



**Fujian Highsun Synthetic Fiber Technology Co Limited v PPG Industries EA (U) Limited  
(Commercial Case E062 of 2023) [2023] KEHC 24242 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E062 OF 2023  
DKN MAGARE, J  
OCTOBER 27, 2023**

**BETWEEN**

**FUJIAN HIGHSUN SYNTHETIC FIBER TECHNOLOGY CO  
LIMITED ..... PLAINTIFF**

**AND**

**PPG INDUSTRIES EA (U) LIMITED ..... DEFENDANT**

**JUDGMENT**

////ARGUMENTS

**Background**

1. The plaintiff is a corporation established and carrying on business in the people's republic of China The defendant is a company purporting to carry on business in Kampala, Uganda. The plaintiff's advocate will service of summons upon the defendant.
2. The Plaintiff filed suit claiming the following: -
  - a. A declaration that the consignment that was shipped by Fujian Highsun Synthetic Fiber Technology Co Ltd to PPG Industries E.A (U) Ltd through Evergreen Shipping Line under bill of lading number 148300051265 dated 20th March 2023 in container numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188 is the property of Fujian Highsun Synthetic Fiber Technology Co Ltd and the defendant has no right to it.
  - b. A permanent injunction restraining the defendant from taking possession of the consignment that was shipped by Fujian Highsun Synthetic Fiber Technology Co Ltd through Evergreen Shipping Line under a bill of lading number 148300051265 dated 20th March 2023 in



container numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188.

- c. An order directing Evergreen Shipping Line, the Kenya Ports Authority, the Kenya Revenue Authority or any other government agency in control of the consignment that was shipped in containers numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188 and under a bill of lading number 148300051265 dated 20th March 2023 to release it to Fujian Highsun Synthetic Fiber Technology Co Ltd and the consignment be repatriated back to the country of origin or such other destination that Fujian Highsun Synthetic Fiber Technology Co Ltd may choose.
  - d. Costs of the suit together with interest at court rates.
3. The plaintiff pleaded that sometimes in January 2023, they received an e-mail from one Andy Casale who represented himself as the Procurement Officer at Air Products and Chemical Industries Corporation. He used the e-mail address info.airproducts@gmail.com. This person enquired about the availability of Nylon Chips and he indicated that they were very interested in purchasing 8 X 20 ft containers of the nylon chips and therefore requested the plaintiff to send more information about the product such as pricing, discounts and any other suitable alternatives. They engaged and an order was made as follows; -
- Item Name: Nylon Chips RV 2.5 BR  
Quantity required: 5 X 40 ft HQ  
Incoterms: CIF Mombasa port of Kenya.  
Price: US\$ 1.90/Kg  
Payment method: 100% TT (telegraphic transfer) with a payment period of 60 days after the BL (bill of lading date)  
Port of destination: Mombasa port of Kenya.
- Item Name: Nylon Chips RV 2.8 BR  
Quantity required: 5 X 40 ft HQ  
Incoterms: CIF Mombasa port of Kenya.  
Price: US\$ 1.89/Kg  
Payment method: 100% TT (telegraphic transfer) with a payment period of 60 days after the BL (bill of lading date) Port of destination: Mombasa port of Kenya.
4. The while engaging Casale by e-mail believed that he was a genuine person. They agreed that supply will be done based on cash on delivery. Later, the plaintiff packaged the goods ordered under invoice number HP1S230102 and delivered the consignment to Evergreen Shipping Line for shipment to the defendant through the port of Mombasa. Evergreen packed the goods into five (5) containers being container numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188 and issued a bill of lading number 148300051265 dated 20th March 2023. The consignee and the notifying party under the bill of lading was the Defendant.
  5. The Plaintiff followed the previous order and upon Casale's request, the plaintiff sent the original documents to the defendant through DHL and shared the waybill tracking code with Casale. Casale



wrote back on 28th March 2023 confirming receipt of the original shipping documents. The plaintiff shared its bank details with Casale for settlement of the invoices.

6. They pleaded a claim based on fraud. They set out the particulars:-
  - a. Misrepresenting to the plaintiff that the buyer of the suit consignments was PPG Industries, Inc of 1 PPG Place, Pittsburg Pennsylvania, United States of America.
  - b. Deceiving the plaintiff into releasing to them original shipping documents for the consignment in question.
  - c. Misrepresenting to the plaintiff that payment for one of the suit consignments would be made by 28th April 2023 and thereafter failing to make payment. d) Taking possession of one of the consignments from the plaintiff without paying for it.
7. They also fear that the bill of lading to the remaining consignment is not a negotiable document and the obligation of the shipping line is to deliver the goods to the named consignee. This consignment is therefore in danger of being released to the defendants who had not paid. The case was ordered to proceed by way of case stated.
8. The respondent did not file a defence or even attend court. I have perused the file and noted that the case has been proved on a balance of probabilities.
9. In *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
10. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
11. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the



probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

12. In the case of *Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd* [1984] eKLR, the Court of Appeal stated as doth: -

“The trial judge rightly applied to the facts before him the relevant law enunciated by Spry, VP in *Lakhamshi v Attorney General*, (1971) EA 118, 120 for such cases which -

It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

13. In the opinion of the Appellant, he had proved his case against the Respondent on a balance of probabilities. Reliance was placed on the case of *Abdi Kadir Mohammed & Another V John Wakaba Mwangi* [2009] eKLR where the court stated that:

“It was similarly held in *Butt v Khan* [1981] KLR that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission. The test, as stated in *Gough v Thorne* [1966] 1 WLR 1387 (referred to in the *Butt v Khan* decision) was whether the child was of such an age as to be expected to take precautions for his or her own safety and finding of contributory negligence can only be made if blame could be attached to the child. In the absence of an eye witness account in the present case and having found the investigating officer’s evidence quite unreliable, it cannot be said with certainty whether or not the deceased in this case did actually run into the road as claimed. Despite that being the evidence tendered by the witness called by the respondent the same cannot be the basis for finding the minor 50% to blame. For the father to have allowed him to attend the show on his own despite his tender years, there is no doubt that the deceased, whom the respondent described as clever boy did possess.”



The Court in the above case further made the following finding:

“Yet the same report stated that the motor vehicle was moving at a slow speed of between 30 to 40 kms due to a crowd in the town. It appears to me that the learned trial magistrate, taking the said piece of evidence as the best evidence available was right in finding negligence on the part of the driver. That the learned trial magistrate read carelessness on the part of the driver is not, in my considered view, an importation of personal opinion into the case. On a balance of probabilities the evidence tendered proved the above and the learned trial magistrate was therefore justified in finding as she did.”

14. The Appellant further relied on the case of *Felister Nduta Muthoni & Another v Attorney General* [2004] eKLR where the court made the following finding:

“From the foregoing circumstances the time was early in the morning. The traffic was scarce. The deceased in this case seemed not to have been aware of the vehicle. It is without a doubt that DW2, the driver was over speeding. He failed to take precaution and to slow down to 50KPH as is required by the traffic rules for all the vehicles that are driven within the city boundary. At the same time the deceased should have taken precaution and stopped at the road without taking due care for the presence of oncoming traffic. I would in the circumstances find that the defendants, driver and or agent is liable for this accident. I say so due to the impact of the vehicle on the deceased. This was so great that it caused him to sustain fatal injuries soon after. I would compute liability against the defendant at 80%. I hold that the deceased bears 20% liability on the grounds that he ought to have taken precaution whilst at the vicinity of the road.”

15. The bottom line is the case is merited. The same is therefore allowed.

### **Determination**

16. In the end the Court decrees as doth:

- a. A declaration that the consignment that was shipped by Fujian Highsun Synthetic Fiber Technology Co Ltd to PPG Industries E.A (U) Ltd through Evergreen Shipping Line under bill of lading number 148300051265 dated 20th March 2023 in container numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188 is the property of Fujian Highsun Synthetic Fiber Technology Co Ltd., the Plaintiff's herein.
- b. A permanent injunction restraining the Defendant its agents and servants from taking possession of the consignment that was shipped by Fujian Highsun Synthetic Fiber Technology Co Ltd through Evergreen Shipping Line under a bill of lading number 148300051265 dated 20th March 2023 in container numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188, belonging to the Plaintiff.
- c. An order directing Evergreen Shipping Line, the Kenya Ports Authority, the Kenya Revenue Authority or any other government agency in control of the consignment that was shipped in containers numbers EGHU9382946, EGHU9562974, TGBU4018003, BMOU4650460, and EISU9433188 and under a bill of lading number 148300051265 dated 20th March 2023 to release it to Fujian Highsun Synthetic Fiber Technology Co Ltd and the consignment



be repatriated back to the country of origin or such other destination that Fujian Highsun Synthetic Fiber Technology Co Ltd. may choose.

- d. The plaintiff to have costs of the suit.
- e. The costs of repatriation be recovered as part of the costs to the suit.

**DELIVERED, DATED AND SIGNED AT MOMBASA, VIA EMAIL ON THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**KIZITO MAGARE**

**JUGDE**

**In the presence of: -**

Munyoki for the plaintiff

No appearance for the Defendant

Court Assistant - Brian

