THE LAW OF AGENCY IN KENYA: A CASE STUDY
OF KENYA NATIONAL TRADING CORPORATION (KNTO)

Dissertation submitted in partial
fulfilment of the requirements for
the LL.B. Degree, University of Nairobi

By

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ACKNOWLEDGEMENTS

Thanks to my mother without whose encouragement and motivation I would not have gotten this far. My unqualified appreciation and gratitude to my Supervisor Mr. Willy Mutunga without whose guidance and patience this dissertation would have been incomplete.
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INTRODUCTION

With the ever increasing development of commerce as a means of exchange in material goods, the necessity of understanding the law of agency becomes of greater importance. Large business organisations which control the bulk of collection and distribution of the material goods produced in any given country will have agents throughout that country and even beyond. Indeed, by far the large amount of business is carried on through agents of one kind or another, whether agents are branch managers, tour agents or distribution agents. Agency, therefore, covers a vast variety of legal rules and results of which an explanation and exposition of their individual and immediate purpose is worthy of consideration. This is because the law of agency performs a function that is both basic and in dispensable to our economic life because with efficient division of labour we have increase in production which in fact gives rise to an increase in the need for commercial exchanges and its this process of exchange which forms the domain of agency. The agent who is sometimes referred to as the "middleman" throughout his existence held a unique position in the production process and more so in the distribution of the goods so produced. I say unique because the agent has been subjected to more criticism than any other known creature of commerce and yet the agent has thrived and blossomed with the capitalist mode of production oblivious almost to the ever present opposition to his profession or occupation.

Such opposition to the role of the agent can be seen today in the developing capitalist societies where time and again they have been blamed for the economic woes of such countries, mainly because the majorities of agents in such countries are not indeginous people hence they are seen as mere
Profiteers at the expense of the indigenous people. Recently the Kenyan Minister of Industry Hon. Munyuwa Waiyaki blamed the ever rising prices of goods on "some unscrupulous business men." He was in fact referring to the agents who handle the distribution of basic commodities, the Minister threatened that in future the government would withdraw the licences of such treders. Licences which in the first place were validly issued, the licences having complied with the required legal provisions and who are subject to the Price Control Act. The minister's statement which can only be termed as political, however, expressed the sentiments of the consumers who throughout the development of agency have seen the agent or middlemen as the cause of their misery. To the consumer the middleman is the unwarranted go-between him and the producer and whose only apparent contribution is to raise the price of the goods which finally reach the hands of the consumer. Thus the consumer almost always disregards or ignores the virtues and positive contribution of the middleman who in fact earlier ensures a more efficient circulation and distribution of both raw materials and manufactured goods, which is a fundamental aspect of any capitalist mode of production. The consumer in castigating the middleman is therefore, oblivious of the middleman's role in facilitating his (the consumer's) access to the goods.

Developing countries who either due to colonial or trade links with the imperialist west have adopted the capitalist mode of production, and put more precisely we can safely say they had no choice in the face of western imperialism. Hence the first priority of the independent governments in those countries has been to grasp and redirect the inherited foreign dependency. In so doing a number of their states have thought it wise to play a greater role in the circulation and distribution of essential goods to all the population. The importance of this role can be seen from the lesson learnt by Kenya in the period 1979-1980 during which the government was forced to take frantic measures to import maize and to ensure a tighter control in dealings in the same. However, such governments have remained cautious and have had to compromise this role with their avowed economic policy of free enterprise, hence, they have opted for state co-operations which perform an overall supervisory role in the distribution process.
In Kenya one such body is the Kenya National Trading Corporation hereinafter referred to as KNTC. The KNTC is engaged with the countrywide distributions of essential commodities like salt, sugar etc, and to achieve its objects the KNTC employs the services of a chain of countrywide appointed agents through whom they distribute.

It is impossible to understand the merits and demerits of this particular mode of distribution as employed by the government of Kenya through the KNTC without going back to the origins of this practice, i.e. agency relationships and the law that governs such relationships and how that history has shaped and explains the present. Being a subscriber to Hegel's theory that law must be studied on the ground and not in the air, I have seen it fitting to approach this legal investigation by first looking at the history of the law of agency in Kenya in Chapter one of this paper. The second chapter will discuss the role and aims of the law of agency in Kenya today. These two chapters will, provide the background upon which agency as applied by KNTC will be viewed in chapter three.

It is in this last chapter that I will offer a critique of the practice of agency as adopted by KNTC vis-a-vis the law. Finally, in my conclusion, I will set out the important facts that have emerged in the foregoing discussion and also make recommendations and suggestions through which the government's goal of efficient distribution of foodstuffs and other essential commodities for the benefit of indigenous Kenyans may be achieved through agency.

Note that in my study, I shall assume that the reader is acquainted with the Marxist Theory of Law and the state which forms the basis of my critique.
FOOTNOTES

1 Blackwood and Wright: Principal and Agent Ch. Pp 1

2 VOK NEWS 23 November 1980

3 CAP Laws of Kenya

4 Willy Mutunga; Commercial Law & Development Nairobi
CHAPTER I

A BRIEF HISTORY OF AGENCY LAW IN KENYA

To be able to understand the role of the law of agency in Kenya today, which is the content of the next chapter, it is important that we first delve briefly but comprehensively into the history of the law of agency applicable in this country today.

In this respect it is equally important to re-assert the fact that the law of agency just like any other branch of law (except customary law) in this country is basically derived from the English Law that was imported here along with British colonialism. This is made clear by the content of our Judicature Act S.3 which interalia provides that the courts in this country shall exercise Jurisdiction in conformity with "...the substance of the common law, the doctrines of equity, and the statutes of general application in force in England on the 12th August, 1897. Thus in a word the history of agency law in Kenya is the history of the development of that law in Britain before it was imposed on Kenya. This is exemplified by the fact that the courts and parliament have made little, if any, attempts to change the law on agency as inherited from our colonisers. The result is that the bulk of post-independence judicial decisions in agency disputes are based on English precedents.

Maitland in his inquiry into the English agency law traces the origin of agency to the doctrine of "users", a doctrine which Holmes and Holdsworth say derives from the Germanic 'Salman' or 'Trenland' - a person to whom the fulfillment of a particular task was entrusted, usually the transference of land in order that he might make that conveyance according to his grantor's directions. It is therefore accepted that instances of agency did occur in the early medieval period even though the law in this respect was then in its infancy. Hence, in those days we find that kings would empower persons to borrow money on their name.

Maitland emphasises that influence of the clergy in the promotion of agency and the law that governs it and he gives an example of a case during the reign of Edward I where an abbot was sued for the price of goods purchased by a monk and which came to the use of the convent. However, even he admits that the influence of the church was not sufficient to bring the institution of Agency to its full fruition. The medieval community was therefore satisfied with no more than a rudimentary concept of Agency. Thus agency did not become a single or significant subject until roughly the turn of the 19th Century and it is from then on that its modern history unfolds. This rudimentary concept of Agency as referred to by Maitland has been broken down to three distinct histories...
The first and most important of these three is the history related to the action of debt and assumpsit. Debt lay against a principal who had bought or acquired goods through an agent who in turn had acquired them acting upon the powers or authorities conferred upon him by that principal. It is this liability that gives to agency its present day contractual mould.

The second history was related to deeds and had a far more limited range being concerned with certain transactions which an agent could not perform on behalf of his principal, otherwise than by covenant under seal. The effect was that the agent could for example surrender the principal's land unless he was so authorised under seal. Thus in such instances the agent could not act in his own name as the agent but only in the name of the principal. This practice was to diminish greatly in the 19th Century.

The third history relates to the remedy of account, an action which became available as early as 1200 A.D. and which provided remedy in cases where an action definius or debt was inadequate. Such was the case where the lord of a manor had appointed a baliff who on his behalf would receive rents and profits accruing from the estate. Soon this action was extended to cover the relationship between partners as well as between factors and principals.

However, despite the importance of this action at this time it is no longer the principal remedy as between principal and agent even though it remains an important equitable remedy. By the end of the mediaval period, the common law of England had arrived at the stage where a principal could be made liable for a contract made on his behalf by an agent only in three instances one, was where the principal had given express authority; two, where the principal had ratified what the agent had done; and three, where the agent had acted within the scope of his authority.

Fridman identifies the emergence of brokers and factors in mercantile practice during this time and distinguishes them in that the brokers were agents whereas factors were servants. However, the law applicable to both was the same as the issue of authority was emphasized in both cases. Even at this stage, Fridman points out that "although isolated instances of something like agency relationship are to be found .... there is no greatly developed legal institution which can be described as agency and there is little law on the subject." He adds that it is only with the development of commercial life in many areas such as the growth of trading companies from the 17th Century onwards, that the law of agency began to grow in importance and eventually emerging as distinct concept separate from the form the master and servant relationship the asserts that this development was greatly assisted by the introduction of both
In the Court of Chancery, the relation between principal and agent was initially seen as the relationship between an 'Cestui que trust' and the trustee. The ideas employed by the Court of Amity in respect of the relations of ship owners, masters and merchants were later introduced into the law relating to principal and agent as applied by the court of Chancery first by HOLT L J.

In maritime law the ship owners were liable for the controls made by the master where the owner had not authorised or ratified the making of that contract as long as the master had acted in good faith due to necessity or within the scope of the powers conferred upon him by his contract of employment or by the law of the sea. The introduction of such ideas into the Court of Chancery were important in so far it gave rise to the concept of the principal's liability for torts committed by agents and consequently gave rise to the modern law of vicarious liability.

Fridman states that so far as contract is concerned, the early part of the 18th Century was still largely preoccupied with the notions of express authority and ratification. Any possible injustices that might have occurred could be cured by appeals to equity. It was in the later part of the 18th Century and the early part of the 19th Century that leading ideas of the modern law of agency emerged in more or less their present day form. The use of estoppel, the law of undisclosed principals, the wide authority of factors and other similar agents at common law and under the Factors Act (1889) all appear at this time. What happens in the 19th Century is that these developments are refined to meet the needs of the commercial community.

In this respect the importance of the Industrial Revolution in England and Europe as a whole cannot be ignored. It is industrialisation and its effects that from then dictated the commercial life and consequently the needs of the commercial community. Hence the development from the rudimentary notion of agency described above to the modern agency practice and the law that governs it were a direct result of this industrialisation. The law itself can be said to comprise partly of the common law, partly equity, and partly maritime and mercantile law.

One Kenyan scholar has shown that agency law before and under feudalism in Britain was embryonic since Britain did not have a national market nor could it boast of a national economy as whatever trade there was was localized until the emergence of the merchants who began trading beyond their local provinces in search of markets. He asserts that it was in the era of competitive capitalism and the establishment of bourgeois rule that a national market developed and production stepped up because of inventions and innovations: a result of the Industrial Revolution.
With increase in production, the need for agents multiplied given their importance to the distribution process and their role in the exchange of the produced goods and the acquisition of raw materials. It is this latter role for which the law of agency and practice was first employed in the British colonies in Africa and Asia. Hence Kenya agency law has its history in British colonialism and we shall presently see the neo-colonial roles for which it has been adopted in present day Kenya.
FOOTNOTES CHAPTER I

2. See Generally; The decisions of the East African Cout of Appeal in Agency cases

3. I, L. Q. R. 162 at P. 163


6. Speak 4 v Richards (1617) HOB. 206

7. Burdett v Willet (1708) 2 Vern 638

8. Fridman, Law of Agency (IBID)


10. Mutunga, (Supra)

11. Mutunga (IBID)
THE ROLE OF AGENCY LAW IN KENYA TODAY

In a word the law agency is to be found in the law of contract. The relation between the law of agency and the law of contract is obvious from the fact that the core of agency relationships is the contract between the principal and the agent under which the two undertake certain contractual duties and obligations in respect of each other and also third parties.

This being so, an exposition of the agency in Kenya cannot be complete without an emphasis of the predominance of contract. The role that agency law serves today is one which is to be traced in the development of contract law and the role played by it. This development of course has to be traced from Britain before the imposition of contract law in Kenya. 1

Alongside British capitalism after the fall of British feudalism, there emerged a system of "free enterprise" which demanded free labour and free play of economic forces devoid of state intervention. For these purposes every individual was declared equal in law and capable of entering freely into contracts of his choice. Thus in law the factory worker was equal to the factory owner! 1

The emphasis was on freedom of contract and sanity of contract. Thinkers like Sir Henry Maine even equated contract with progressive societies. F. Kessler says: "With the development of a free enterprise system based on unheard of division of labour, capitalist society needed a slightly elastic legal institution to safeguard the exchange of goods and services on the market." 2

Common lawyers wanted no truce in reacting to the apparent need for improvement. They transformed "contract" from the clumsy institution that it was in the sixteenth century into tool of almost unlimited usefulness and ability. Contract became the indispensable instrument of the enterpriser for it enabled him to achieve his ends in a rational manner. Under monopoly capitalism, further modifications have been affected by these lawyers such that today the contract instrument will normally take a fairly detailed and elaborate form complete with exemption clauses. 3
CHAPTER II

THE ROLE OF AGENCY LAW IN KENYA TODAY

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The freedom of contract that is emphasised all through this development is however illusory. Mutunga points out that: "Physical freedom which the overtime of freedom of contract emphasizes ignores the relevant consideration the economic power."

The result of the inequality in economic and bargaining power has been that contracts have been used as instruments of exploitation under capitalism mainly of labour by capital. The worker has little choice when signing the employment contract under which he will provide his labour for a bare subsistence pay. To do otherwise might entail starvation and even a conviction for being a vagabond. (There aren't many jobs nowadays).

The role of law in these circumstances was therefore to protect the interests of the property owners in their exploitation of the workers hence the law had to express their interests. Stripped of its ideological cloak freedom of contract therefore means the freedom to exploit and to be exploited.

As witnessed in Britain, the development of the law of agency was activated and linked to the development of a national market under British capitalism. In Kenya we do not have a national market. Ours is part of the market for modern imperialism. The law of agency was therefore imposed on Kenya to serve three well known roles under colonialism and neo-colonialism alike.

Kenya like any other country that underwent colonialism was economically, socially and culturally shaped by its past colonial masters such that it was integrated into the imperialist world to serve three basis roles:

1) to provide raw materials for metropolitan populations.
2) to provide a market for foreign manufactured goods, and
3) to provide a suitable place for foreign investment.

As Mihyo says:

"The function of law is to give expression to the existing social order and in some cases to give rise to new relations." This explains why the roles which Kenya plays under modern imperialism will have to find expression in our laws which do not only facilitate but also perpetuate the 'status quo'. It is therefore now appropriate to briefly look at the legal rules that govern agency relationships so as to justify the observation we have made above.
The essence of the agency relationship is the agent's legal ability to effect contractual relations between his principal and a third party. This legal ability is itself based on the agent's authority and power vested upon him by virtue of the agreement or contract between him and the principal.

The agent may only affect the principals relationship with a third party if he has acted within his authority such authority may be expressly stated in the contract or implied as being consequential or incidental to the exercise of the express authority. There is also usual authority which is possessed of a particular class of agent. The general rule is that the principal will not be liable for unauthorised acts of the agents hence the agency relationship is restricted to instances where the agent has acted within his authority. Want of authority will make the agent personally liable to the third party unless the principal ratifies the act.

Coupled with the fundamental issue of authority are the duties which are imposed upon the agent under the agreement. Firstly, the agent is not allowed to make secret profits. Secondly, the agent has a duty to account to his principal in respect of money or goods received from the principal or on his behalf. Thirdly, the agent may not delegate his duties to any other person, and finally he must not deny his principal's title to the goods.

Given the above, one readily agrees with Fricman when he states that:

"In the relationship between agent and principal, the principal's interests is the paramount consideration." Thus the law is governing the relationship protects the principal's interests and ensures that the agent works for his sole benefit for a remuneration or identity in some cases.

When related to the Kenyan situation, the consequences are frightening. What it means is that the Kenyan trader or company which is appointed an agent of a foreign manufacturer must always ensure that his actions are for the benefit of his overseas principal.

Mutunga has ably shown that the investment of metropolitan finance is aimed at maximization of surplus value (profits). To achieve this the capitalist needs a means of reaching consumers. The local agents provide this vital link. Mandel paraphrasing Mark wrote that:
"When production of commodities is completed the industrial capitalist already possess the surplus value produced by workers. But this surplus exists in a particular form: it is crystallized in commodities, just as capital advanced by the industrialist is too. The capitalists can neither reconstitute their capital nor appropriate the surplus value so long as they retain this form of existence. To realise surplus value he must sell the commodities produced. But the industrialist does not work for definite customers (except when he carries orders for the 'ultimate customer') he works for an anonymous market. Everytime that a production cycle is completed he would then have to stop work at the factory, sell his commodities in order to recover his outlay and then resume production. By buying what the industrialist produces, the traders relieve him of the trouble of going himself to look for the consumer. They save him the loses and charges involved in interrupting production until the commodities have reached their destination. They so to speak, advance him the money capital that allows him to carry on producing without interruption.

But the traders who advance to the industrialist the funds they need to reconstitute their capital and realise their surplus value; must in turn quickly sell the goods they bought, so as to begin the operation a new as soon as possible. Now, each production cycle brings in the same amount of surplus value provided that the capital and the rate of surplus value remain the same. Increasing the number of production cycles accomplished in one year means increasing total amount of surplus value produced that year. Reducing the circulation time of the commodities is thus not only a way of realizing value morequickly, it is also a way of increasing the amount."

The role of agency in this apt evaluation of the production, distribution and capital accumulation cycles is clearly that of facilitating the quick realisation of surplus value and increasing the amount of such value so as to finance further capital investment. Agency in this process is the instrument employed in modern commerce to ensure a faster if not more efficient distribution and circulation of the manufactured goods.

When related to Kenya, this in effect means that foreign manufacturers are enabled to accumulate increasing surplus value year after year through the good offices of their local agent.
The surplus value so generated is then repatriated and becomes capital for further investment by foreign capitalists. At this point it is necessary to demystify the myth of "local" industries which have grown as a result of the government's post-independence economic policy of import/export substitution. The truth is that there are no local industries as such since in practice such industries are financed by and are controlled by foreign investors. However, these foreign investors have taken care to appease the advocates of Africanization by appointing African directors who to the outsider will appear to be the powers controlling the enterprise rather than the foreign investors whose controlling powers are exercised through the expatriate managers and technical advisors in whose hands the actual management is vested.\textsuperscript{15}

Moreover, these foreign investors normally ensure their control by holding the majority shares in any such local industry so that even where the government is a participant, policy will still be formulated by the foreigners. It is further argued that even where the enterprise is a wholly owned government concern it is still subject to management agreements with foreign experts whose services are paid from the profits made. In which case it is doubtful whether it is indeed possible for the government to recover its capital input for a long time especially since such industries would have been financed by foreign loans for which the government has to pay interest in addition to the sum loaned.

Before moving on to our case study it is important to point out at this stage that in modern commerce there has been a merger of contract and agency so that today one would rarely find an agent 'per se' but will instead find a contract to purchase in standard form and which inevitably contains terms and conditions which are indicative of an agency relationship.\textsuperscript{16}
FOOTNOTES - CHAPTER II

1. See: Law of Contract Act (1872) India
2. Kassler, F. Contracts of Adhesion - Some thoughts about Freedom of
   Contract. C.L.R. 43 at P. 631.
   Vol. 3 pp 1-17
4. Mutunga, W (ibid)
6. Mutunga, W (Supra)
7. Mutunga, W Law of Agency and Sales of Goods, Nairobi P. 4
   After independence, Peter Lang, Frankfurt P. 48
    (ii) (1955) E.A. 49
    Reading v. a. G. (1951) A.C. 507
12. Fridman, G.H.L. (Supra)
13. See (i) Moritzaber v. A. Thomsen (1935) E.A.C.A. 34
    (ii) Dalgay & Co. v Cluaser (1961) E.A. 178
15. See N.C.C.K. Who controls Industry in Kenya for a complete discussion
16. See: Contract between D.T. Dobbie (Kenya) Ltd., and Daimler Benz
    as reproduced in Mweselis
    Dissertation, LL.B 1977
The Kenya National Trading Corporation (KNTC) was registered under the Companies Act (CAP 486) Laws of Kenya in March, 1965. Upon its inception it had a share capital of Kshs.200,000 divided into 10,000 shares of Kshs.20 each of which 9,998 were held by ICDC, a wholly owned government parastatal body. The other two shares were held by two directors as nominees of ICDC.

In 1973, this share capital was increased by 90,000 shares of Kshs.20 each hence today the KNTC has an issued share capital of Kshs.2 million divided into 100,000 shares of Kshs.20 each. Of these ICDC holds 99,999 shares the other one being held by the Chairman of the Board of Directors as a nominee of ICDC.

The KNTC is therefore a wholly owned subsidiary of ICDC and was incorporated with the sole purpose of pioneering Africanisation in the field of distribution at the instance of the Kenya government after independence following mounting dissatisfaction among African entrepreneurs over the domination of Asians and other non-indigenous traders in the field of distribution and commerce in general.

Thus the KNTC had as its major objective being a state agency, to institute reforms in the commercial and industrial structure in the country. To achieve this goal the government sought to center upon the KNTC a monopoly over all dealings with basic and essential commodities. At present the KNTC has a monopoly in the distribution of rice, sugar, and salt. It also deals in cement, textiles, bicycles and paints, matches and general hardware. However, this monopoly has not been given legal effect though it has become the practice.
The result is that the KN TC has absolute discretion as to what commodities to deal in and in what quantities at every given time subject only to the objects clause in its Memorandum of Association. Consequently a trend has developed whereby the decisions arrived at by KN TC as to what transactions to enter into are rarely consistent with the monopoly that has been given to it by the government. Research has shown that the KN TC may in one year or years trade in a certain commodity only to discard this commodity in another year and instead enter into a different and probably new trade.

An illustration of this trend is to be found in the KN TC dealings in cement and textiles. Matonyo Textile Agencies which was appointed KN TC distributor for textiles testified that KN TC abruptly and without notice to them in 1976 having been their suppliers since 1968. The KN TC confirmed that they had ceased to deal in textiles mainly due to the low profits earned from the trade. Similarly Damco Agencies, another KN TC distributor for hardwares testified that the KN TC had ceased to be their link with cement manufacturers in 1979. The KN TC defended this switch by arguing that the manufacturers due to various reasons were unable to promptly and adequately supply them with cement during this period after 1979. The result of this practice is that there is no clear cut definition of KN TC monopoly and the fact that in 1981 the KN TC is once again dealing in cement is clear testimony of this inconsistency.

The only exception appears to be in transactions in commodities in whose manufacture the government is a participant such that KN TC is under an obligation to purchase all the sugar produced by the manufacturing factories through the Kenya Sugar Authority which in turn only sells to KN TC.

Whether it has a purchasing monopoly or not the KN TC always makes its purchases from from the manufacturers both local and foreign by paying cash or through a bankers cheque. This is merely a contract for sale of goods and no agency relationship is created by this transaction. The prices at
which the KNTC purchases and resells these goods to their distributors are controlled and therefore the profit margin available to KNTC is fixed by the government.

Thus an important aspect of KNTC operations is governed not by agency law but by the law of contract and sales of goods i.e. the acquisition of the commodities with which it deals. The only element of agency in the relationship is the vicarious liability of the manufacturer for any defects in the goods sold to distributors and consumers. Where the suit is brought by the consumer the action will presumably be in court for negligence whereas where the suit is brought by a distributor it is possible that he may hold the manufacturer vicariously liable for the breach of contract committed by KNTC as agent of the manufacturer i.e. that the goods acquired by the distributor through the contract of sale between him and KNTC did not meet the description.

An illustration of this aspect of KNTC operations is to be found in the recent allegations that KNTC was selling unwholesome salt. The KNTC argued that liability for such a defect lies with the manufacturers Messrs Kensalt Ltd and the proposed suit against KNTC was accordingly to be instituted against Kensalt Ltd.  

In a similar case a manufacturer whose goods (nails) were ordinarily marketed through KNTC was brought before court charged with producing sub-standard goods for sale contrary to the Kenya Bureau of Standards specifications. In the same manner where the KNTC sought to recover monies due on a contract for the sale of barbed-wire which they had sold to a distributor on credit, the distributor unsuccessfully attempted to raise the defence of failure of the goods to meet the required standards. The court ruled that having appropriated the goods he was liable for their price to KNTC upon that contract and he could only seek remedy for damages against the manufacturer for the defects.
Thus KNTC bears no responsibility in respect of goods 
sold by them nor does it owe any duties of the agent to the 
manufacturer to whom KNTC does not account nor receive 
remuneration from.

Finally, among others, the KNTC deals with the 
following manufacturers:

- Bamburi Portland Co. Ltd. for cement;
- Kenya Industrial Estates Ltd. for hardware and allied 
equipment;
- Gladhome (K) Ltd. for bicycles and parts;
- Dunlop Rubber Co. (U.K.) for tyres;
- Kensalt Ltd. for salt and,
- Supra Match Manufacturers Ltd for matches.

Nowhere however in KNTC records are any dealings in 
estential commodities like cooking oils, maize meal and 
other basic foodstuffs mentioned.

The only aspect of the dealings of KNTC which can be 
said to point towards any agency relationship between the 
KNTC and the manufacturers occur in the fields of 
advertisement and the monopoly available to KNTC. The 
manufacturers impliedly undertake to advertise the goods 
which the KNTC buys from them for distribution. Secondly, 
the monopoly indicates an agreement that KNTC has priority 
over all other prospective dealers in respect of the goods 
manufactured by the firm.

As mentioned in the foregoing discussion, the KNTC 
in its operations employs a chain of nationwide distribution 
agents in almost every trading centre in the Republic. These 
distribution agents are appointed upon application to the 
KNTC and are issued with certificates of appointment which 
give them a monopoly of trade in KNTC supplied commodities 
in the area in which they are situated and to which their 
operations as distributors is restricted under the 
appointment. It is in this process of appointment that the 
KNTC carries into effect its Africanisation policy by 
ensuring that only indigenus traders are appointed as agents.
Research has shown that a serious flaw exists here as the method of appointment is not entirely foolproof. There is a clear likelihood of irregularities which would defeat the aim of giving business to small African businessmen and also likely to defeat the purpose of equitably and fairly distributing essential commodities. An illustration of both observations is to be found in the case of Mulu Mutisya & Co. whose directors are a prominent businessman and politician together with a KNCTC member of staff as co-director. This alone points at corruption and undue influence in the appointment of agents. The company long ceased to operate through its premises but records of both the KNCTC and the Registrar of Companies show sales to this company and that it has not been wound up. Where these commodities go is anyone's guess!

The contractual effect of the appointment is to give rise to a relationship whose terms are that the agent shall have a monopoly of the trade in KNCTC supplied goods and in return the agents have a duty to ensure equitable and fair distribution of the goods sold to them by KNCTC. Secondly, the distributor is bound to sell the goods either at the governmental controlled price or at the price recommended by KNCTC or the manufacturer. The KNCTC in return guarantees that the distributor will always be adequately supplied with the commodities in which the KNCTC is trading at any given time.

To enforce these terms the KNCTC has the power to refuse to renew the distributors certificate of appointment which is renewable yearly. A case in point is a Busia KNCTC agent who sold sugar to Uganda at black market prices in 1980 was refused renewal by KNCTC when he went for renewal in 1981. However, apart from the remedy available against violation of the pricing agreement under the Price Control Act, the KNCTC has no machinery for ensuring that these distributors will comply with the recommendations as to the resale prices of the commodities. The question that remains is how does the distributor enforce his rights against the KNCTC? And on what basis?
Strictly speaking we cannot say that an agency relationship exists between the distributors and the KNCTC but there are these terms which are indicative of an agency relationship such that it can be assumed that such a relationship is what the parties intended.

However, in the ensuing relationship the distributor does not owe the KNCTC the duties normally owed by the agent to the principal nor does the principal bear his normal duties here. More important however is the fact that the KNCTC as principal cannot be held liable for any faults or breaches of contract committed by the distributor as agent. The rule is that the principal will only be vicariously liable if the act is done by an agent as a servant and not as an independent contractor. The argument being that in the former case the principal controls both what and how the agreement is to be carried through whereas in the latter case the principal only controls what should be done. The KNCTC distributors like most other commercial agents are independent contractors.

During its early days the KNCTC would supply goods to these traders on credit and the traders would then pay KNCTC after reselling the goods. Default in payments by distributors however led to the abandonment of this practice and resulted in litigations for the recovery of the price at the instance of the KNCTC. Examples of such cases are KNCTC vs KIMANI & CO. 7; KNCTC vs. WAIRUMU MWANGI 8; KNCTC vs. WAMUNYU ENTERPRISES 9; all of which involved the recovery of the price for goods supplied.

The fact that these actions were for recovery of the price rather than for breach of duty to account is evidenced against the argument that there exists an agency relationship between the distributors and KNCTC. The relationship is 'prima facie' that of a buyer and a seller on a contract for sale, payment to be made in the future. All the eleven out of twenty three agents in Nairobi who were interviewed testified that they bought their goods for cash or upon a cheque coupled with a bankers guarantee through KNCTC.
Damco Agencies, a company dealing in hardware and building materials testified that during the period when they used to receive their cement supply from KNTC they pay for the quantity required at the KNTC and were then issued with LPOs which they could present to the manufacturers, Bamburi Portland Cement Ltd. and receive the goods. Similarly the proprietor of Wamunyu Enterprises testified that when he purchases sugar he paid money in cash to KNTC which issues him with a receipt with which he collects the sugar from KNTC go-downs.

The effect of this procedure is that title in the goods shall pass to the distributor upon the completion of the sale agreement in accordance with the law of sales of goods (Sales of Goods Act). This is contrary to the agency relationship where title in most cases remains in the principal. In addition to this, once the distributor has acquired the goods he may resell them as he wishes subject only the Price Control Act and the agreement between him and the KNTC as opposed to any agency relationship where his dealing with the goods are entirely restricted to the scope of his authority. The similarity in the two cases is that in both the agents dealing with the goods are restricted by the principal.

The system adopted by the KNTC fails to benefit those for whose benefit it was incorporated as all the distributors interviewed testified that the profit margin left for them by the KNTC is inadequate to sustain them in business and in all the agents I visited carried on trade in other commodities apart from the KNTC trade. The distributors stated that their profits were further reduced by the costs they incurred like labour, transport and storage of the goods sold to them by KNTC.

However, as witnessed in the experience of Damco Agencies which for some time had to compete with other businessmen for cement from the manufacturers, the KNTC remains very capable in terms of protecting their appointed distributors from competition by non-indigenous businessmen where it chooses to. The records at Damco
Agencies show very little trade in cement during the period KNTC had stopped dealing with cement such that whereas the company earned Kshs 587,085/65 from trade in cement in the year ended September 1978, it only earned Kshs 214,117/05 in 1979.

The foregoing discussion has therefore shown that even though the application of agency practice and law by the KNTC is dominated by the law of contract and sales of goods, in practice the relationship that subsists between the distributors and the KNTC is basically one of agency. It is also clear that failure to utilise the rules of agency in this practice has led to various shortcomings, with the KNTC coming out of the part in the most favourable position.

Given this set up, it is no wonder that the KNTC made profits right from its first year of operation and continues to do so. At the end of June 1966 after one trading year it declared a profit of £222,837 before taxation and more recently in 1979 a net profit of £204,724 was realised. This trend can be seen from the table below which gives data from the growth in turnover over a period of 12 years.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TURNOVER IN K£ MILLIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>8.1</td>
</tr>
<tr>
<td>1967</td>
<td>8.0</td>
</tr>
<tr>
<td>1968</td>
<td>11.0</td>
</tr>
<tr>
<td>1969</td>
<td>12.0</td>
</tr>
<tr>
<td>1970</td>
<td>15.0</td>
</tr>
<tr>
<td>1971</td>
<td>16.0</td>
</tr>
<tr>
<td>1972</td>
<td>20.0</td>
</tr>
<tr>
<td>1973</td>
<td>24.0</td>
</tr>
<tr>
<td>1974</td>
<td>26.0</td>
</tr>
<tr>
<td>1975</td>
<td>34.1</td>
</tr>
<tr>
<td>1976</td>
<td>42.8</td>
</tr>
<tr>
<td>1977</td>
<td>50.8</td>
</tr>
</tbody>
</table>

Source: KNTC Annual Report and Accounts 1976/77
From this trade the government has benefited in two ways; from the tax imposed on the profits realised and also in respect of the dividends earned from the shareholdings through ICDC. In the table below the taxes and dividend returns accruing to the government over the same 12 year period is illustrated.

<table>
<thead>
<tr>
<th>Year</th>
<th>Taxation (K£)</th>
<th>Dividend(K£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966</td>
<td>38,624</td>
<td>-</td>
</tr>
<tr>
<td>1967</td>
<td>57,557</td>
<td>-</td>
</tr>
<tr>
<td>1968</td>
<td>87,009</td>
<td>10,000</td>
</tr>
<tr>
<td>1969</td>
<td>20,598</td>
<td>10,000</td>
</tr>
<tr>
<td>1970</td>
<td>66,663</td>
<td>10,000</td>
</tr>
<tr>
<td>1971</td>
<td>91,523</td>
<td>10,000</td>
</tr>
<tr>
<td>1972</td>
<td>101,724</td>
<td>10,000</td>
</tr>
<tr>
<td>1973</td>
<td>135,250</td>
<td>10,000</td>
</tr>
<tr>
<td>1974</td>
<td>179,789</td>
<td>10,000</td>
</tr>
<tr>
<td>1975</td>
<td>154,245</td>
<td>10,000</td>
</tr>
<tr>
<td>1976</td>
<td>178,489</td>
<td>10,000</td>
</tr>
<tr>
<td>1977</td>
<td>186,990</td>
<td>10,000</td>
</tr>
</tbody>
</table>


Thus on the surface of it, it would appear that the KNTC venture has turned out to be a very profitable one for the government. However, this cannot be overemphasized given that after a perusal of the public documents of the companies or manufacturers who are mentioned elsewhere in this paper, it was found as a matter of fact that these are either wholly or partly owned by foreigners. Where the ownership is indigenous like the case of Sapra Match Manufacturers Ltd., the company's operations are dependent on the availability of loans and overdraft facilities from the financial institutions i.e. banks which in Kenya are invariably foreign owned!
We have earlier stated the manufacturing industry in Kenya is thus dominated by international finance capital. Hence in its efforts to develop an efficient distribution system, the KNTC is in effect enables a quick return on the investments made by foreign capitalists thereby perpetuating foreign economic domination which is sustained by the profits earned from such increments in industry. In fact these foreign investors who share the profits earned by the distributors in this way, 6 out of the 11 distributors interviewed admitted having loans and/or overdraft facilities from their respective bankers on which interests are payable.

CONCLUSION

From the above exposition one can draw a few conclusions which provide a basis for some suggestions or recommendations. First and foremost the KNTC has been shown to have available at its discretion a machinery within the ambit of the law of agency which if properly utilised would ensure an efficient, fair and equitable distribution of basic commodities.

Inspite of this available machinery the KNTC has instead opted for a loosely defined mode of operation whereby its relationship as principal with its agents is based on the general principles of contract law and sales of goods. This paper has shown that in so doing the KNTC has failed to attain its goal of ensuring a fair or equitable distribution of essential commodities mainly due to its own laxities.

It has also been shown that the indegenous small businessman for whose benefit the KNTC was established has not really benefited from KNTC operations. This is mainly arisen from the fact that due to the inconsistency and laxity of the KNTC in its choice of fields of trade and the acquisition of the goods has left an opportunity for the Asian and other non-indegenous business to continue competing with KNTC distributors for essential commodities over which KNTC is supposed to have a monopoly. Moreover it has also been shown that these distributors earn very little profits from their trade with KNTC and are inadequately protected under the present system since they have no means
However it's not enough to use the present law of agency or to change it in order to ensure that the distribution of essential commodities is carried out in conformity with the economic enspiration of this country. To attempt to do this would be tantamount to trying to effect a social, economic and political revolution through legislation. Such an approach is doomed in the face of the Marxist Theory of Law and the State which has established beyond doubt that such a change can only come through a revolutionary overhaul of the economic base. The required overhaul in this case is one which lead to indigenous domination of the economy both in commerce and industry as opposed to foreign capitalists. When this is achieved the law will then reflect the interests of the indigenous businessmen and the KNTC will then use that law of agency in its operations for the benefit of indigenous investment as opposed to foreign investment.
1. Industrial & Commercial Development Corporation formed by the ICDC (amendment) Act 1967 which repealed the IDC Act, 1954.


4. KNTE v. VINCENT DENGA H.C.C.C. 929/67

5. 1981 KNTE had 7,589 such agents

6. Interviews of G.K. Mathenge, Company Secretary KNTE.

7. H.C.C.C. 58/66

8. H.C.C.C. 233/69

9. H.C.C.C. 28/67

10. CAP 26 Laws of Kenya Ss.18,19.

11. Sapra Match Manufacturers has a loan of Kshs.4 million from Habib Bank Nairobi. It also has overdraft facilities upto Kshs.1 million.