



**Wiltex Limited v Menengai Stores Limited (Civil Suit E621 of 2021)  
[2025] KEHC 2128 (KLR) (Commercial and Tax) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2128 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E621 OF 2021  
FG MUGAMBI, J  
FEBRUARY 14, 2025**

**BETWEEN**

**WILTEX LIMITED ..... PLAINTIFF**

**AND**

**MENENGAI STORES LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The Plaintiff is a Hong-Kong based company and for a number of years served as the Defendant's primary supplier for its business of general hardware and merchandise which include power tools, nuts, bolts, washers, sprayers, levels and various other hardware items.
2. On diverse dates in the years 2017 and 2018, the Plaintiff exported various items for the Defendant upon Defendant's request and confirmed orders. The Plaintiff then raised invoices for the same totalling USD 1,072,846.17. The Plaintiff filed the present suit through its plaint dated 29<sup>th</sup> May 2021 claiming that the Defendant failed and/or refused to settle the sums claimed under the said invoices and as such seeks the said USD 1,072,846.17 together with interest and costs.
3. In response, the Defendant filed a statement of defence dated 26<sup>th</sup> October 2021 stating that the invoices issued to it by the Plaintiff were tainted with illegalities and that as per the Defendant's calculations, the remaining debt to the Plaintiff as per the stands at USD 345,051.52. The Defendant avers that it has been willing to clear this amount through regular installments, however this significant discrepancy has hindered the parties' ability to resolve the outstanding debt amicably, despite numerous communications and the Defendant's demonstrated willingness to settle the sum they acknowledge as due.



4. The matter was set down for hearing where the Plaintiff presented its Managing Director, Bupesh Khatrias its witness (PW 1). He relied on his witness statement dated 29<sup>th</sup> May 2021 and produced the Plaintiff's List and Bundle of Documents dated 29<sup>th</sup> May 2021 (PExhibit 1). On their part, the Defendant presented its General Manager, Vikas Gudka as its witness (DW 1) and he relied on his witness statement dated 4<sup>th</sup> February 2022 and produced the Defendant's List and Bundle of Documents dated 26<sup>th</sup> October 2021(DExhibit 1).
5. After the hearing, the parties were directed to file written submissions which are on record and which together with the evidence, I will make relevant references to in my analysis and determination below.

### **Analysis and Determination**

6. From the pleadings, evidence and submissions of the parties, the main issue for the court's determination is whether the Defendant is indebted to the Plaintiff in the sum of USD 1,072,846.17 or whether the contract between the parties is tainted with illegality so that the Defendant is only indebted to the Plaintiff in the sum of USD 345,051.52 or not at all.
7. The answers to these issues will be determined based on who provided the court with probable evidence that proves the existence of the facts they want the court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which 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" and that: "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person."
8. Likewise, in *Miller v Minister of Pensions*, 1947 ALL ER 372, Lord Denning aptly summarised the application of the standard in the following terms:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."
9. The Court of Appeal in *James Munuu Mucheru v National Bank of Kenya Ltd*, [2019] KECA 1058 (KLR) summarized this by stating that:

"Courts will make a finding based on which party's version of the story is more believable."
10. As stated, it is not in dispute that the Plaintiff supplied goods to the Defendant and raised invoices amounting to USD 1,072,846.17. Both parties admit that there were two sets of invoices issued by the Plaintiff:
  - (i) dummy or reduced-value invoices with lower amounts intended to minimize tax obligations in their respective countries, and
  - (ii) true-value invoices reflecting the actual amounts payable, which were higher and included interest charges.



11. The Plaintiff is thus relying on the true value invoices for payment whereas the Defendant is relying on the reduced value invoices. The Plaintiff stated that the true value invoices were the ones to be used for payment whereas the reduced value invoices were only issued for the Defendant's sake and benefit and that this arrangement has been ongoing for a number of years.
12. On its part, the Defendant stated that the reduced value invoices were the only reason why they did business with the Plaintiff and that the Plaintiff benefitted by getting sales of between USD 1.5 million to 2 million. It also denied that the parties agreed on the interest of 12% charged by the Plaintiff in the invoices. However, the Defendant stated that they were not disputing the prices for the supplied goods and it also admitted that they had no issue with the payments based on the true value invoices save for the interest charged therein. On interest, the Plaintiff stated that the parties had an "informal agreement" for charging the interest and that this has been ongoing for 25 years without any dispute from the Defendant.
13. For the rate of interest charged by the Plaintiff in the invoices to apply, there had to have been a meeting of minds between the parties which is an essential component for the formation of an enforceable contract. Whereas the Plaintiff stated that there was an "informal agreement" for the application of this interest in the invoices, I find that there was no proof for this.
14. Even if the said invoices with interest was presented without contest, it should not be lost that an invoice is a demand for payment on terms agreed. (*Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority*, [2009] KECA 461 (KLR)). Therefore, there has to have been a preceding agreement that had been consummated by an offer and acceptance and what remained was payment of the price agreed as consideration. There is no evidence of an agreement between the parties for the application of the rate of interest on the invoices. This makes the said invoices a one-sided and unilateral offer by the Plaintiff that was not accepted by the Defendant. (Also see *Toyota Kenya Limited v Vehicle & Equipment Leasing Limited*, [2021] KEHC 12871 (KLR)).
15. I therefore find that the invoices presented by the Plaintiff that had interest charged on them cannot bind the Defendant as there is no evidence that such was agreed and accepted by the Defendant. Since the Defendant admits the amounts in the true value invoices save for the interest charged, I am inclined to believe that the amount due to the Plaintiff is per the Defendant's calculations which is USD 345,051.52.
16. To clarify my finding, it is common ground that the Plaintiff's claim is based on the true-value invoices rather than the dummy invoices. While this court cannot sanction or enforce an arrangement designed to circumvent tax obligations, the Defendant's admission of liability under the true-value invoices justifies the enforcement of that portion of the agreement that remains legally valid. Had the claim been solely based on the dummy invoices, issued for the purpose of tax evasion, the entire contract would have been void for illegality.
17. However, since the contract is severable, and in the interest of public policy, both parties must fulfill their tax obligations before benefiting from any relief granted by this court. The principle that one must "render unto Caesar what is Caesar's" applies here. Compliance with tax laws is a prerequisite for enforcement of any legitimate claim arising from this agreement.

## Conclusion and Disposition

18. Accordingly, I make the following final orders:
  - i. Judgment be and is hereby entered for the Plaintiff against the Defendant albeit in the sum of USD 345,051.52 together with interest from the date of filing suit until payment in full;



- ii. Before execution of this decree, both parties shall furnish proof of tax compliance by settling the difference between the genuine and dummy invoices with their respective tax authorities. Such compliance shall be confirmed through official tax clearance certificates or similar verifiable documentation from the relevant authorities.
- iii. Each party shall bear its own costs for the portion of the claim affected by illegality; as such, the Plaintiff is awarded 25% of its legal costs for the successful portion of its claim corresponding to the admitted debt of USD 345,051.52.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>TH</sup> DAY OF FEBRUARY 2025.**

**F. MUGAMBI**

**JUDGE**

