REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 577 OF 1985

BROLLO KENYA LTD...PLAINTIFF

VERSUS

CYRIL ONDATTO & 3 OTHERS.................................DEFENDANT

JUDGMENT

March 2, 1989, **Githinji J** delivered the following Judgment.

The Plaintiff – a Limited Liability Company, has sued Cyril Ondatto (First Defendant), CA Malenya (Second Defendant), JC Muga (Third Defendant), BM Munyeki (Fourth Defendant) respectively on their own behalf and "on behalf of all other Committee Members of Municipal Stadium Harambee Flood Lights Project Committee Mombasa" to recover a sum of shs 687,023/-. It is pleaded in paragraph 3 of the plaint that the shs 687,023/- is the

> "balance due and owing by the defendants to the plaintiff for materials supplied and services rendered by the plaintiff to the defendants at the defendants' request and instance in terms of an agreement entered on the 21st April, 1983 ....".

The four defendants who are represented by Mr Kitonga filed a joint statement of defence.

In paragraph 2 of the defence, the four defendants deny owing the plaintiff the sum of shs 687,023/-.

In paragraph 3 of the defence, the defendants plead that they would contend that plaintiff's suit lacks particulars and is bad in law.

In paragraph 4, the defendants plead without prejudice that their contract with the plaintiff was for a sum of shs 880,000/- which contract was never varied and that the plaintiff is in breach by failing to complete the contract.

In paragraph 5 the defendants admitted the jurisdiction of this court.

Four agreed issues were filed namely:-

1. Are the defendants jointly and severally liable to the plaintiff on their own behalf and that of all other committee members of the Municipal Stadium Harambee Flood Lights Project Committee of Mombasa in the sum of shs 687,023/-?

2. Was the original contract entered into between the parties varied?

3. Which party is in breach of the contract?

4. What amount if any, is payable to the plaintiff plus costs and interest thereon?

Mr Esmael Jivanji (PW1) who is the General Manager of the plaintiff company is the only witness called by the plaintiff. According to him the four defendants are committee members of Mombasa Stadium Floodlights Project and that in 1982 the plaintiff and the Project Committee entered into a contract for erecting towers for installation of the floodlights at a contract price of shs 880,000/- and the plaintiff agreed to build the towers at that price. PW1 produced a letter dated 4/6/82 (Ex 2) from the 4th defendant which he calls the original contract and which reads as follows:-

> **<u>“MOMBASA STADIUM FLOODLIGHTS</u>**
>
> I make reference to your letter GM/NN/084/82 of 28th May, 1982 addressed to Mr Ondatto, Chairman of Municipal Stadium Floodlights Project and copied to me, Executive Secretary, and inform you with pleasure that at their meeting of May 19, 1982 the Project Committee agreed to award you Brollo (K) Ltd., and M/s Mare Electric Ltd, the contracts of installing 4 towers including live work and installing floodlights fittings as per the specifications and details contained in your quotations of May 10, 1982 from Brollo (K) Ltd, and 8th April, 1982 from Mare Electric Limited.
>
> “ Our advocate is in the process of drawing contract documents for signing but in the meantime, I would like you to start construction and steel work on the strength of the letter to avoid delay and consequential price rises as mentioned in your quotation documents.”

That letter is addressed to Mr G Moreto, the Factory Production & Financial Manager of the plaintiff company.

PW1 testifies that other than the letter Ex 2, there was no other documents of the contract and that no formal contract was drawn as stipulated in the letter Ex 2. According to him, he started the project before the formal contract was drawn and built the floodlights towers. However, PW 1 goes on to say that because of increased prices of materials, the plaintiff was not able to finish the work and by an Agreement dated 21/4/83 (Ex 1) entered into by the plaintiff and the four defendants the original contract price of shs 880,000/- was varied upwards to shs 1,347,023/-. Before the contract price was varied, the plaintiff had been paid shs 660,000/-. The plaintiff therefore claims the difference between the contract price of shs 1,347,023 and the shs 660,000/- (that is shs 687,023/-).

It is the contention of PW 1 that the plaintiff has finished the project and he tendered letter dated 29/10/84 addressed to the plaintiff by the second defendant (Ex 3) as evidence that the project is complete.

Mr Charles Adavaji Malenya (DW.1) (second defendant) gave evidence on his behalf and on behalf of the defendants. He is a member of Municipal Stadium Floodlights Project Committee as well as project engineer.

According to him, the Municipal Stadium Floodlights Project is a Harambee Project where various groups have come together to render voluntary services. He elucidates that the Project Committee which is composed of 40 or 50 members comprise of representatives of various groups such as the Council, Government, Footbal Committee, Bamburi Cement Co, KANU, Doctors, Hotel Industry, Cargo Handling Services, etc, and that Mr Brollo of the plaintiff company was a member of the Project Committee.

DW.1 described the circumstances under which the contract was made and the terms of the contract and subsequent variations as hereunder. The plaintiff appeared before the Project Committee and offered to erect four towers and four electric cabins at a contract price of shs 880,000/- which offer was accepted by the Project Committee. The full committee then authorised the fourth defendant (Secretary of the Project

Committee) to write to the plaintiff as per letter dated 4/6/82 (Ex 2). The contract price of shs 880,000/- was based on drawings from Sondhi Consulting Engineers employed by the plaintiff and the costing was done by Mr Moretto the site engineer of the plaintiff company. The Project Committee also contracted with Mare Electric for electrical installation and with Umoja Electric Co which had to do other electrical work.

It was stipulated that a formal agreement would be drawn but it was never prepared. After doing most of the work the plaintiff abandoned the project in about December 1982 and sought an increase of the contract price and on 9/12/82, the plaintiff wrote to the first defendant as chairman of the Floodlights Committee. The letter dated 9/12/82 (D Ex I) reads in the relevant part as follows:-

> **"Re: Mombasa Floodlights Project**
>
> I wish to bring to your attention serious discrepancies that occurred in our verbal gentlemanly agreement to undertake the above project. As you know, you and our former Production Manager agreed on certain estimated figures which were never validated by a formal contract. Secondly, the estimates which Mr Moretto gave were never based on any figures produced by a quantity surveyor. What has therefore transpired is that we have been working on under estimated provisional figure of Kshs 880,000/00 which is far below our actual cost.
>
> "The following breakdown will confirm this:-
>
> 1. Foundation work undertaken by M/s Campagnoia – Invoice attached - Kshs 546,328=
>
> 2. Fabrication work undertaken by M/s Bahati Construction –Letter ttached -250,000=
>
> Our own materials 20,000 Kgms
>
> Galvanized – Total 240,000=
>
> Bolts and nuts - 100,000=
>
> Painting of the structures - 40,000=
>
> Cutting of trees in the Stadium - 20,000=
>
> Architectural Fees – Invoice attached - 41,695=
>
> Total disbursements - 1,238,023=
>
> Add Contigencies - 80,000=
>
> Kshs 1,318,023=
>
> This makes a total of Kshs 1,318,023.00. In order for us to break even, it forces us to request for a revision of this project to a minim of Kshs 1,318,023/-.
>
> Please let us have your firm agreement on our proposal."

After many correspondences DW 1 whose work it was to regularly inspect the progress of the project reported to the main Project Committee which held a meeting on 23/3/83 and under Minute No 1/83 (Ex D 2) resolved as follows:-

“1. It was disappointingly noted by the committee that despite the discussion held under Minute 29/82, M/s Brollo Kenya Limited and M/s Mare Electric had not completed the work that they were supposed to do. It was noted that Brollo Kenya Limited had failed to meet its obligation as had been agreed upon at the last meeting. After a lengthy discussion, it was agreed that since Mr Ngeny did not seem to commit Brolle Kenya Limited on vital matters, it was appropriate for the committee to send a delegation to the general manager for discussion on these matters.

The delegation will also raise the matter concerning Minute 30/82. The delegation will comprise the Chairman, Secretary and Mr Muga (Town Treasurer’s Department)........”.

As authorised by the Project Committee the delegates who are the four named defendants held a meeting with the plaintiff on 21/4/83 resulting in the signing of the document (Ex I) on which the plaintiff relies as basis for variation of the contract price. I reproduce the document (Ex I) *in extenso*:-

‘RESOLUTIONS ARISING FROM A JOINT MEETING BETWEEN GENERAL

MANAGER BROLLO (K) LIMITED AND

PROJECT COMMITTEE ON 21ST APRIL, 1983

Present:

Mr C Ondatto – Chairman

Mr Malenya – Project Engineer

Mr JC Muga – Treasurer

Mr BM Munyeki – Secretary

Mr Ombuoro (GM) – Representing Brollo

Mr Jivanji (Chief Accountant) Brollo

Mr Ng’eny.

1. Provision of conduits for Housing Electric Cables The General Manager stated that the responsibility of providing conduits for housing wiring cables lay with Electrical contractors M/s Mare Electric Limited but not M/s Brollo (K) Limited. He however stated that his company would be prepared to provide the conduits providing the cost thereof would be met by Project Committee. The cost would be:-

Conduit pipes – Shs 22,218/25 and Shs 40,000/- for labour.

The Committee agreed to consider M/s Brollo’s representation and announce its decision later.

2(a) Cost Variation Following a request from M/s Brollo (K) Limited for cost variation the following final figures were agreed upon:-

Original cost shs 880,000.00

Approved increase shs 467,023.00

Total Project Cost shs 1,347,023.00

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2(b) It was noted that to-date some Kshs 660,000/- has already been paid. A further payment of Kshs 180,000/ - would be made immediately.

2. It was further agreed that M/s Brollo (K) Limited will do the remaining works including painting as soon as possible.

Confirmed as true record of proceedings and agreements thereupon

GENERAL MANAGER FOR M/S BROLLO (K) LTD Sgd.

CHAIRMAN sgd. FOR PROJECT

COMMITTEE."

DW 1 says that the above document was a Minute and the delegation was to report to the Committee and have the minutes of 21/4/83 discussed and approved otherwise the four members of the Committee were not empowered to enter into any agreement. The main Committee rejected the demand of the plaintiff and instructed DW 1 to write to the plaintiff as in the DW 1's letter dated 29/10/84 (Ex 3).

According to DW 1 the project is at standstill as left in December 1982. There is painting to be done to the main structures. The frame to the main structures has to be supplied and fixed.

According to DW 1, they owe the plaintiff Kshs 220,000/- which is payable on completion of the whole work.

After the conclusion of the trial, Mr Kitonga for the four named defendants, submitted among other things, that the suit is defective and bad in law because in his own words

> "where a suit is against individuals in their own private capacity and where the committee as in this case, is not a body corporate or registered legal entity, then every defendant must be named and must be given summons and must be afforded a hearing."

He relied on Order 1 rule 8 of the Civil Procedure Rules.

Mr Khanna for the plaintiff replied that the defendants are sued as members of a committee and as office bearers and that the correct procedure has been followed. He referred to *Atkin's Court Forms* 2nd Ed Vol 30 – 1979 at page 32. Mr Khanna further submitted that the defendants are estopped from raising the submission because they did not enter appearance by protest and have admitted that they are properly sued. The two learned counsels did not cite any law.

I will start by considering the submissions raised by Mr Kitonga and later the merits of the plaintiff's claim.

Order 1 rule 8 of the Civil Procedure Rules reads as follows:-

> "(1) Where there are numerous persons having the same interest in the suit one or more of such persons may sue or be sued, or may be authorised by the court to defend in such suit on behalf or for the benefit of all other persons interested.
>
> (2) The court shall in such cases direct the plaintiff to give notice of the institution of the suit to all persons either by personal service or, where from the number of persons or any other case such service is not reasonably practicable by public advertisement, as the court in each case may direct."

Order 1 rule 8(1) above is in the same words as the former English Order 16 rule 9 of RSC.

It is however slightly different from Order 1 rule 8 of the Indian Code of Civil Procedure Act V of 1908 see *Mulla's Code of Civil Procedure* 13th Ed Vol 1 at page 610 which reads:-

> "Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued or may defend, in such suits, on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct". (underlining mine).

In *Atkin's Court Forms* 2nd Ed Vol 30 1979 at page 38, there is the following note:-

> "Unregistered friendly societies must sue or be sued in the names of all representative members for example 'AB and JK (on behalf of themselves and all other members of ....society"

The commentary to English Order 15 rule 12 RSC – *Supreme Court Practice* Vol 1 1979 at page 24 on representative defendants is in relevant part as follows:-

> "Where .... a plaintiff desires to sue any combination of persons under a title purporting to be the name of a society or club or association, (not being a registered society or partnership firm) it is the practice to allow him sue two or more members thereof with the added statement that they are "sued on their own behalf and on behalf of all other members of the .... (name of combination under which debt was contracted)."

That commentary goes on to say –

> That the plaintiff does not need leave to bring the action against representative defendants nor leave or order in the first instance in selecting the persons he will sue as representing the others "But at any stage after the proceedings have began, the plaintiff may apply for a representation order."

In*Walker v Sur and Others* [1914] 2 KB 908 and in *Hardie and Lane Limited v Chiltern and Others*, [1928] 1 KB 663, other than for the class, the suits were framed and filed as plaintiff in the present case had done.

The Kenya Order 1 rule 8(1) just as the former English Order 16 rule 9 RSC or the current English Order 15 rule 12 does not make it mandatory that the plaintiff must seek leave of the court before he institutes a suit against defendants in a representative capacity and from the practice, the plaintiff suit as filed is proper in form.

In the Uganda case of *Johnson v Moss and Others* [1969] EA 654, a miscellaneous cause was filed by the plaintiff under the Uganda Order 1 rule 8 of Civil Procedure Rules seeking the court's permission before filing the suit for the defendants to be appointed to represent all the other members of the Club.

This can be explained by the fact that Order 1 rule 8 of Uganda Civil Procedure Code was in the same words as Indian Order 1 rule 8 where the words "with the permission of the court" precede the words "sue" or "be sued" unlike in the Kenya Order 1 rule 8 of the Civil Procedure Rules. As explained in the commentary 12 to Indian Order 1 rule 8 at page 615 of *Mulla's Code of Civil Procedure* Vol 1 13th Ed, that order requires that permission of the court be obtained before the suit is instituted. Even then as the same commentary shows, the rule does not forbid leave being granted afterwards.

Though the plaintiff is free in the first instance to select the persons he wishes to sue as representing the

others, the next step is to move the court by a summons in chambers for a representation order so that the court can make inquiry to find out if the sued defendants are the proper representatives of the others and if so give authority and if not refuse the authority.

This is clearly stated in the following passage from the judgment of Vaughan Williams LJ in *Walker v Sur & Others* (supra) at p 934:-

> "The rule as it stands does not purport to leave it to the mere will or choice of the plaintiff or of the defendants, nor to give a right in either case of selection at the choice of the plaintiff who wishes to sue representative members of unicorporated society. As I understand the rule, it lies with the Judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as proper to be authorised to defend in such cause or matter on behalf of or for the benefit of all persons so interested, then the order may be made".

Such representation order was sought in *Balwat Singh v Joginder Singh and Another,* [1962] EA 395 but refused.

The third step as provided by Kenya Order 1 rule 8(2) is that the plaintiff should apply for the court's direction and see that a notice of the institution of the suit is given to all the defendants.

I think that the following passage in the judgment of Lane, Ag J, in *JJ Campos and Another v ACI De souza and Five others,* [1933] 15 KLR 86 at page 87, correctly and clearly interpretes Order 1 rule 8 and is still good law:-

> "These authorities give colour to the view that the court cannot authorize defendants to be sued in a representative capacity without application being made to it, and further that all persons having an interest ought on principle to be given an opportunity of defending. It would seem that Order 1 rule 8, not only lays down the practice to be followed in cases where there are numerous persons having the same interest in one suit and where one such persons is suing or is being sued on behalf of all, but it contains a direction as to the manner in which the rights of all such persons must be safeguarded. It is in fact mandatory upon the court to see that notice of the institution of the suit is given to all parties interested and from this it may be inferred that in a case of this sort the court is not at liberty to take cognizance of a suit by or against one or several persons selected from the body of interested persons unless and until the steps set out in the rule are carried out".

It is clear that the plaintiff failed to comply with the provisions of Order 1 rule 8 and take the important steps of obtaining a representation order and to see that notice is issued to all interested defendants.

Even if the plaintiff applied for a representation order he would not have obtained it automatically. He would have proved to the court that there is a class of persons who are numerous, that all have the same interest in the suit, that the four named defendants are authorised to represent all others and that the nature of the claim is such as fixes liability on all the members of the class.

The plaintiff's claim is in one paragraph. The claim is based on a debt or rather contract.

It does not disclose why the four named defendants are proper persons to represent all others.

After hearing the evidence, it emerged that the Municipal Stadium Floodlights Project is a Harambee Project (self-help) by all residents of Mombasa whereby unknown members of public have raised funds to install floodlights at the Municipal Stadium for use by the general public.

It is said that the Project Committee who are the defendants comprise of about 40 members who represent various groups such as the Municipal Council, KANU, Doctors, Hotel Industry, Cargo Handling Services, etc. The Project Committee is not therefore the primary group but agents of an amorphous body

comprised of the residents of Mombasa at large.

DW 1 in his letter of 29/10/84 (Ex 3) calls it a "sub-committee."

We have no evidence of the organizational set-up of the body which undertook the floodlights project. Doesn't the body have officers such as Chairman, Secretary, Treasurer, etc.? Who selected the project committee and what are their powers and duties? Are the members of the Project Committee permanent until the project is over or any ground can send one of its employees alternatively to represent the group in the project committee?

It would seem that very few of the Project Committee members attend the meetings of the Project Committee.

David Augustine Katiso Silas (DW 2) testified that normally 8-10 members attend. Indeed the minutes of the meeting of the Project Committee held on 23/3/83 (D Ex 2) only 8 Committee Members attended (excluding representative of the plaintiff and representative of Mare Electric (contractor in the project).

Mr Brollo of the plaintiff company was also a committee member. It is that Project Committee which is said to have made an oral contract with the plaintiff at a Stadium.

In the notes to English Order 15 rule 12 in the *Supreme Court Practice 1979 Vol 1* at page 208 second paragraph, the author comments as hereunder:-

> "Similarly, in its application to cases of contract or quasi-contract, the rule only applies where the person sought to be represented have the same right or are all under the same liability and have the same defences and no others as those representing them as plaintiffs or defendants in respect of the claim for which the action is brought. The rule does not therefore apply to an action for the price of goods sold and delivered (*Baker v Allanson*, [1937] 1 KB 463, CA) nor to an action for the price of work and labour done (*Walker v Sur*, [1914] 2 K B 930, CA) nor to an action for money had and received (*Hardie & Lane Ltd v Chiltern*, [1928] 1 KB 663, CA). But the rule will apply if the action is framed in the form of a declaration of right to recover the debt or money and for payment thereof by trustees or other persons in who the property or fund of the numerous persons is vested (*Ideal Films Ltd v Richards*, [1927] 1 KB 374, CA)"

The facts of this case are peculiar but not distant from the facts in *Walker v Sur and Others* (supra) and the same principles applied in *Walker's* case are applicable here.

The plaintiff has sued the management committee of the Floodlights Project. As appears from the nature of the Project, this management committee which number about 40 is not a class but agents of a class which is not clearly indentifiable. The class may either be the combination of the many groups which has each sent a committee member to the Project Committee or the residents of Mombasa at large. I think that if anybody was to be sued, it is that class whatever it is because the Project does not belong to the Management Committee and because the Project Committee has no interest in the Project other than that of representing the groups which selected them.

The second problem is whether those groups or the residents of Mombasa at large constitute a class which can be sued and represented by a Management Committee.

Onus was on the plaintiff to prove so which he has not done. Even if the Management Committee is taken as a class of its own, it is not apparent that all the committee members have the same interest in the suit. There is no property vested in the committee. There is evidence that very few of the committee members attend the meetings and even in this suit despite the fact that four of them were sued in their own behalf and on behalf of others, it is only the second defendant who appeared in court.

The contract was made in a stadium and there is no evidence that each of the Committee Members was

present and was a party to the contract. Some of them may have ceased to be members. In those circumstances, it is difficult to say that all are under the same liability and the same defences as the four named defendants.

The conclusion that I reach is that even if the plaintiff had applied for representation order, he would not have succeeded and the suit could have been dismissed at the preliminary stage.

The defendants did not enter conditional appearance and proceed to challenge the jurisdiction of the court. Contrary to what Mr Kitonga says the practice of conditional appearance has been accepted in this country – see *Saddique v State Life Insurance Corp of Pakistan,* [1975] EA 257.

The defendants did not at the preliminary stage challenge the validity of the representative suit and indeed admitted the jurisdiction of the court. But I do not subscribe to the view expressed by Mr Khanna that the defendants are estopped from raising submissions of law after the hearing has been concluded. Such matters as alluded to above concerning suits against representative defendants are not wholly matters of technicality.

As Lane, Ag J, said in the *Campo's* case (supra) the court is not at liberty to take cognizance of the plaintiff's suit against the defendants selected from the body of interested persons unless and until the steps set out in Order 1 rule 8 are carried out.

The case of *London Association For The Protection of Trade and Others Greenlands Limited*, [1916] AC 15 throws some light on the issues of estopped that Mr Khanna has raised. In that case two named defendants and unicorporated association were jointly sued albeit irregularly for libel. One of the defendants was the secretary of the Association. The Association was also joined as a party. An official and member of the Association entered appearance on behalf of himself and all other members of the Association. The secretary of the Association and the Association did not object to competence of the suit against the secretary and the Association and eventually judgment was entered against the secretary and the Association and against the other defendant. However, on appeal to the House of Lords, by the secretary, and the Association – (not on the issue of defective representative suit), Lord Parker of Waddington at page 38 examined, among other things, the misjoinder of the Association as a defendant, the wrongful appearance by a member of the Association on his behalf and on behalf of all other members, whether the official of the Association who entered appearance could have been given leave to represent others if he so applied, and the class of members of the Association who could have been liable and found that those issues were questions of substance and not mere technicality which could be waived if the parties so elected.

Similarly, in this suit, the issues I have referred to above concerning the suit against representative defendants are issues of substance which cannot be disregarded and considered waived merely because the defendants did not see it fit to raise objection at the appropriate stage. In any case, I take it that the issue of defendants' liability on their own behalf and on behalf of all other committee members is covered by the first of the agreed issues. For the reasons above, the plaintiff's suit against the defendants cannot succeed in its present form as it discloses no claim against the defendants sustainable at law or cognizable by the court. That finding is sufficient to dispose of the suit.

I will now turn to the merits of the plaintiffs' claim against the defendants.

The evidence discloses that the plaintiff's claim of shs 220,000/- which is the balance on the original contract and claim for shs 467,025/- based on the agreement of 26/4/83. There is no dispute about the claim for shs 220,000/- except that the defendants allege that the plaintiff did not complete the project and is therefore not entitled to the payment at the moment. The claim for shs 220,000/- arises from a building contract which was oral. It seems that time for completion was not made an essential condition. PW 1 says that the plaintiff finished the project. He produced a letter dated 29/10/84 (Ex 3) written by the second defendant which among other things, directs the plaintiff to return to the site and give the second and final coating to the towers and make arrangements to hand over the work.

PW 1 gives the estimate of such coating as between shs 8,000/- and shs 10,000/-. The defendants do not give an estimate.

DW 1 in cross-examination by Mr Khanna testified that what remained to be done by Brollo was "very little – painting and installation of the frame". According to him, it was a frontal frame on which electrical fittings could be bolted. DW 1 agrees that he did not mention the frontal frame in his letters of 29/10/84. It appears that there were two other parties contracted to do electrical fittings and they have not honoured their obligations.

As regards the completion of the project, I prefer the evidence of DW 1 to the evidence of PW 1 as PW 1 concedes that he is not the one who was supervising the project which it is clear that DW 1 was supervising the project on behalf of the defendants. In his letter of 29/10/84, DW 1 still insisted that the final coating has not been done.

I conclude therefore that the plaintiff has finished the project other than doing the final coating whose cost I assess as shs 10,000/- from PW 1's evidence.

This was a lumpsum contract and the defendants cannot refuse to pay merely because there is a little work to be done. Under the principle of substantial completion (performance) the defendant is required to pay the contract price subject to deduct for the cost of uncompleted work. There is no evidence from the defendants that entire completion was a condition precedent to payment.

I find therefore that the plaintiff is entitled to payment of shs 220,000/- less shs 10,000/- being cost of uncompleted work that is – shs 210,000/- with costs and interest.

The claim of shs 467,023/- is based on the agreement of 21/4/83 which according to the plaintiff varied the contract price from shs 880,000/- to shs 1,347,023/-.

It is agreed by the parties that though the contract was oral, there was indeed a valid contract. There is no dispute about the terms of that contract nor is any term in dispute. PW 1 concedes that the plaintiff agreed to the contract price of shs 880,000/- after the plaintiff's production manager had done the costing of the project and that the under estimate, if any, was due to plaintiff's fault. As admitted by the time the agreement to increase the contract price was reached, plaintiff had already been paid shs 660,000/ - out of the contract price of shs 880,000/- and that at the time the plaintiff received payment of shs 660,000/- the plaintiff had nearly completed the project.

The first issue which arises is whether the defendants varied the contract price of shs 880,000/- by the agreement of 21/4/83. Minute 1/83 (D Ex 2) of 23/3/83 shows, among other things, that the Floodlights Project Committee complained of the plantiff's failure to meet its obligations and resolved to "send a delegation to the General Manager (of the plaintiff company) for discussion on these matters". The delegation selected comprised of three people, Chairman, Secretary and one Mr Muga.

The delegation held a meeting with the plaintiff's representatives on 21/ 4/83 and the report of the meeting is described as "RESOLUTIONS" (Ex I) though the same report says that the request of Brollo (K) Ltd., the variations and the final figures were "agreed upon". The report is signed by one member of the delegation.

DW 1 (second defendant) says that the resolutions were in fact Minutes which had to be submitted to the Main Committee for approval as the delegates had no authority to enter into any agreement. Indeed, in his letter dated 29/10/84 (Ex 3) the second defendant informed the plaintiff among other things that the sub-committee met on 26/10/84 to discuss the plaintiff's letter conveying the claim for variation of the contract price and that the sub-committee did not accept the variation of the contract price. PW 1 testified that the committee met and rejected the proposal for variation of the contract price.

It would appear that the three delegates were agents of the committee Minute 1/83 did not authorize the three delegates to vary the contract price as they deemed fit. The original contract having been made by

the committee on one hand and not by the three delegates.

I agree the three delegates could not have validly varied the contract price – an important term of the contract – without express mandate.

The only reasonable construction of the "RESOLUTIONS" of 23/3/83 is that an agreement for variation of contract price was reached which agreement had to be submitted to the committee for approval as indeed it was but approval refused. Even if the plaintiff's contention that the contract price was varied by the three delegates is accepted, the committee as principal would not be liable on the contract if the agents acted without authority unless the principal ratifies the variation which it did not.

The second issue is that of consideration. If there was indeed a variation of the contract price, was there consideration to make the variation enforceable? Paragraph 1135 at page 574 of *Halsbury's Laws of England*, Vol 4, 4th Ed Provides:-

> "Except in the case of a contract under seal, consideration is necessary to support a contract. A promise of additional payment for work already included in the contract is given without consideration and it is unenforceable but where there is uncertainty as to whether or not an item of work falls within the original contract, a provision for additional payment to perform the work is enforceable.
>
> Any other variation of the terms of the contract will generally be unenforceable unless supported by fresh consideration ....".

The learned author of *Hudson's Building and Engineering Contracts,* 10th Edition, at page 22 puts it more clearly:-

> "A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If , however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain......".

When the variation agreement was reached the plaintiff as conceded by PW 1 had nearly completed the project and had been paid shs 660,000/- out of the original contract price of shs 880,000/-.

The defendant had not asked the plaintiff to do more work than was in the original contract.

The plaintiff's letter (D Ex 1) confirms that at the time of seeking variations, he had done the work under the contract. In this court, the plaintiff did not attempt to support by evidence such as invoices, the variation he sought.

Before the variation agreement was reached, the defendants were asking the plaintiff as shown by Minute 1/83 (D Ex 2) merely to perform his obligation under the contract. Otherwise, by agreeing to pay more, the defendants were not deriving any benefit.

The plaintiff's case could not have supported the grant of a rectification order even if he had sought it in court.

I conclude therefore that the variation agreement as it was without consideration is unenforceable and the plaintiff is not entitled to payment of the shs 467,023/-.

For the reasons I have stated, I dismiss the plaintiff's suit on the ground that it discloses no claim against the defendants sustainable at law and cognizable by the court.

Plaintiff will pay the defendants the costs of this suit.

Dated and Delivered at Mombasa this 2nd day of March , 1989.

E.M GITHINJI

JUDGE.