



**Kenya Trucks and Tractors Limited v County Government of Mombasa (Civil Suit E002 of 2020) [2023] KEHC 2393 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2393 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E002 OF 2020  
OA SEWE, J  
MARCH 24, 2023**

**BETWEEN**

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

**AND**

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

**JUDGMENT**

1. In its Complaint dated October 30, 2020 and filed herein on November 4, 2020, the plaintiff described itself as a limited liability company carrying on the business of supplying and delivering heavy industrial machines in the Republic of Kenya. In that capacity, it responded to an invitation to tender advertised in the local newspapers in the year 2014. The tender was for the supply and delivery of five units of 20-ton payload tippers. The plaintiff averred that it participated in the tender and turned out to be the successful bidder. Accordingly, it was issued with a Local Purchase Order by the defendant to supply 5 units of 20-ton payload tippers at the total price of Kshs. 46,524,120/=.
2. It was the contention of the plaintiff that it proceeded to import the 5 units of tippers on behalf of the defendant vide Bill of Lading No. HDGLCNKE0147350 and Certificate of Origin No. 15C3700B2289/00028 which it delivered to the defendant on June 22, 2015 via Delivery Note No. 0541 and Invoice No. 0431. At paragraphs 12-17 of the Complaint, the plaintiff averred that, as the motor vehicles were delivered towards the end of the Financial Year 2014-2015, it was verbally agreed between the parties that the payment would be made in two tranches; and that the 1<sup>st</sup> tranche of Kshs. 27,914,472/= would be paid in July 2015. This was never to be.
3. Thus the plaintiff's cause of action was that the defendant has to date failed, refused and/or neglected to settle the aforesaid sum of Kshs. 46,524,120/= plus interest and additional costs incurred in connection with the supply of the 5 tippers despite various requests, follow ups and undertakings. Accordingly, it filed this suit praying for judgment against the defendant for:



- (a) Kshs. 46,524,120/=;
  - (b) Costs of the suit;
  - (c) Damages for breach of contract;
  - (d) Interest on [a], [b] and [c] at court rates from the date the debt arose till payment in full;
  - (e) Any other relief that the Court may deem fit to grant.
4. The claim was resisted by the defendant vide its Defence dated December 17, 2020. The defendant denied each and every allegation made in the Plaintiff, including allegations that it issued the subject LPO to the plaintiff. It denied having received any payload tippers from the plaintiff and asserted that it was a stranger to the allegations set out in paragraphs 12 to 20 of the Plaintiff. In response to paragraph 20 of the Plaintiff, the defendant affirmed that County Governments were funded by the National Government to clear all outstanding pending bills and that it therefore settled all its pending bills and is not in any way indebted to the plaintiff. It accordingly prayed for the dismissal of this suit with costs.
5. The suit was heard on June 22, 2022 and in support of the plaintiff's case, evidence was adduced by its Accountant, Gabriel Musyoka Waema, on the basis of his witness statement dated October 30, 2020. He testified that, in response to a tender advertisement floated by the defendant in the year 2014, the plaintiff put in its bid for the supply and delivery of, among others, 5 units of 20-ton payload tippers. It was Mr. Waema's evidence that the plaintiff's bid emerged successful leading to an award of the tender dated September 2, 2014, which it accepted on September 8, 2014. Mr. Waema also confirmed that, after acceptance of the award, the defendant issued the plaintiff with a Local Purchase Order Ref. No. 2260301 dated October 2, 2014 for the supply and delivery of 5 units of 20-ton payload tippers for the total sum of Kshs. 46,524,120/= inclusive of 16% VAT.
6. It was further the evidence of Mr. Waema that the plaintiff imported the said 5 tippers via Bill of Lading No. HDGLCNKE0147350 and Certificate of Origin No. 15C3700B2289/00028 and delivered them to the defendant on June 22, 2015 via Delivery Note No. 0541. The plaintiff thereupon raised its Invoice No. 0431 dated June 22, 2014 for payment. Mr. Waema explained that, as the vehicles were delivered towards the end of the Financial Year 2014/2015, the defendant proposed to make the payment in two instalments and proceeded to issue a payment voucher for Kshs. 27,914,472/= for the first instalment before the lapse of the financial year. The plaintiff was required to raise supporting documents on the basis of which the defendant generated the payment voucher dated June 27, 2015.
7. At paragraph 16 of his witness statement, Mr. Waema explained that, ultimately, even this first instalment payment was not made as promised. Accordingly, vide a letter dated July 5, 2016, the plaintiff cancelled the verbal arrangement and demanded payment of the entire sum of Kshs. 46,524,120/= as per its Invoice No. 0431. He explained that the defendant ignored the plaintiff's demands for payment and that the debt remained unpaid by December 6, 2018 when the defendant again opted to prepare two payment vouchers for Kshs. 27,914,472/= and Kshs. 18,609,648/=, but that even in this instance the vouchers never yielded any payment.
8. Mr. Waema further testified that while the plaintiff was actively pursuing its claim against the defendant, it became aware of a Presidential Directive issued in January 2020 to all County Governments that all pending bills be cleared; and that funds would be provided by the National Treasury for that purpose. He added that the plaintiff took the initiative to write to the defendant on February 7, 2020 seeking payment pursuant to the Directive. It also wrote to the National Treasury and Planning requesting for information on its pending bill. While the defendant responded to say



that the plaintiff's matter would be looked into, the National Treasury wrote to the plaintiff to say that its pending bill was not listed among the defendant's debtors as at June 30, 2018.

9. Thus, it was the testimony of Mr. Waema that the acts of the defendant in ignoring the subject debt is intentional; and that the debt is yet to be paid, notwithstanding that it was missing from the list of pending bills that were settled pursuant to the Presidential Directive of January 2020. He produced the plaintiff's List and Bundle of Documents as exhibits in proof of the claim. They were marked the Plaintiff's Exhibit 1 herein). Accordingly, Mr. Waema urged the Court to find in favour of the plaintiff and enter judgment for it in the sum of KShs. 46,524,120/= as quantified in the Plaint together with interest and costs.
10. Although the defendant filed a defence, it failed to file either a list of witnesses and statements or a list and bundle of documents. Indeed, after the close of the Plaintiff's case, the defence counsel, Mr. Furaha, intimated that the defendant would not be calling any witness. In the premises, the court proceeded to give directions on the filing of closing submissions before fixing the matter for judgment.
11. In its written submissions filed on July 26, 2022, Mr. Khan for the plaintiff urged the Court to find that the plaintiff had proved its case on a balance of probabilities. He pointed out that the defendant neither filed any witness statement nor adduced any evidence in rebuttal; and therefore that the plaintiff's evidence is uncontroverted. He made reference to a good number of authorities to underscore his submission that where the plaintiff gives evidence in support of his case and the defendant fails to call any witness in support of his allegations, the plaintiff's case stands unchallenged. Counsel further submitted that the denials contained in the defence therefore are meaningless averments with no probative value in the absence of supporting evidence.
12. In particular, Mr. Khan relied on Sections 107 and 108 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the following cases:
  - (a) *Bilha 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 Rassul Nzembe Mwadzaya* [2020] eKLR.
13. On his part, Mr. Furaha for the defendant proposed the following issues for determination in his written submissions dated August 1, 2022:
  - (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) Who bears the costs of the suit.
14. On the effect of the defendant's failure to adduce evidence, Mr. Furaha submitted that the burden of proof was on the plaintiff to prove its claim to the satisfaction of the Court as required by sections 107 and 109 of the *Evidence Act*; and that that burden was not 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 in this case remained on the plaintiff throughout the case and did not shift merely because the defendant failed to adduce evidence in court.
15. On whether the defendant is indebted to the plaintiff, Mr. Furaha submitted that since the plaintiff acknowledged that the defendant prepared two payment vouchers copies of which were annexed at pages 22 and 23 of the plaintiff's bundle of documents, it was illogical and disingenuous for the



plaintiff to then turn around and allege that it was never paid at all by the defendant. He reiterated the defendant's stance that the plaintiff was duly paid and that the defendant does not owe any debt to the company. He urged the court to rely on the letter from the plaintiff to the National Treasury exhibited by the plaintiff at pages 91 and 92 of its bundle of documents, and the response thereto by the Director General, Budget Fiscal and Economic Affairs, at page 93 of the Plaintiff's bundle of documents. Thus, Mr. Furaha prayed that the plaintiff's suit be dismissed with costs.

16. I have given due consideration to the pleadings filed herein, the evidence adduced by the plaintiff as well as the written submissions filed on behalf of the parties by their counsel. One of the foremost issues emerging from the submissions filed herein is the effect of the failure by the defendant to adduce evidence. While counsel for the plaintiff took the view that the effect is that the plaintiff's case is entirely uncontroverted and ought to be allowed as prayed, Mr. Furaha was of the posturing that the burden of proof remained throughout on the plaintiff, notwithstanding that no evidence was adduced by the defendant.
17. First and foremost, section 107 of the [Evidence Act](#) is explicit 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."
18. Likewise, 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.
19. Accordingly, 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...”
20. Needless to say that authorities abound to support either side of the argument; such as the authorities cited by Mr. Khan, which propound the view that where no evidence is called, the plaintiff's case remains unchallenged. For instance, in *Bilha 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...”



21. 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...”

22. And, in Drappery Empire v Attorney General (supra) Hon. Rawal, J. (as she then was) was more pointed in her approach. She held that:

“...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.”

23. 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 pronounced itself thus:

“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.



24. In the instant matter, there was no counterclaim. Accordingly, I would agree with the defence counsel that the burden of proof was throughout on the plaintiff; and it mattered not that the defence opted to call no witness.
25. That said, I must now proceed to analyze the plaintiff's evidence to ascertain whether all the elements of its case have been proved on a balance of probabilities. I note that, although counsel for the plaintiff proposed a total of 14 issues in the plaintiff's List of Issues dated February 10, 2022, not all of them are in dispute. For instance, it is not in dispute that the defendant invited tenders from interested dealers to supply and deliver 5 units of 20-ton payload tippers or that the plaintiff was awarded the tender at the unit price of Kshs. 9,304,824/= and the total price of Kshs. 46,524,120/=. The plaintiff produced as exhibits copies of the Local Purchase Order issued by the defendant at page 4 of its Bundle. Along with the LPO, the plaintiff produced a copy of the Bill of Lading and related documents as well as its delivery note and Invoice dated June 22, 2015. Accordingly, the only issues for determination are:
- (a) Whether the defendant paid for the 5 units of 20-ton payload tippers; and,
  - (b) Whether the plaintiff is entitled to general damages for breach of contract.
  - (c) Who should pay the costs of this suit?

**(a) On Payment by the defendant:**

26. The evidence on record, as adduced by Mr. Waema (PW1) is that, upon delivery of the tippers, the plaintiff thereupon raised an Invoice for payment, namely, Invoice No. 0431 dated June 22, 2014. It is plain therefore that the delivery was made towards the closure of the financial year 2014/2015 as was explained by Mr. Waema. In addition, the plaintiff adduced credible evidence to demonstrate that, a Payment Voucher was generated by the defendant on June 27, 2015, not for the full amount of Kshs. 46,524,120/=:, but for Kshs. 27,914,477/= only. A copy of the Payment Voucher was exhibited by the plaintiff at page 15 of the Bundle of Documents marked as the Plaintiff's Exhibit 1. Hence, I am convinced as to the truth of the evidence of PW1 to the effect that the plaintiff was agreeable to the defendant's proposal to have the contract sum paid in two tranches; and that even that proposal was not honoured by the defendant.
27. It is noteworthy that the cancellation of the arrangement for payment in two instalments was not made by the plaintiff until 5<sup>th</sup> July 2016, about one year later. This is borne out of the plaintiff's letter exhibited at page 16 of the plaintiff's Bundle of Documents. Moreover, there are on record several demands for payment by the plaintiff between July 5, 2016 and January 10, 2020 as per the documents exhibited at pages 17 to 21 of the plaintiff's Bundle of Documents. Clearly therefore, the entire amount of Kshs. 46,524,120/= was still outstanding as at February 7, 2020 when the defendant, through its County Secretary wrote to the plaintiff acknowledging its obligations to the plaintiff. That letter is as page 88 of the plaintiff's Bundle of Documents. Indeed, in a letter dated September 4, 2020, the National Treasury and Planning conceded to the plaintiff that:

“...the only complete documents submitted were for the tender no. CGM/PRO/QTN/36/2013-2014 for the supply of five (5) 20-ton Payload Tippers each amounting to Kshs. 9,304,824 bringing the total amount to Kshs. 46,524,120...”

28. In the absence of proof of payment, I am satisfied that the aforesaid sum remains due and payable from the defendant to the plaintiff and that the plaintiff has proved on a balance of probabilities that the defendant is indeed indebted to it in the sum of Kshs. 46,524,120/=:.



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

29. 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...”

30. Thus, in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949) 2 KB 528* it was held 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.”

31. In the instant matter, the plaintiff alleged, quite vaguely I must say, that the defendant failed to honour the salient terms, conditions and stipulation of the contract, despite being obliged to; that the defendant failed to pay for “...the works despite the latter being successfully completed to its satisfaction”; and that the defendant failed to act in good faith in the discharge of its constitutional mandate and powers. It is noteworthy, however, that other than the LPO, no formal contract was signed between the parties. The LPO itself makes reference to the terms and conditions stated on the back thereof; which terms were never brought to the attention of the Court.

32. In *Gedion Mutiso Mutua v Mega Wealth International Limited [2012] eKLR*, 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...”

33. Similarly, in *Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR*, the Court of Appeal held:

“...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...”

34. In the premises, I am far from convinced that the plaintiff is entitled to damages for breach of contract over and above the liquidated claim of Kshs. 46,524,120/=.

**(c) On Costs of the Suit:**

35. The proviso to section 27(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya is explicit that costs follow the event; the event herein being that the plaintiff is the successful litigant herein. Hence, the plaintiff is entitled to costs of the suit. I would accordingly award the costs of this suit to the Plaintiff.
36. In the result, judgment is hereby entered for the plaintiff in the sum of Kshs. 46,524,120/= together with interest thereon at court rates from the date hereof until payment in full together with costs of the suit.

It is so ordered.

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

**OLGA SEWE**

**JUDGE**

CIVIL SUIT NO. E002 OF 2020 JUDGMENT 4

