



**Klite International Trade Company Limited v Amey PLC & another (Civil Case 48 of 2022) [2023] KEHC 27547 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 48 OF 2022  
F WANGARI, J  
JULY 28, 2023**

**BETWEEN**

**KLITE INTERNATIONAL TRADE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**AMEY PLC ..... 1<sup>ST</sup> DEFENDANT**

**JAYDEN ROWAN ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. On 25/7/2022, the Plaintiff (a limited company incorporated under the laws of Hong Kong) filed a plaint dated 13/7/2022 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 4 Interested Parties, seeking for orders inter alia that there be a declaration that the Defendants have got no claim over the consignment as stated herein below in this judgment. The Interested Parties were discharged from the proceedings via the order issued by this court on 27/1/2023.
2. The 2<sup>nd</sup> Defendant contacted the Plaintiff, a designer, manufacturer and supplier of LED lighting products, claiming he was the sales executive of the 1<sup>st</sup> Defendant Company. He was desirous of purchasing the LED lighting products from the Plaintiff. The Plaintiffs did due diligence and confirmed that the 1<sup>st</sup> Defendant was a reputable company.
3. The Plaintiff and the Defendants entered onto a contract for sale of the LED products for USD 513, 500. The contract is dated 24/3/2022. Payment was to be done within 30 days of the bill of lading. The Plaintiff was to ship a total of consignment of 3 containers.
4. The Plaintiff dispatched the 1<sup>st</sup> consignment in 3 containers, containing a total of 390,000 pieces of A60 – 8 4.9W LED B22 Bulbs valued USD 222 300. This was after the parties agreed that the shipment be done before payment. The consignment was insured the same and loaded there at the Seaport of



Ningbo China, to Port of Mombasa through Gold Star Line Ltd. They were under Bill of Lading; GOSUNGB1128850, GOSUNGB1128851 and GOSUNGB1128852.

5. The original Bills of Lading were forwarded to the 2<sup>nd</sup> Defendant together with the certificate of origin No 22C3302B0992/00086. The goods were not paid for within 30 days as per the agreement. The 2<sup>nd</sup> Defendant requested for extension of time and requested for the release of the 2<sup>nd</sup> consignment. No payment was made and the 2<sup>nd</sup> Defendant went underground.
6. The Plaintiff becoming suspicious of the Defendants sought to ascertain the genuineness of the Defendants. It was found that the 1<sup>st</sup> Defendant was a genuine company, but the 2<sup>nd</sup> Defendant was unknown to them and neither was the transaction at hand. The 2<sup>nd</sup> Defendant was a fraudster, hence the genesis of this suit.
7. Interlocutory judgment was entered against the Defendants as they never entered appearance despite being served. Matter was fixed for formal proof, where the Plaintiff's witness adopted her witness statement as her evidence in chief. The documents in the Plaintiff's list of documents were adopted as the exhibits of the court.

### **Analysis and determination**

8. After considering the pleadings on record and the Plaintiff's witness statement, the issues for determination are;
9. The only 2 questions in this matter are: -
  - a. Whether the title to the goods has passed.
  - b. Whether the plaintiff has a lien overpayment for the goods.
  - c. Whether the Plaintiff ought to pay fees in demurrage accruing in respect to the shipment of the consignment.
10. Section 19(1) of the *Sale of Goods Act*, provides that as hereunder;  
Property in specific or ascertained goods passes when intended to pass
  1. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
  2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
11. In this case, the payment was to be done within a 30 days of receipt of the Bill of Lading. Payment was not made. The goods did not pass title. The goods thus remain the property of the shipper.
12. Further, the importer was later found to be a fraudster. Consequently, the shipper did not sell the goods. Delivery and payment are concurrent conditions. Under Section 30 of the *Sale of Goods Act*, the buyer must be willing to take possession and make payment concurrently. Therefore, the seller cannot lose title before delivery and payment is made.
13. On the second issue, Section 41 of the *Sales of Goods Act* states as follows;  
Seller's lien



- (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.
  - (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.
14. From the above, the seller's lien is still available in this case as payment and delivery of goods had not taken place.
  15. On the third issue, considering the circumstances under which the goods were shipped into the country, it would be onerous to impose demurrage charges on the Plaintiff. The court exercises its discretion and directs that the Commissioner of Customs & Border Control Department, Kenya Revenue Authority, and the Kenya Revenue Authority to waive the demurrage charges as prayed. I also note that when the above parties were discharged from these proceedings, there were no conditions imposed as against the Plaintiff.
  16. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that costs follow the event. However, this court retains its discretion to order otherwise. In the circumstances of the case, considering that the 2<sup>nd</sup> Defendant is a fraudster who probably doesn't exist, and who dragged the 1<sup>st</sup> Defendant's name into the transaction, the court exercises its discretion and awards no costs.
  17. Consequently, the suit has merit. I therefore make the following orders: -
    - a. That judgment is entered in terms of Prayers (a) to (e) of the Plaintiff.
    - b. Prayer (f) of the Plaintiff is declined, and there are no orders as to costs

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**F. WANGARI**

**JUDGE**

In the presence of:

M/S Mwaniki h/b for Kimathi Advocate for the Plaintiff

N/A for the Defendant

Abdullahi, Court Assistant

