



**REPUBLIC OF KENYA**

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

**CIVIL APPLICATION NO. 648 OF 1985**

**NATGIL ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**GATUKUYU COFEE GROWERS COOPERATIVE**

**SOCIETY LTD & 2 OTHERS.....DEFENDANT**

**JUDGMENT**

By plaint filed on 8th March 1985 Natgil Enterprises Ltd (the plaintiff) claims against Gatukuyu Coffee Growers Co-operative Society Ltd (the defendant) the sum of Kshs 933,750 in respect of goods sold and delivered by the plaintiff to the defendant. The goods referred to are 996 bags of fungicide. The defendant has been granted leave to bring into the proceedings as third-parties Afrocox Co Ltd (hereinafter called "Afrocox") and Ashford Laboratories Ltd (hereinafter called "Ashford") because Afrocox purportedly acting as agents of Ashford received the goods from the defendant as a result of certain correspondence between the parties.

Apparently Ashford delivered the bags of fungicide to the defendant, on the defendant's order, some time in February, 1984. According to the affidavit of William Terence Flynn, on behalf of the plaintiff, at a meeting held on August 13, 1984, of the Management Committee of the defendant, attended by a representative of Ashford and himself representing the plaintiff, it was agreed that the contract between Ashford and the defendant be terminated, and that a fresh contract be entered into between the plaintiff and defendant for the order to be given to the plaintiff, that outstanding payments be made to the plaintiff and, that the price of the fungicide be reduced from Kshs 995 per bag to Kshs 937.50 per bag. This meeting and decision was followed by a letter from the defendant to Ashford and copied to the plaintiff, dated August 15, 1984, and a reply from the plaintiff dated August 28, 1984 for Kshs 993,750 for 996 bags of the fungicide. According to the annexures to Flynn's affidavit Ashford issued the defendant with a credit note in respect of the fungicide for Kshs 991,750 (dated August 28, 1984) and another credit note for Kshs 623,125 (dated August 25, 1984) was issued to Natmo Chemicals Ltd. It is not clear from Flynn's affidavit what the relationship is between these two credit notes, but it is clear that the defendant received credit from Ashford and it appears to be in respect of the fungicide, the subject of this suit.

Thereafter the plaintiff wrote several letters requiring payment of the contract price of Kshs 933,750 and I do not think this is in dispute, the amount has not been paid to the plaintiff to this date. Instead, on September 11, 1984, the defendant wrote to Ashford, with copies to the plaintiff and to Afrocox, informing them that, for reasons set out in the letter, the Management Committee of the defendant had decided to return the bags of fungicide to Ashford. This action appears to have been taken as a result of two letters, one from Afrocox to the defendant (dated September 5, 1984) and the other from Afrocox's advocates (dated September 7, 1984) to the defendant. According to these two letters, Afrocox was the sole commission agent of Ashford for the marketing and selling of the type of fungicide, the subject matter of the suit, and had acted as agent for Ashford in the sale of the fungicide in question by Ashford to the defendant. That Ashford had directed the defendant to pay commission direct to Afrocox, and by rescinding the contract with Ashford the defendant had become liable for damages to Afrocox.

One can understand the defendant's confusion at this stage. One could only wish the defendant had taken legal advice.

The defendant's letter of September 11, 1984, not unnaturally, received three different responses. From

Ashford's advocate came a letter dated September 18, 1984, indicating their lack of interest in the matter and telling the defendant to address further correspondence to the plaintiff. From the plaintiff came further demands for payment of the contract price. From Afrocox came a letter dated September 14, 1984 stating that as the order was served by them on behalf of the Ashford they would make the necessary arrangements to collect the bags of fungicide.

This, Afrocox did, it appears, between September 14 and 17, 1984.

The plaintiff still demands the contract price of the fungicide from the defendant. What are the defendant's answers to this? It will be as well to deal with the last point first. The defendant contends that by clause 44 of the bylaws of the society all contracts shall be signed on behalf of the society by the chairman or the vice chairman, the treasurer or the honorary secretary, unless decided by general meeting. Ignoring the uncertainty from the wording of the bylaws whether the contract may be signed by any one of these officers, it seems clear that the bylaw was intended to control the internal administration of the society and cannot be said to be binding on the whole world especially in a case, as here, where a contracting party was dealing with the management committee. The society cannot rely on its own bylaws to avoid a contract which is apparently entered into by officers of the society who may be expected to control the administrative affairs of the society. I am fortified in my view by reference to the decision in *Taws Ltd v Othaya Farmers Co-op Society Ltd* (1977) KLR 92 cited by the plaintiff's advocate.

The next ground relied upon by the defendant was that the plaintiff misrepresented, through Mr Flynn, that it had bought Ashford and that no one else had a claim to the fungicide. That the contract was void through misrepresentation. The alleged misrepresentation was of two facts, namely that the ownership and rights over the fungicide had passed to the plaintiff and that Ashford had been bought by the plaintiff. These misrepresentations are denied in Mr Flynn's affidavit, but even if they were made on behalf of the plaintiff it is difficult to know how they could prejudice the defendant in this contract. By the contract being taken over by the plaintiff the defendant received the fungicide at a substantially reduced price; this is not denied by the defendant. Ashford has not claimed the fungicide. Neither has Afrocox. The only complaint in respect of the new contract came from Afrocox who seem to complain that they are being deprived of their commission. This, surely, is a matter between Ashford and Afrocox, and does not concern the plaintiff. Afrocox, it is clear from the correspondence, is interested in this matter only as an agent of Ashford and has no contractual relationship with the plaintiff. Ashford has, as is clear from the correspondence, divested itself of any interest in this fungicide. If their agents maintain an interest in it, they must do so as agents and without their principal's concurrence. All this, as I have stated, is a matter between Ashford and Afrocox and cannot affect the contract between the plaintiff and the defendant.

This reasoning must apply to the whole of the defendant's defence, which I need set out in full here. At the time the defendant returned the fungicide to Afrocox their contractual liability was to the plaintiff and they had ceased to have any contractual relationship with Ashford, and it follows with Ashford's agent Afrocox, in respect of the fungicide. The defendant is liable to the plaintiff under the contract entered into verbally on August 13, 1985 and confirmed in writing two days later, whatever the rights and liabilities as between the defendant, Afrocox and Ashford. The defendant has no answer to the plaintiff's claim.

Accordingly I enter judgment for the plaintiff as prayed in the plaint together with the costs of this application.

**Dated and Delivered in Nairobi this 2nd day of December 1985.**

**D.SCHOFIELD**

**JUDGE**