> Defendant to assist the Plaintiff to evade payment of taxes on the cargo of 3800 toners.

34. It was contended for the Plaintiff that the property in the 3800 TK 17 toners had passed to the 2<sup>nd</sup> Defendant. That by virtue of Sections 19 and 20(d) of the Sale of Goods Act, Cap 31, the property in the goods had passed to the 2<sup>nd</sup> Defendant on receipt of the goods. That the 2<sup>nd</sup> Defendant having received and retained the goods and having failed to reject or return them within a reasonable time without intimating to the Plaintiff that it had rejected the same, the property therein had passed to it. Section 36 of the Sale of Goods Act and the case of **Poole Vs Smith (Balham) Ltd (1962) 2 ALL ER 482** were relied on in support of that contention.

35. Section 19 of the Sale of Goods Act provides: -

***“(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.***

***(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case”***

36. On the other hand Section 20(d) of that Act provides: -

***“When goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer: -***

***(i) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;***

***(ii) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, or, if no time has been fixed, on the expiration of a reasonable time.”***

37. Under Section 19 of the Act, property passes when the parties intend. Such intention is to be discerned from the terms of the contract or the conduct of the parties. From the evidence on record, it is not expressly clear when the parties intended that the property in the 3800 TK 17 toners do pass to the 2<sup>nd</sup> Defendant.

38. As regards Section 20 (d) of the Act, it is clear that the 2<sup>nd</sup> Defendant did not signify its approval or acceptance of the said 3800 TK 17 toners. It is also clear that the 2<sup>nd</sup> Defendant did not give notice to the Plaintiff of its rejection of that consignment within a reasonable time or at all. The 2<sup>nd</sup> Defendant has continued to be in possession of over 3600 TK 17 toners for over 10 years now! Did the property therein then pass? If so, when? Section 36 of the Act provides: -

***“36. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”***

39. I have considered the case of **Poole Vs Smith's Care Sales (Balham) Ltd (1962) 2ALL ER 482** relied by the Plaintiff. The facts and circumstances in the **Poole Vs Smith's Case** are not applicable in this case. In that case, there was clear evidence that the vehicle had been delivered to the Defendant on

the basis of **“Sale or return”**. The Plaintiff demanded for the return of the vehicle within a specified time which demands the Defendant failed to heed.

40. In the instant case, firstly, it is not clear on what basis the 3800 TK17 toners were delivered to the 2<sup>nd</sup> Defendant in July, 2004. There was no evidence to show that the goods had been delivered to the 2<sup>nd</sup> Defendant as a sale. At no time did the Plaintiff demand for their return or deem them sold to the 2<sup>nd</sup> Defendant. To the contrary, it would seem that either the Plaintiff intended to hoodwink the 2<sup>nd</sup> Defendant to pay for items the latter did not require or force a sale of the 3800 TK 17 toners upon the 2<sup>nd</sup> Defendant.

40. However, from the conduct of the parties it can be safely concluded that the Plaintiff and the 2<sup>nd</sup> Defendant may have been in agreement as to when the property in the 3800 TK 17 toners was to pass. Pages 17 to 36 of the P Exhibit 1, are various Invoices and LPOs by the Plaintiff and the 2<sup>nd</sup> Defendant. It would seem that in terms of the 2<sup>nd</sup> Defendant’s letter of 23<sup>rd</sup> December, 2004, as and when a need arose, the 2<sup>nd</sup> Defendant would raise an LPO for the Number of toners required to the Plaintiff who then raises an invoice/delivery note whereby, the toner is then released from the AFOD stores to the Unit requiring the same. To my mind, that can be said to be when the property in the toners passed from the Plaintiff to the 2<sup>nd</sup> Defendant. Otherwise than that, the property in the toners remained in the Plaintiff.

42. Accordingly, in my view and I so hold, that there was no contract of sale of 3800 TK 17 toners to the 2<sup>nd</sup> Defendant. The said toners belonged to and are still the property of the Plaintiff. The 2<sup>nd</sup> Defendant is not bound to pay for their value. The loss has to fall where it lies, with the Plaintiff.

43. Ultimately, the Plaintiff has not proved its case to the balance required in law and its suit is for dismissal and is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at Nairobi this 8<sup>th</sup> day of May, 2015.

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**A. MABEYA**

**JUDGE**