



**Kenya Trucks and Tractors Limited v County Government of Mombasa (Civil Suit E001 of 2020) [2023] KEHC 2394 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E001 OF 2020  
OA SEWE, J  
MARCH 24, 2023**

**BETWEEN**

**KENYA TRUCKS AND TRACTORS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff, Kenya Trucks and Tractors Limited, filed this suit on November 4, 2020 claiming Kshs. 53,595,000/= from the defendant, the County Government of Mombasa. The plaintiff's cause of action was that, at the defendant's request, it submitted a quotation in the year 2015 for the use of its bulldozer and wheel loader. The plaintiff stated that it quoted an hourly rate of Kshs. 15,000/= for each of the machines. Thereafter, the defendant issued it with 12 Local Service Orders specifying the hire period to be from July 5, 2016 until February 7, 2017.
2. The plaintiff contended that the machines were duly availed to the defendant; and that the defendant's nominated supervisors would sign the work sheets on a daily basis, confirming the hours worked for the day per machine. The plaintiff further asserted that, by February 2017 the total amount payable by the defendant was Kshs. 53,595,000/=, for which the defendant prepared a Payment Voucher. It further averred that, for reasons unknown to it, the defendant failed to make the payment as expected. The plaintiff thereafter sent several demand letters to the office of the Governor, to no avail. Instead, all it received were empty promises to pay.
3. At paragraphs 15, 16 and 17 of the Plaint, the plaintiff averred that it became aware of a presidential Directive issued in January 2020 to all County Governments concerning the payment of all pending bills. Based on that information, the plaintiff wrote to the defendant, reminding it of its outstanding debt. It averred that, thereafter on the February 7, 2020, the defendant wrote back stating that it was looking into the matter and would revert soon. The plaintiff also wrote to the National Treasury



requesting for information on the pending bills and was advised that this particular pending bill was not listed among the defendant's pending bills as at June 30, 2018.

4. In the light of the foregoing, the plaintiff contended that the defendant breached its obligations as set out in the service contract. It also alleged fraud, collusion as well as negligence and breach of duty to act in good faith on the part of the defendant. Particulars thereof were furnished by the plaintiff at paragraphs 18, 19 and 20 of the Plaintiff. It is for the foregoing reasons that the plaintiff filed this suit claiming:
  - (a) Kshs. 53,595,000/=;
  - (b) Costs of the suit;
  - (c) Damages for breach of contract;
  - (d) Interest on [a], [b] and [c] above at court rates from the date the debt arose.
  - (e) Any other relief that the court may deem fit to grant.
5. The defendant filed its defence in the matter and denied the plaintiff's allegations. For instance, in response to paragraph 7 of the Plaintiff, the defendant averred that, despite having issued the 12 local service orders as averred, the hiring period never actually commenced as the trucks intended to be hired out from the plaintiff were never actually availed; and thus, the intended contract was never performed. Accordingly, the defendant denied that its supervisors signed daily worksheets on its behalf as alleged by the plaintiff.
6. The defendant admitted that it is aware of the Presidential Directive alluded to by the plaintiff, as well as the fact that the plaintiff wrote to the National Treasury seeking for additional information in connection with its alleged pending bills. According to the defendant, the National Treasury made it clear that there was no such pending bill as has been claimed herein. Thus, the defendant denied that it was in breach of any contract as the fault was the plaintiff's for not availing the equipment as requested for by the defendant. It specifically responded to the allegations of breach of contract, fraud, collusion, malice, negligence and misrepresentation particularized at paragraphs 18 to 23 of the Plaintiff and prayed for the dismissal of the suit with costs.
7. The matter came up for hearing on June 22, 2022 and in support of the plaintiff's case, evidence was called Gabriel Musyoka Waema (PW1). He adopted his witness statement dated October 30, 2020 in which he stated that he is an employee of the plaintiff and was then the financial/accounting officer; and was therefore in charge of accounts. He also explained that the plaintiff is in the business of supplying and delivering hire services of Bulldozers and Wheel loaders based on dry rates (without fuel and service costs) on an as and when required basis.
8. In respect of the instant matter, PW1 stated that the plaintiff quoted an hourly rate of Ksh. 15,000/= for each of the equipment for which the defendant issued 12 Local Service Orders (LSOs). According to him, the hiring commenced on July 5, 2016 and was to go on until February 7, 2017. He added that the defendant would sign the daily work sheets through its nominated supervisors by end of day and hand over a copy of the worksheets to the plaintiff; while the originals would be sent to the Head, Green and Urban Services, confirming the hours worked for the day.
9. PW1 further explained that, due to the emergency VIP state visit to the County of Mombasa and the festive season of December 2016 to January 2017, the plaintiff was advised to ensure that the machines were providing services during the said period on the understanding that the LSOs were to follow. It was his evidence that, although the services were provided, the LSOs were never issued. At paragraphs 8 and 9 of PW1's witness statement he gave the particulars of the pertinent documents and the total



- cost of the additional services. It was thus the evidence of PW1 that the defendant did not pay for the hire of its machines, amounting in total to Kshs. 53,595,000/=; which amount remains unpaid to date.
10. It was further the testimony of PW1 that the plaintiff wrote several demand letters and made numerous follow ups including writing to the Governor of Mombasa and was advised that the defendant's County Secretary was looking into the matter and would get back to the plaintiff as soon as possible. He further testified that, while the plaintiff was actively pursuing its claim, it became aware of a Presidential Directive to all County Governments in January 2020 to the effect that all pending bills be cleared; and that funds would be provided by the National Treasury for that purpose. PW1 further stated that the plaintiff took the initiative to write to the defendant on February 7, 2020 seeking payment pursuant to the directive and was once more advised that the defendant was looking into the matter and would revert soon.
  11. At paragraph 15 of his witness statement, PW1 stated that the plaintiff also wrote to the National Treasury and Planning, requesting for information on its pending bill, and that the National Treasury wrote back advising that the plaintiff's pending bill was neither listed as an eligible or ineligible pending bill in the defendant's list as at June 30, 2018. PW1 concluded his evidence by stating that to date, the defendant has failed, refused and/or neglected to settle the aforesaid sum of Kshs. 53,595,000/=. PW1 also produced the plaintiff's List and Bundle of Documents (marked the Plaintiff's Exhibit No. 1) to buttress his evidence. He prayed that judgment be entered in favour of the plaintiff as prayed in the plaint.
  12. The defendant filed a defence but failed to file either its list of witnesses and statements or a list and bundle of documents. After the close of the plaintiff's case, the defence counsel, Mr. Furaha, intimated that the defendant would not be calling any witness. Accordingly, the court proceeded to give directions on the filing of closing submissions. On behalf of the plaintiff, Mr. Khan relied on his written submissions dated August 2, 2022. He relied on several authorities to support his submission that where the plaintiff gives evidence in support of his case and the defendant fails to call any witness, the plaintiff's case stands unchallenged. Thus, counsel urged the court to find that the defendant's averments amount to a general traverse and are therefore meaningless averments with no probative value in so far as they are not supported by way of evidence. In particular, counsel relied on the following cases:
    - (a) *Bilba Matiangi v Kisii Bottlers Limited & Another* [2021] eKLR;
    - (b) *Daniel Kenga Katana & 4 Others v Dzitu Toto Bokole & 3 Others* [2022] eKLR;
    - (c) *Netah Njoki Kamau & Another v Eliud Mburu Mwaniki* [2021] eKLR; and,
    - (d) *Kenya Power & Lighting Co. Ltd v Rasul Nzembe Mwadzaya* [2020] eKLR.
  13. On behalf of the defendant, Mr. Furaha relied on his written submissions filed on September 26, 2022 in which he proposed the following issues for determination:
    - (a) What is the effect of the defendant's failure to adduce evidence in court?
    - (b) Whether the defendant is indebted to the plaintiff;
    - (c) Whether the plaintiff can claim for payment of works allegedly done but not requested for; and,
    - (d) Who bears the costs of the suit.
  14. Mr. Furaha relied on sections 107 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya in urging the Court to find that the obligation of the plaintiff to discharge the legal burden of proof



is not in any way predicated on whether or not the defendant adduced evidence. He relied on [\*GAS Kenya Limited v Amber Enterprises Limited\* \[2020\] eKLR](#), for the proposition that the burden of proof remains on the plaintiff throughout the case; and that the burden did not shift merely because the defendant failed to adduce evidence in court.

15. Mr. Furaha further submitted that the burden of proof was on the plaintiff to show that upon issuance of the LSOs, the plaintiff delivered the machines as agreed and thereafter raised an invoice. He urged the Court to note that, in cross-examination, the PW1 conceded that several of the delivery notes allegedly prepared by the plaintiff were not actually received by the defendant. He posited that those aspects of the plaintiff's claim are fictitious. As for the delivery notes that were received, counsel pointed out that same were paid. He made reference in particular to page 38 and the admission by PW1 in cross-examination that the deliveries that were duly received were actually paid for. He also drew the attention of the Court in this regard to the letters at pages 91, 92 and 93 of the plaintiff's bundle of document dated August 20, 2020 and September 4, 2020, respectively, to support his assertion that this particular claim is fictitious.
16. At paragraphs 23, 24 and 25 of his written submissions, Mr. Furaha urged the Court to note that, although the plaintiff's evidence was that the defendant requested for work through LSOs, it went ahead and claimed for work allegedly done in the absence of LSOs. He submitted that, in the absence of an LSO requesting for services, it was impossible to ascertain the scope of works envisaged and whether the services were rendered. He accordingly urged for the dismissal of this suit with costs as it is contrived as a means of unjust enrichment.
17. I have considered the pleadings filed herein by the parties as well as the evidence adduced by the plaintiff. I have likewise considered the written submissions filed on behalf of the parties by their counsel. Learned counsel for the defendant, Mr. Furaha, posed the question as to the effect, if any, of the failure by the defendant to adduce evidence. He propounded the view that the burden of proof remained throughout on the plaintiff, notwithstanding that no evidence was adduced by the defendant; and therefore it is not a walk-over for the plaintiff in this case. On the other hand, Mr. Khan for the plaintiff urged the posturing that, since no evidence was adduced by the defence, the plaintiff's case stands uncontroverted and therefore ought to be allowed as presented and the orders prayed for granted.
18. I have given due consideration to these rival positions by counsel from the prism of section 107 of the [\*Evidence Act\*](#), which states that:
  - (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."
19. In the same vein, section 108 of the [\*Evidence Act\*](#) provides that:

The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
20. It is plain therefore that the legal burden of proof in a civil case such as this is on the plaintiff to prove its assertions on a balance or probabilities. Hence, in [\*Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank\* \[2004\] eKLR](#) the Court of Appeal held: -

“...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed



by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail...”

21. I note, however, that there are numerous authorities, of a persuasive kind, to support the posturing taken by Mr. Khan, namely, that where no evidence is called, the plaintiff’s case remains unchallenged. One of them is *Bilba Matiangi v Kisii Bottlers Ltd & Another* (supra) it was held:

“Where a Plaintiff gives evidence in support of her case but the Defendant fails to call any witness in support of its allegations then the Plaintiff’s evidence is uncontroverted and the statement of defence remains mere allegations...”

22. The same position was adopted in *Daniel Kenga Katana* (supra), *Netah Njoki Kamau & Another v Eliud Mburu Mwaniki* (supra) and *Kenya Power & Lighting Co. Ltd* (supra). Similarly, in *Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another* [2015] eKLR, it was held that:

“...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true...”

23. Lastly, in *Drappery Empire v Attorney General*, HCCC No. 2666 of 1996, Hon. Rawal, J. (as she then was) was of a similar view. Here is what she had to say:

“...where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendants to adduce evidence the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.”

24. The Court of Appeal has however provided guidance in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR in which the main issue for determination was whether the learned judge erred by holding that the appellant had failed to prove its case on a balance of probabilities, notwithstanding the fact that the respondent had not called any evidence to rebut the appellant’s case. The Court of Appeal held:

“The appellant relies on a number of decisions to press the view that in the absence of rebuttal evidence by the respondent, its case must automatically be taken as proved. We have already alluded to some of those cases in this judgment... First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v. Crusair Ltd* (No1) [1987] KLR 103 when he stated:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if



they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant’s failure to testify when he had filed a defence and a counterclaim. While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.

25. Hence, in so far as the defence filed herein did not entail a counterclaim, I would agree with the defence counsel that the burden of proof was throughout on the plaintiff; and therefore that it was inconsequential that the no evidence was adduced by the defendant.
26. Turning now to the merits of the case, the parties appear to be in agreement that the defendant approached the plaintiff with an offer to hire its equipment for the purpose of clearing solid waste at Kibarani dump site. To that end, the defendant issued the plaintiff with 12 LSOs indicating the agreed consideration at Kshs. 15,000 per hour per machine. Copies of the LSOs were exhibited as part of the plaintiff’s bundle of documents. Whereas the plaintiff contended that the hire period was extended by mutual consent to February 2017; and that the machines were availed as ordered, the defendant was of a contrary posturing. Hence there is a contestation that invoices were justifiably raised and delivered to the defendant for payment in the total sum of Kshs. 53,595,000/=.
27. In the premises, most of the issues proposed by the plaintiff in its List of Issues dated February 20, 2022 are non-issues. The issues lending themselves for consideration are:
  - (a) Whether indeed the services were rendered by way of availing the subject motor vehicles for the agreed hours; and if so, whether the defendant has paid for those services.
  - (b) Whether the plaintiff is entitled to damages as pleaded.
  - (c) Who should pay the costs of this suit?

**(a) On whether the services were rendered:**

28. From the evidence adduced herein by PW1, the plaintiff billed the defendant for services allegedly rendered on the basis of LSOs, and on the basis of requests for extension of service period, but without LSOs. In respect of the first category, PW1 conceded in cross-examination thus:

“I confirm we delivered as per the LSO. At p.7 of the Plaintiff’s Bundle is an LSO that was issued by the defendant to the Plaintiff. It bears a signature by the defendant. The LSO was received by the Plaintiff and duly stamped as received. We delivered on the basis of the LSO. The delivery note is at p. 9 of the Plaintiff’s Bundle. The DN was not stamped or signed by the defendant. The same goes for the DNs on pp. 15, 18, 21 and others. At p. 38 is a DN...”

29. It is evident therefore that in all the instances aforementioned there was no acknowledgment of delivery of the hired services. Indeed, in the only instance where such delivery was acknowledged, namely, in respect of LSO No. 1228637 and Delivery Note No. 2206, exhibited at page 38 of the plaintiff’s Bundle, PW1 conceded that payment was made by the defendant per Payment Voucher No. (at page



43 of the plaintiff's Bundle of Documents). It follows therefore that, in respect of the unsigned delivery notes, the plaintiff's evidence falls short of proving delivery of services on a balance of probabilities in so far as there is a lingering doubt as to whether or not the services were rendered.

30. Further to the foregoing, the plaintiff relied on worksheets and summaries that were prepared by PW1 without the in-put of the defendant. Hence, PW1 admitted that the documents do not bear any stamp of the defendant or the names of the officers who allegedly signed them on behalf of the defendant. PW1 also conceded that the names appearing on the documents, namely, Richard and Benson, are names of employees of the plaintiff and not the defendant. Again, this goes to show that the evidence adduced by the plaintiff falls short and is insufficient to prove the plaintiff's case on a balance of probabilities.

**(b) On whether the plaintiff is entitled to damages for breach contract:**

31. Needless to say that damages are available as a remedy for breach contract. In Anson's Law of Contract 28<sup>th</sup> Edition the opinion is given that:

“Every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal...”

32. Thus, the principle in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 is that:

“In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach...What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.”

33. Having found that the plaintiff has not proved its case on a balance of probabilities, the issue of an award of damages would not arise; and if anything, I would not have awarded any amount over and above the sum claimed of Kshs. 53,595,000/=, on the basis of *Gedion Mutiso Mutua v Mega Wealth International Limited* [2012] eKLR, in which it was held thus:

“The principal guiding the award of general damages for breach of contract was restated in *Provincial Insurance Company of East Africa Ltd vs. Mordekai Mwangi Nandwa* [1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. the plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of



mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract..."

34. The same thought was expressed by the Court of Appeal in *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR, thus:

"...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi Vs. Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also *Securicor (k) vs. Benson David Onyango & Anor* [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages..."

35. In the premises, I find no merit in the plaintiff's case. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF MARCH 2023**

**OLGA SEWE**

**JUDGE**

