



**Brick & Mortar Holdings Limited & another v Kenfreight (EA) Limited (Civil Case E338 of 2019)
[2023] KEHC 24695 (KLR) (Commercial and Tax) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E338 OF 2019
EC MWITA, J
SEPTEMBER 29, 2023**

BETWEEN

BRICK & MORTAR HOLDINGS LIMITED 1ST PLAINTIFF

TENGERI NYARAMBA OSORO 2ND PLAINTIFF

AND

KENFREIGHT (EA) LIMITED DEFENDANT

JUDGMENT

1. On 21st July 2015, the 1st plaintiff entered into a road carriage agreement with the defendant to transport a consignment of engineering and general purpose vehicles, spare parts self-sustainment stores, general stores, office and accommodation stores and break bulk equipment from Mombasa to Juba, South Sudan through Uganda.
2. One of the terms of the contract was that the 1st plaintiff was to provide vehicles it had legal ownership over and had to ensure that the vehicles were in good condition.
3. The plaintiffs averred that in 2018, the defendant instructed the 1st plaintiff to transport a consignment from Mombasa to Juba. The 1st plaintiff provided 1 vehicle registration numbers KBT 713J; KBT 714J; KBV 116E; KBX 713D; KCC 410G; KCC 411G; KCC 412G; KCC 413G; KCC 414G; KCE 613W; KCE 614W; KCG 570S; KCJ 056T and KCJ 057T for that purpose.
4. The consideration was USD 74,200 which was to be paid in two installments. The first installment was to be paid at the time of loading and the balance within 45 days of receipt of the 1st plaintiff's statement.
5. The defendant did not pay the first instalment of USD 50,200 in lump sum. Instead, the amount was paid in a series of smaller installments to the 1st plaintiffs' bank accounts through Abdallah Haytham Badbess. The final payment of the first installment was made on 28th February 2019. Further payment



was made in cash to the 2nd plaintiff by Abdallah, leaving a balance USD 24,000. The delay in paying the first instalment lead to delay in loading and transporting the consignment.

6. The consignment was eventually loaded between 15th and 28th December 2018, and the trucks arrived at the Namule Border crossing (between Uganda and South Sudan) between 24th February 2019 and 6th March 2019. The vehicles were however not allowed to cross into South Sudan due to the expiry of the tax exemptions from South Sudan's Ministry of Finance and Planning. The delivery was completed on 18th April 2019 after a new exemption certificate was issued on 25th March 2019. This delay made the 1st plaintiff incur waiting charges.
7. The 1st plaintiff issued a statement of account for the outstanding balance of USD 24,000 and the waiting charges of USD 396,200, but the defendant declined to settle the account.
8. The plaintiffs claim is that the defendant not only breached the contract but also fraudulently issued some delivery notes for the consignment in the name of Aham Transporters, (Aham) an entity that was not privy to their agreement. The defendant also refused to indicate the 1st plaintiff's name in some of the delivery notes despite the consignment being transported by its vehicles. The plaintiffs further averred that the defendant committed fraudulent acts against them and gave particulars of the fraud.
9. The plaintiff filed this suit seeking the balance of USD 24,000; waiting charges of USD 396,200; general damages; punitive, exemplary and aggravated damages for breach of contract; costs of the suit and interest.

Evidence

10. The 2nd plaintiff testified, adopted his witness statement as his evidence and produced a bundle of documents as exhibits. The 2nd plaintiff stated that he received instructions by phone to transport the consignment; LPOs were thereafter issued containing the agreed amount for transporting the consignment and that although loading was completed on 27th December 2018, they could not mobilize and deliver the consignment due to late payment of the first installment.
11. The 2nd plaintiff denied that there was a subcontract between the 1st plaintiff and Aham, asserting that Mr. Twalib was the defendant's agent. The 2nd plaintiff stated that their exhibits contained copies of logbooks showing details of the vehicles in the LPOs as well as those produced by the defendant that were used to transport the consignment. He also stated that the invoice issued by the 1st plaintiff on 3rd January, 2019 for USD 4200, matched the amount specified in the defendant's LPO dated 31st December, 2018.
12. In cross examination, the 2nd plaintiff admitted that the LPOs issued to the 1st plaintiff were not on record; that there was no evidence that the contract amount was agreed at USD 74,200 other than what was in the invoices; there was no evidence that the plaintiffs raised concerns with the defendant when they received payments in the first installment through Mr. Twalib paid on 20th Dec 2018 and the last of the 1st installment on 9th January 2019; that it ordinarily takes 5 days by road from Mombasa to the South Sudan border; that he was aware that the exemption was to expire; that the 1st plaintiff was to ensure that it had relevant documents (including valid tax exemption certificate); and that there was no evidence to support the waiting charges claimed.



Defence and counterclaim

13. The defendant filed a defence against the plaintiffs' claim and a counterclaim against the 1st plaintiffs and Aham. Aham was not a party to the plaintiffs' suit. The defendant admitted that there had been an agreement dated 21st July 2015 which was, however, concluded.
14. The defendant denied the averments in the plaint. In particular, the defendant denied contracting the plaintiffs on 8th December 2018 to transport the consignment from Mombasa to Juba. The defendant stated that the contract dated 8th December 2018 was with Aham.
15. The defendant averred that LPOs were issued to Aham, each LPO indicating the agreed transport charges and mode of payment. Aham signed delivery notes signifying acceptance to deliver the consignment. Payment was to be made in two instalments: one at the time of loading and the balance within 45 days after receiving Aham's statement of account. The defendant denied issuing LPOs to the 1st plaintiff.
16. The defendant again stated that the deposit was paid to Aham as agreed and on diverse dates. The consignment was delivered by Aham and the money due under the contract was fully settled. The defendant maintained that it was a stranger to any private arrangements between the plaintiffs and Aham.
17. In the counterclaim, the defendant averred that Aham breached the terms on the contract when it subcontracted the 1st plaintiff without consent in violation of clause 3 of the contract.
18. The defendant stated that Aham and the 1st plaintiff jointly and severally delayed the arrival of the consignment at the Namule border crossing causing the consignment to attract demurrage. They also refused to proceed with the journey and deliver the consignment and resorted to blackmailing the defendant into paying the demurrage charges.
19. The defendant sought judgment against the plaintiffs and Aham for general damages for breach of contract; refund of the overpaid sum of USD 48,098.87; interest at court rates from the date the sums fell due till payment in full; further interest at court rates from the date of filing of suit until payment in full and costs of the suit.
20. Aham did not enter appearance or file a defence. Default judgment was thus entered against Aham in the counterclaim on 5th July 2021.

Evidence

21. The defendant called James Agumba, (Mr. Agumba), its operations manager, who adopted his witness statement and produced two bundles of documents as defence exhibits. Mr. Agumba testified the defendant's road carriage agreements are open ended and are operationalized when LPOs are issued, specifying instructions of a particular consignment, issuance of delivery notes and raising of invoices.
22. The contracts terminate once the instructions in the LPOs have been fulfilled, the consignment delivered and payment of the balance of the contract sum settled. The LPO contains a tracking number, agreed rate, delivery note number and the transporter's name. The defendant also issues delivery notes capturing the truck details and cargo loaded to confirm that the consignment has been released to the transporter.
23. Mr. Agumba confirmed that the defendant and the 1st plaintiff had entered into an agreement by virtue of which the 1st plaintiff delivered some consignment to South Sudan in January 2016. Mr.



- Agumba however denied that the defendant contracted the 1st plaintiff to transport the consignments, the subject of this suit, since the LPOs for the consignment were issued to Aham.
24. According to Mr. Agumba, Aham provided invoices and matching delivery notes once the consignment was loaded. The defendant paid Aham the 50% deposit in several instalments and completed payment on 9th January 2019. Mr. Agumba asserted that according to the contract of 8th December 2018, Aham was responsible for the delivery of the consignment.
 25. On why the delivery notes captured details of trucks belonging to the 1st plaintiff, Mr. Agumba explained that the defendant believed that the trucks belonged to Aham and that it was Aham's duty to ensure that the trucks used to transport the consignment belonged to them.
 26. Mr. Agumba denied prior knowledge or receipt of the 1st plaintiff's invoices and statement of account of 30th April 2019. Mr. Afumba stated that although all documents are received at the reception, payments cannot be made without LPOs and accompanying delivery notes.
 27. Mr. Agumba went on to state that the defendant learnt that Aham had subcontracted transportation of the consignment without the defendant's consent through the email of 14th January 2019 after the 1st plaintiff complained about payment. Due to the disagreement between Aham and the 1st plaintiff, the consignment arrived at Namule border crossing late and after expiry of the tax exemption certificate (on 24th February 2019), despite being aware of the deadline as communicated in the email of 12th January 2019. A fresh exemption certificate had to be obtained (on 26th March 2019) by the defendant through the consignee.
 28. Mr. Agumba admitted in cross-examination, that the 1st plaintiff's contract could apply to the consignments because it was not specific; that even where the contract is subcontracted and consent is given, the liability remains that of the party contracted; that the overpayment of USD 48,098.87 claimed was made to Aham not the 1st plaintiff; that there is no invoice corresponding to the LPO dated 31st December 2018 in the defence exhibits for motor vehicle registration number KCC 410G/ ZE 9340 and that a corresponding delivery note dated 28th December 2018 for motor vehicle registration number KCC 410G/ ZE 9340 issued by the defendant referred to the 1st plaintiff as the transporter.
 29. It was also admitted that the delivery note predates the LPO even though the delivery note was issued after loading. Mr. Agumba maintained that the difference in dates is not material as the rates were already known by Aham and the 1st plaintiff and that the delivery note bears the defendant's stamp to confirm that the truck was crossing to Uganda at Malaba for purposes of tracking the consignment.

Plaintiff's submissions

30. The plaintiffs filed written submissions with oral highlights. The plaintiffs argued that transport and delivery of the consignment was done under the contract dated 21st July 2015, and not under the contract with Aham. The plaintiffs posited that Mr. Agumba had admitted that the terms of both contracts contained similar terms and that the contracts were open-ended and could apply to any consignment.
31. The plaintiffs asserted that the 1st plaintiff was the carrier of the consignment being the declarant in the Transit Good Licenses and Single Administrative Documents required for tax payment to facilitate transit of goods within East African Community, (EAC), lodged with the Kenya Revenue Authority (KRA). This showed that entries were made by the defendant and that the 1st plaintiff's trucks and trailers carried the consignment. No such documents had been supplied in Aham's name.



32. The plaintiffs argued that Aham is a non-existent company following a search at the Companies' Registry. The plaintiffs faulted the defendant for failing to produce documents to prove Aham's existence and also for producing an unstamped agreement. The plaintiffs further argued that the LPOs allegedly issued to Aham had no proof of receipt by Aham. The invoices and purported payment confirmations were made in the names of Aham's directors.
33. The plaintiffs maintained that the defendant was aware that the 1st plaintiff's vehicles were being used to transport the consignments at the time of loading, since the defendant's clerk was tasked with confirming the details of the vehicles being used to transport the consignment at the point of loading. The plaintiffs pointed out that Mr. Agumba had admitted that delivery notes are a confirmation by the defendant's clerk that the consignment had been handed over to a transporter at the point of loading.
34. The plaintiffs took the position that the defendant fraudulently issued some delivery notes for the consignment in Aham's name despite the consignment being transported by the 1st plaintiff's vehicles. According to the plaintiffs, the defendant refused to indicate the 1st plaintiff's name in some of the delivery notes, which it relied on as proof of delivery of the consignment by Aham.
35. The plaintiffs argued, therefore, that there was no assignment or subcontracting of the contract for the transport of the consignment which could be implied from the email correspondence of 5th June 2021. There was also no evidence of the defendant's written consent for the subcontract as required under clause 3 of the agreement.
36. In the plaintiffs' view, the details of its trucks appear on the LPOs and the issuing LPOs on various dates between 16th and 31st December, 2019, after the delivery notes had been issued, was not tenable since instructions were communicated through the LPOs before loading. The plaintiffs also faulted the defendant for producing only 9 LPOs yet 16 trucks were used to transport the consignment.
37. The plaintiffs asserted that although their invoices and delivery notes were acknowledged and stamped as received by the defendant long before they complained of non-payment, the defendant did not raise a complaint or decline to acknowledge the receipt.
38. Regarding the counterclaim, the plaintiffs argued that the counterclaim was entirely against Aham and the defendant had recourse against Aham for breach of the agreement of 8th December 2018, since judgment had been entered against Aham on 5th July 2021, for USD 48,098.87.
39. The plaintiffs urged that the defendant's counterclaim against them be dismissed with costs.

Defendant's submissions

40. The defendant also filed written submissions with oral highlights. The defendant argued that the 2nd plaintiff conceded that any road carriage agreement would only come into effect on issuing LPOs. The defendant issued to LPOs to Aham transport the consignment and not the 1st plaintiff. The defendant asserted that the delivery notes were also issued in favour of Aham and payments were made to Aham upon producing invoices accompanied by LPOs and delivery notes which was a requirement.
41. The defendant relied on the decision in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd* (Civil Appeal No 95 of 1999); (2002) 2 EA 503 [2001] eKLR, for the proposition that courts cannot rewrite contracts for the parties.
42. The defendant again relied on *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* (Civil Case No. 571 of 2015) [2017] eKLR,



that the role of the court in interpreting contracts is limited to the terms of the contract in the strict sense.

43. The defendant submitted that there was a subcontract between Aham and the 1st plaintiff, for provision of additional vehicles to transport the consignment. This could be implied from the provision of the 1st plaintiff's vehicles to Aham and receipt of indirect payments from Aham.
44. The defendant relied on the email of 14th January 2019, to show that despite Aham receiving the 50% deposit, it failed to remit the same to the 1st plaintiff, which breach did not concern it as it had no contract with the 1st plaintiff. The defendant relied on *Mereka & Company Advocates v Zakheim Construction (Kenya)* [2014] eKLR and *Ochieng' Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited (Misc. Appl. No. 330 of 2005)* [2007] eKLR, where the Court held that existence of a contract can be implied from the conduct of the parties.
45. On the claim for waiting charges, the defendant, relied on clause 6 of the contract, to argue that the plaintiffs had failed to prove that the defendant was in default of its obligations to pay the deposit on time. It was Aham that owed the 1st plaintiff the duty to pay the deposit and, therefore, the 1st plaintiff had brought its claim against the wrong party.
46. According to the defendant, both Aham and the 1st plaintiff were aware that the tax exemption certificate was to expire, but the 1st plaintiff declined to move the consignment citing nonpayment; held the consignment and blackmailed the defendant into paying the waiting charges. As a consequence, the defendant incurred additional costs of USD 48,098.87 over and above the agreed contractual sum for which the defendant sought a refund.
47. The defendant also lost one of its major clients to whom the consignment was being delivered; its reputation was tainted and, as a result, it was branded unable to deliver on time.
48. The defendant urged the Court to dismiss the plaintiffs' suit with costs and to allow its counterclaim with costs.

Determination

49. I have considered the evidence, submissions and the decisions relied on by parties. The issues that arise for determination are; whether there was an agreement between the 1st plaintiff and the defendant to transport the consignment and whether the defendant was under obligation to pay the 1st plaintiff under the contract. There is a further issue, namely, whether the counterclaim should succeed.

Contract to transport consignment

50. The plaintiffs and the defendant agree that the 1st plaintiff and the defendant had entered into an open ended agreement for transporting a consignment in 2015. There is however, a disagreement on whether there was a contract between the parties to transport the consignment, the subject of this suit.
51. The plaintiffs maintained that the consignment was delivered on the basis of the 2015 agreement, while the defendant argued that the consignment were delivered pursuant to an agreement the defendant entered with Aham, dated 8th December 2018. The defendant denied contracting the 1st plaintiff to transport the consignment the subject of this suit.
52. I have gone through the evidence and documents produced by parties. There is an agreement dated 8th December 2018 executed between the defendant and Aham. The agreement states at clause 8 that agreed transport charges would be in the LPOs and how payment would be made. The agreement had other terms which parties had agreed to comply with.



53. LPOs were issued by the defendant to Aham for transporting the consignment from Mombasa to Juba, in South Sudan. The LPOs had the amount for each part of the consignment and the vehicle involved. Aham signed the delivery notes which signified the fact that it had taken the consignment for delivery.
54. The LPOs produced were issued by the defendant to Aham. The Delivery Notes were also issued to Aham. One Delivery Note, No. 103955 dated 15th December 2018 has the name of the transporter as “self”.
55. Aham issued an invoice No. 0472 dated 19th December 2018 to the defendant for USD 12600 for three vehicles; another invoice No. 476 dated 27th December 2018 for USD 12600 for three vehicles, No. 0473 dated 22nd December 2018 for USD 10200 for two vehicles; No. 0474 dated 21st December 2018 for USD 18000 for three vehicles among other invoices. All these invoices were issued by Aham to the defendant.
56. The plaintiffs did not produce an agreement for transporting the consignment loaded in December 2018 to Juba, in South Sudan. The plaintiffs argued that the agreement applicable was that of 2015, but did not dispute the fact that there was an agreement between the defendant and Aham signed in December 2018 to transport this particular consignment.
57. The agreement signed between Aham and the defendant on 8th December 2018 was supported by LPOs, Delivery Notes and Invoices. Payment was also made to Aham through Twalib Haytham and Abdallah Haytham, the officials of Aham.
58. I have perused the documents that were produced by the plaintiffs. The documents did not include LPOs, Delivery Notes and Invoices to support their claim that the defendant had contracted the 1st plaintiff to transport the subject consignment and, therefore, owed the money claimed.
59. The plaintiffs argued that the defendant had received and acknowledged their documents. The defendant’s position was, however, that to be accepted for payment, the documents had to be accompanied with LPOs and Delivery notes which would confirm that there was a contract for the delivery of the consignment.
60. It is worth noting that the defendant maintained and the 2nd plaintiff conceded that any road carriage agreement would only come into effect upon LPOs being issued. In that respect, the defendant maintained that it did not issue LPOs to the 1st plaintiff for delivery of the consignments in issue.
61. The plaintiffs also argued that details of its trucks were in some of the LPOs which meant the defendant had contracted the 1st plaintiff to transport the consignment. The plaintiff also seemed to argue that issuing LPOs between 16th and 31st December, 2019 after the delivery notes had been issued, was not tenable since instructions were communicated through the LPOs before loading.
62. This argument would not assist the plaintiffs. The issue is whether the 1st plaintiff was contracted to transport the consignment which could only be confirmed by issuance of LPOs and Delivery Notes. When the LPOs were issued would not really be an issue given that the LPOs were issued to a party other than the 1st plaintiff.
63. The plaintiffs again blamed the defendant for producing 9 LPOs only despite the fact that 16 vehicles had been used to transport the consignment. The short answer to this, would be that it was the plaintiffs’ duty to prove their case against the defendant and not the defendant to disprove the plaintiffs’ case.



64. Our adversarial system lays the burden of proof on the plaintiff. In this regard, section 107 of the [Evidence Act](#) provides that “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.”
65. Section 109 adds that 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.
66. In this case, the plaintiffs wanted the trial court to believe that the 1st plaintiff had a contract with the defendant to transport the consignment to Juba. It was, therefore, incumbent upon the plaintiffs to prove that such a contract existed, and that 1st plaintiff performed its obligations under that contract. That is why section 108 provides that the burden of proof in a suit lies on the person who would fail if no evidence at all were given on either side. (See *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* (Civil Appeal No. 342 of 2010[2013] eKLR).
67. The burden of proof would, however, shift to the defendant if the plaintiffs established that the contract existed, thereby shifting the burden to the defendant to prove why it could not pay. (See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others* (Presidential Election Petition 1 of 2017) [2017] eKLR).
68. The plaintiff did not tell the whole truth to the court. This is so because a perusal of the email of 14th January 2019 between the 1st plaintiff’s Tengeri Osoro and Aham, copied to among others, the defendant, on the subject: Transportation of UNMISS consignment from Mombasa to South Sudan, shows that there was something between the 1st plaintiff and Aham.
69. Mr. Osoro addressed Mr. Twalib of Aham on the delay in transporting the consignment, one month after the loading had been completed. This was in response to an email of 12th January 2019 from Twalib to Mr. Osoro, regarding a call Twalib had received from the defendant on why the vehicles were not moving as they had discussed on 10th January 2019.
70. The email communication reveals that there was much more between the plaintiffs and Aham that the plaintiff did not reveal to the Court. The defendant complained that the vehicles were not moving. Aham raised the issue with the plaintiffs and the plaintiffs responded that the cause was the delay by the defendant to payment.
71. There was no explanation from the plaintiffs why they were communicating with Aham over the issue of transporting the consignment and not the defendant if there was an agreement between the 1st plaintiff and the defendant to transport the consignment.
72. The only inference that can be drawn from this, is that there was a private arrangement between the plaintiffs and Aham, regarding transportation of the consignment that the two entities wished to keep away from the defendant.
73. That being the case, I find and hold that there was no contract between the 1st plaintiff and the defendant regarding transportation of the consignment to Juba, South Sudan that was capable of enforcement against the defendant. The defendant was therefore under no obligation to pay the 1st plaintiff.



Counterclaim

74. The defendant raised a counter claim against Aham and the plaintiffs. The defendant argued that Aham breached the terms on the contract, in particular, clause 3, by subcontracting the 1st plaintiff to transport the consignment without consent.
75. According to the defendant, Aham and the 1st plaintiff jointly and severally delayed the arrival of the consignment at Namule border Crossing causing the consignment to attract demurrage. They also refused to proceed with the journey and deliver the consignment. The two blackmailed the defendant into paying the demurrage.
76. The 1st plaintiff filed a defence to the counterclaim denying liability. Aham did not enter appearance and a default judgment was entered against it for USD 48,098.87.
77. The plaintiffs argued that the counter claim was entirely against Aham and the defendant had recourse against Aham for breach of the agreement dated 8th December 2018.
78. The defendant sought judgment against the plaintiffs and Aham for general damages for breach of contract, refund of USD 48,098.87 overpaid, with interest at court rates.
79. I have considered the evidenced on record as well as the exhibits produced. The defendant's position regarding the plaintiffs' claim against it was that there was no agreement between the two parties capable of enforcement.
80. Clause 3 of the contract provided:

The Carrier shall not assign, transfer or sub-contract this transport Agreement and its performance or any benefit thereunder whether wholly or partly, to any person, firm or company or otherwise except with the prior written consent of the sender. Notwithstanding the consent given by the sender in this regard, the Carrier will remain liable to the sender in accordance to the provisions and performance of the agreement.
81. The agreement prohibited Aham and not the 1st plaintiff from assigning or sub-contracting the transport agreement, its performance or any benefit thereunder, whether wholly or partly, to any person, firm or company or otherwise except with the prior written consent of the defendant. Clause 3 was clear that even where consent had been granted, Aham, as the carrier, would still remain liable to the defendant.
82. The Court has agreed with the defendant that there was no contract between the defendant and the 1st plaintiff capable of enforcement. Flowing from the defendant's position, the terms of the contract and the Court's finding that there was no agreement between the two, the 1st plaintiff could not breach terms of a non-existent contract.
83. Terms of a contract can only bind parties thereto and not strangers to the contract. I, therefore, hold that the defendant had no basis in raising the counterclaim against the plaintiffs.
84. Regarding Aham, there is no doubt that the contract between the defendant and Aham, had a clause prohibiting assignment, transferring or subcontracting of the transport without prior written consent. Aham did not enter appearance or file a defence to the counterclaim. The defendant's contention that there was subcontracting of the transport agreement was not, therefore, controverted.
85. The email communication between Ham and the plaintiffs reveals that there was an arrangement between the plaintiffs and Aham regarding the transport of the consignment. This arrangement came



- to light after the defendant complained that the vehicles were not moving. Aham raised the issue with the plaintiffs and the plaintiffs responded that the defendant was responsible because of delayed payment, despite there being no contractual relationship between the 1st plaintiff and the defendant.
86. What can be inferred from the communication, is that Aham indeed assigned, subcontracted or transferred part of the transport agreement and its performance or some benefit thereof, to the 1st plaintiff in breach of clause 3 of the agreement.
87. Due to Aham's failure to enter appearance a default judgment was entered in favour of the defendant for USD 48,098.97. The matter would have ended there. However, the defendant sought general damages for breach of contract which forces the Court to say something on it.
88. In cases of breach of contract, a party may sue for that breach. However, the court has ultimate discretion to award compensation for the breach on the basis of actual loss suffered by the innocent party; that is, substantial or nominal damages. In other words, general damages are not allowable in cases of breach of contract.
89. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.
90. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages, as it would amount to a duplication.
91. Again, in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract.
92. Flowing from the principles enunciated in the above decisions, and the fact that the defendant claimed USD 48,089.97 being overpayment, the claim for general damages cannot succeed.

Conclusion

93. Having considered the pleadings and evidence and carefully analysed it, the conclusion I come to is that the plaintiffs failed to prove their case against the defendant on a balance of probabilities.
94. There was no evidence that the 1st plaintiff had a contract with the defendant to transport the consignment to Juba, South Sudan. The plaintiffs did not also prove that the defendant owed the money claimed to the 1st plaintiff, arising from the alleged contract.
95. On the other hand, the defendant's counterclaim against the plaintiffs cannot be sustained. The defendant's counterclaim for damages for breach of contract against Aham cannot succeed, having claimed the amount overpaid.

Disposal

96. The plaintiffs' suit against the defendant is dismissed with costs.
97. The defendant's counterclaim against the plaintiffs is dismissed with costs.
98. Final judgment is entered for the defendant in the counterclaim against Aham Transporters for USD 48,098.87. The amount shall attract interest at court rates from the date of this judgment until payment in full. Costs on the counterclaim to the defendant to be paid by Aham Transporters.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2023



E C MWITA
JUDGE

