



**Raveshia Pigments Limited v Henkel South Africa Limited- Uganda;  
Magellan Logistics Kenya Ltd & 4 others (Interested Parties) (Civil Case  
E027 of 2024) [2024] KEHC 7604 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7604 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E027 OF 2024  
DKN MAGARE, J  
JUNE 24, 2024**

**BETWEEN**

**RAVESHIA PIGMENTS LIMITED ..... PLAINTIFF**

**AND**

**HENKEL SOUTH AFRICA LIMITED- UGANDA ..... DEFENDANT**

**AND**

**MAGELLAN LOGISTICS KENYA LTD ..... INTERESTED PARTY**

**SEA LEAD SHIPPING AGENCY LTD ..... INTERESTED PARTY**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**HENKEL SOUTH AFRICA (PTY) LTD ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed this case claiming for the following prayers: -
  - a. A Declaration that the contracts evidenced by exchange of emails in the period between 23<sup>rd</sup> February 2024 and April 2024 between the Plaintiff and the Defendant are null and void ab initio.
  - b. A Declaration that the Plaintiff is the legal and equitable owner of the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in Bills of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, 3100016357 dated 25/3/2024 for 1 FCL and 3100015176 dated 25/3/2024 for 1 FCL.



- c. An Order cancelling the Bill of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, Bill of Lading No. 3100016357 dated 25/3/2024 for 1 FCL and Bill of Lading No. 3100015176 dated 25/3/2024 for 1 FCL.
  - d. An Order allowing the Plaintiff and/or its appointed agents to take possession of the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in Bills of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, 3100016357 dated 25/3/2024 for 1 FCL and 3100015176 dated 25/3/2024 for 1 FCL for exportation and repatriation.
  - e. Damages for fraudulent misrepresentation.
  - f. A Permanent Injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties whether by themselves and/or through their employees, officers, servants or agents from issuing a delivery Order with respect to the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in Bills of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, 3100016357 dated 25/3/2024 for 1 FCL and 3100015176 dated 25/3/2024 for 1 FCL to the Defendant or any other party that is not the Plaintiff and or its appointed Agents.
2. The Defendant and Interested Parties were served. On 13<sup>th</sup> May 2024, the Court directed that the matter proceeds by way of case stated. This was also informed by the fact that in any case the Plaintiff was going to admit their statement and documents.
  3. In my perusal of the pleadings and submissions, the court notes that the Defendant acted fraudulently by holding itself out as a legitimate company incorporated in Uganda and a subsidiary company of the 5<sup>th</sup> Interested Party, a company incorporated in South Africa but it emerged that there were no records of the existence of such a company as the Defendant.
  4. The address of the Defendant was thus fictitious, false and nonexistent and the Defendant has ignored communication from the Plaintiff.
  5. From the pleadings, the cargo in the Bills of Lading is described as 135,000Kg of Synthetic Yellow Oxide 920 (Iron Oxide Yellow Pigment). Its total cost is USD 202,500 and was purportedly ordered by the 5<sup>th</sup> Interested Party on behalf of their subsidiary, the Defendant. The cargo is said to have arrived at the Port of Mombasa when the Defendant consignee became unreachable and unavailable and so a court order was necessary for the release and sell of the goods to a new buyer.
  6. The Interested Parties are not involved with the Defendant. It is said to be a company posing with fictional authenticity.
  7. The court has considered all the purported email correspondences, Purchase Orders and sales contract which were but communications in vain. Since the bill of lading is not negotiable, the shipping line is set to deliver goods to the consignee.
  8. The Plaintiff's case is further that the contract was dubiously entered with misrepresentation of the fact of the existence of the Defendant who is said to be a fictional entity made up by third party fraudsters.
  9. The payment was not made. The Plaintiff thus prayed the court to enter Judgment in its favor.



## Analysis

10. The case is not opposed. The issue is whether the court should issue an order restraining the delivery of the goods in the consignment to any other person than the Plaintiff.
11. The court notes that the Defendant though using the name “Ltd”, is not a limited liability but an unregistered business name. It was as such a non-existent company masquerading as a subsidiary of the 5<sup>th</sup> Interested Party. This is part of the increased lapses in Maritime and International Trade where the fraudsters use names similar to established names of companies including in Europe, Africa, Asia and USA taking advantage of language barriers, to import and defraud shippers.
12. The court also notes that the Plaintiff, on the facts presented, has to prove its case regardless of whether it proceeded by way of case stated. The burden of proof was on the Plaintiff. This is set out in section 107-109 of the Evidence Act as follows: -
  107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
    - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
13. In the case of Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September, the Supreme Court stated as doth: -
  - “ 62. On this sole important issue, the law is clear that he who alleges must proof.  
The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.
  63. Burden of Proof is used to mean an obligation to adduce evidence of a fact.  
According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each



fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

14. Further, in analyzing the purport of a bill of lading in the case of *Ginegar Plastic Products Ltd v Victrex Ltd & another* [2021] eKLR, the court, Njoki Mwangi J stated as follows: -

“ 19. In considering if the plaintiff still has good title to the consignment of goods after issuing a bill of lading in the name of the defendant, it is necessary to look into the value attached to the said document states as follows in regard to bills of lading-

“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship. The signed bill of lading is handed over to the shipper, who may either hold onto it or transfer it to a third person. During the voyage and transit, the bill of lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. This person named in the Bill of lading as the person to whom the delivery of goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A bill of lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.”

15. Therefore, I find and hold that the Plaintiff established by way of the documents presented in court that the bill of lading was issued in the absence of a contract of carriage and was as such a nullity.

16. Under Section 41 and 42 of the *Sale of Goods Act*, the Plaintiff retains and unpaid seller’s lien. The Section provides as doth; -

“ 41.

- (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases

- a. where the goods have been sold without any stipulation as to credit;



- b. where the goods have been sold on credit, but the term of credit has expired; (c) where the buyer becomes insolvent.
      - c. (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.
42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder unless the part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.”
17. Therefore, in this case, without payment, and with the person contracting being fictitious, the Plaintiff is entitled to claim and return its goods. In *Junca Gelatines S.L v Hilton Ingredients (U) Ltd* [2021] eKLR, Njoki Mwangi, J stated as doth: -
- “ 22. Since the order for the consignment of goods was made fraudulently the title in the goods did not pass to the defendant. It is my finding that the plaintiff has discharged its burden of proof on a balance of probability”
18. Consequently, the court is satisfied that the defendant did not pay for the consignment, the same was fraudulently ordered. The court cannot give effect to an illegality. The contract for sale was thus void *ab initio*. There is nothing parties can add to make the contract legal having been void. In the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) stated as follows;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
19. The end result is that the suit is merited and is accordingly allowed with costs.
20. However, the Plaintiff also prayed for damages for fraudulent misrepresentation as against the Defendant. This relief cannot issue in vain since the Defendant is nonexistent and so unavailable. The purported sales contract is consequently void for all intents and purposes and I so find and hold.

### **Determination**

21. In the upshot, the Plaintiff's suit succeeds based on following orders: -
- a. A Declaration be and is hereby issued that the contracts evidenced by exchange of emails in the period between 23<sup>rd</sup> February 2024 and April 2024 between the Plaintiff and the Defendant are null and void *ab initio*.
  - b. A Declaration be and is hereby issued that the Plaintiff is the legal and equitable owner of the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in Bills of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, 3100016357 dated 25/3/2024 for 1 FCL and 3100015176 dated 25/3/2024 for 1 FCL.



- c. An Order be and is hereby issued cancelling the Bill of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, Bill of Lading No. 3100016357 dated 25/3/2024 for 1 FCL and Bill of Lading No. 3100015176 dated 25/3/2024 for 1 FCL.
- d. An Order be and is hereby issued allowing the Plaintiff and/or its appointed agents to take possession of the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in Bills of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, 3100016357 dated 25/3/2024 for 1 FCL and 3100015176 dated 25/3/2024 for 1 FCL for exportation and repatriation.
- e. A Permanent Injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties whether by themselves and/or through their employees, officers, servants or agents from issuing a Delivery Order in respect of the goods in container numbers: Volu4923150, Buru6630658, Buru6611257 and SLVU4629091 more particularly described in the Bill of Lading No. 3100015941 dated 22/3/2024 for 2 FCL, Bill of Lading No. 3100016357 dated 25/3/2024 for 1 FCL and Bill of Lading No. 3100015176 dated 25/3/2024 for 1 FCL to the Defendant or any other party that is not the Plaintiff and or its appointed Agents.
- f. The Plaintiff shall keep the interested parties indemnified of claims from the defendant.
- g. The interested parties to bear their own costs.
- h. Costs of the suit of USD 5,550/= be awarded to the Plaintiff together with the cost of repatriation.
- i. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

**Ms. Nzisa for the Plaintiff**

**No appearance for the Defendant**

**No appearance for the Interested Parties**

**Court Assistant - Jedidah**

