



**Corrugated Sheets Limited v Varsani Merchandise Limited (Civil Suit  
13 of 2019) [2025] KEHC 6598 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 13 OF 2019**

**E OMINDE, J**

**MAY 21, 2025**

**BETWEEN**

**CORRUGATED SHEETS LIMITED ..... PLAINTIFF**

**AND**

**VARSANI MERCHANDISE LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The background of this case is that the Plaintiff and the Defendant are both Limited Liability Companies engaged in the business of the manufacture and supply of construction materials and the sale of merchandise respectively. According to the Plaintiff, it was contracted to supply the Defendant with assorted hardware materials for the defendants' hardware business shop located in Eldoret. However, in the course of business, the defendant failed to pay for goods worth Kshs. 21,479,496.47 which resulted in the institution of the present suit.
2. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 22/03/2019. Initially, the court had entered an ex parte judgement against the defendant vide a judgment delivered on 05/02/2020 with costs and interest thereon for failure to enter appearance and file a defence. The defendant then filed a Notice of motion seeking to have the judgment set aside. This court set aside the judgment vide a ruling dated by Hon Mr. Justice E.K. Ogolla 08/03/2022 and the defendant was granted leave to enter appearance and file a defence.
3. The Plaintiff filed an amended plaint dated 21/03/2022 seeking judgement against the defendants for the sum of Kshs. 17, 379, 496.47, costs of the suit inclusive of the costs of Kshs. 4,100,000/- which amount was paid by the defendants during the pendency of the suit and interest. The Plaintiff alleges that it was contracted to supply the defendant assorted hardware material for its hardware shop based in Eldoret and further, that it supplied these goods on a running account number 5000527, which goods were supplied on invoices payable upon expiry of 30 days from the date of delivery.



4. It is the plaintiff's case that defendant was supplied with goods worth Kshs. 21,479,496.47/- which were not fully paid for. That out of this amount owed, the defendant made some payments to settle the outstanding amounts as follows;

RTGS 19/12/2019 Kshs. 3,000,000/-

10/06/2020 Kshs. 500,000/-

04/08/2020 KSHS. 600,000/-

TOTAL Kshs. 4,100,000/-

5. The plaintiff prays that the court enters judgment against the defendant for;
- a. The sum of Kshs. 17,379,496.47
  - b. Costs of the suit inclusive of costs on the sum of Kshs 4.1 Million shillings which was paid during the pendency of the suit.
  - c. Interest on (a) and (b) above.
  - d. Any other relief that this Honourable Court may deem just to grant.

### **Defendants' Defence**

6. The defendant filed a statement of defence dated 15/03/2022 and a further Amended Defence filed on 16/11/2022. In a ruling dated 22/03/2024 by Hon Mr. Justice Wananda Anuro the amended defence was struck out on the ground that it had been filed without the leave of the court. The Judge directed that the defence dated 15/03/22 shall be the only defence to be deemed to be on record.
7. The defendant denied that there was a legally binding contract between themselves and the plaintiff for the supply of assorted hardware materials and that the same was supplied through a running account as alleged. That in the absence and/or non-production of the contract, the allegation is categorically denied as well as any engagement in the manner portrayed by the plaintiff between the stated periods and in the terms aforesaid and put the plaintiff to strict proof. The defendant further denied that payment was to be done between the timelines alleged by the plaintiff.
8. The defendant averred that they are strangers to the allegations that the defendants collected all the goods the subject matter of this suit through authorized agents and using its own trucks for transport and stated that the plaintiff had not showed anything in support of this assertion. That further, the plaintiff had not shown that their authorised agents acknowledged receipt of the goods if at all they did, and if so, then it with any authorisation from the defendant.
9. The defendant denied the amount claimed stating that the figure of Kshs. 21,479,496.47 was exaggerated with a view to have the plaintiff unjustly enrich itself. In further response the defendant stated that it engaged in several businesses with the plaintiff where it supplied goods to the defendant and the defendant paid for the goods as agreed, with the balance to be paid in due course. The defendant acknowledged the indebtedness but stated that the same was not to the extent quoted by the plaintiff and further, that it had always made good on its payments when they fell due.
10. The defendant further stated that it had partially made good the debt due to the plaintiff and at that at some point they had entered into a mutual understanding on how to set off the debt. That the Plaintiff received Kshs. 4,100,000/- towards setting off the claim which amount has not been deducted by the plaintiff from the amount claimed. Additionally, the defendant called for the plaintiff to provide an itemization of the said issues and without prejudice, averred that they don't have any knowledge of



any unpaid money to the magnitude and/or amount and if any, it is not to the quantity quoted in the plaint. It maintained that they have never refused to pay their creditors and suppliers and denied occasioning any loss to the plaintiff.

### **Reply to defence**

11. The Plaintiff filed a reply to the defence dated 30/03/2022 where it reiterated the averments in the plaint and that the defendant made payments amounting to Kshs. 4,100,000/- in a bid to settle the accounts, long after the filing of the suit. The Plaintiff denied the allegations that its claim is exaggerated and maintained that the unpaid balance is still Kshs. 17,379,496.47/-. The plaintiff averred that the defendant having admitted being indebted to the plaintiff and having paid part of the debt, there is no reasonable defence to the plaintiff's claim. That the allegations of malice and unjust enrichment are without any factual or legal basis, are scandalous and ought to be struck off. That the defence is a sham calculated to delay and obstruct justice and ought therefore to be struck out.

### **Hearing of the suit**

12. The plaintiff testified through PW1 Harish Patel. He stated that he is one of the directors in the Plaintiff company and his work entails sales and marketing. He stated that he knows the defendant with whom they did business. He adopted his witness statement dated 15/04/2024 as his evidence in chief. He testified that the defendant was a customer of the Plaintiff and as at the time of filing this suit it was indebted to the Plaintiff in the sum of Ks. 21,479,496.47 on account of goods sold and delivered. He produced in support of their case 21 exhibits as listed in the plaintiff's List of Documents. These too were adopted as part of the plaintiff's evidence and the documents marked as Exh1-21. He testified that Exhibits 1-19 were invoices addressed to the defendant. That their dates range from 16/1/2016 - 6/6/2016. That Exh20 was the Financial Statement of the defendants' account with the plaintiff for the period 1/1/2017 to 5/2/2019 and Exh21 was a demand letter dated 08/01/2019.
13. He testified that out of the Ks. 21,479,496.47 claimed, Ks. 4,100,000/- was paid leaving a balance of Ks. 17, 379, 496. 47. He denied that as between themselves and the defendant they did a reconciliation of their accounts and found that only Ks. 4,100,000/ was outstanding. It is his testimony that they initiated this suit on 3/4/2019 seeking the recovery of the Ks. 21,479,496.47 and the defendant was duly served with summons to enter appearance. That following service of summons, Mer. Devshi Karsan in his capacity as a director of the defendant made an offer to transfer a five bedroomed maisonettes he had developed in Eldoret to wit title number Eldoret Municipality Block 8/53 to the plaintiff in settlement of his company's outstanding account with the plaintiff but on condition that the plaintiff paid him Ks. 5,000,000/- such that it amounted to an offer to sell the maisonette at Ks. 27,000,000/- on 10/5/2019.
14. That through their Advocate Mr. Samba, they engaged Royal Valuers Limited to carry out a valuation of the property and it is not true as alleged by Mr. Devshi Karsan Varsani in his witness statement that their Advocate requested the defendant to offer any security in the form of a title deed. That following the valuation, the plaintiff declined Mr. Varsani's offer whereupon Mr. Varsani undertook to sell the property himself and liquidate the defendant company's indebtedness to the plaintiff. That eventually, Mr. Varsani remitted a total of Ks. 4,100,000/- as already herein captured above but did not pay off the entire debt and that this amount was paid during the pendency of the suit. He testified that the defendant was issued with invoices and financial statements reflecting the sums claimed herein and he has never questioned their legitimacy and/or authenticity and that it was dishonest to state that the goods supplied were only for the amount of Ks. 4,100,000/-



15. In cross examination, he stated that there was an agreement for the supply of goods with the defendant but there was no written contract. That this is because they had done business over a long period of time. Further, that there was no LPO received by them and that the orders were made by the defendant on phone. That he had not availed any evidence of the said phone calls. He stated that the defendant had a running account no. 500527 with them and further, that it is the customer not the company that signs on the account when goods are collected. That it is their drivers that went to collect the goods that signed the invoices. That exhibit 1 was signed by Julius Mwangi who was the driver who was sent by the defendant to collect the goods on their behalf. That the said Mwangi was not an employee of the defendant but could have been a transporter that they were using.
16. He stated further in cross examination that the defendants would call them and tell them that a driver would collect the goods on their behalf. He gave the registration number of the lorry that Julius Mwangi would use as KBR 647P. He stated that he did not know the owner of the lorry. That the driver would sign on the invoice and also on the delivery note. He stated that they did not avail copies of the delivery notes but had produced the invoices which also have the ID Number of the driver. He stated that the defendant did not acknowledge the amount owed in writing.
17. He testified that the offer to use a maisonette to settle the debt was verbal. He admitted that without a written offer, the court cannot tell what its terms were. That despite the fact that the Valuation Report at paragraph 1 stated that the valuation was for purposes of a mortgage the offer was for a transfer over the loan the defendant owed them. That the valuation was for purposes of getting the market value of the property which was located on Eldoret Municipality Block 8/563. He stated that at no time did Mr. Varsani dispute the particulars of the persons who collected goods on their behalf or that these goods will be collected on their behalf by these persons who they themselves identified to the plaintiff beforehand.
18. The defendant on their part testified through DW1 one Devshi Karsan. He adopted his witness statement as his evidence in chief and the List of Documents dated 02/04/2024 as exhibits in support of his case. The same were marked as Exhibits 1 - 5. He stated that he is a Director of the defendant. That the plaintiff used to sell hardware materials to the defendant until the year 2016 when the defendants' business ran into hardship and they did not make any further orders from the plaintiff and that at by that time they owed the plaintiff some money. That they did not sign any documents at the opening of the account. That they used to sign LPOs to the plaintiffs for the supply of the goods which LPOs he had not seen. He confirmed that they made a payment of Ks. 4,100,000/- as the case was ongoing after they got the demand letters. That this was after they reconciled their accounts and they found this to be the outstanding amount.
19. He testified that when he was served with the decree for Ks. 21, 479, 494.47 when the case was heard ex parte, he instructed his lawyer to have the judgement set aside. That in the meantime, he had engaged the directors of the plaintiff as well as their lawyer Mr. Jeremiah Samba with a view to settling what was outstanding. That the lawyer asked him to offer any property as security as they did the reconciliations. That he shared a copy of his property known as Eldoret Municipality Block 8/569 (A3) for purposes of confirming that he had property which could be sold to satisfy what was due. That he later proceeded with the sale of the property because after reconciliation, he discovered the sum due to the plaintiff was much less than the value of the property. That he then paid the amount owing as averred by the plaintiff and to the best of his knowledge has cleared the entire amount and the sums claimed have no basis.
20. In cross examination he stated that he is the majority shareholder in the defendant company and therefore has the greatest say on issues of management. That they would send the drivers with the LPOs to collect goods from the plaintiffs and they would receive copies of the deliveries from the plaintiffs



and for the goods that were not delivered to them, they would not receive any copies of delivery notes and/or invoices. He stated that they did not file copies of their reconciliation statements in court and further, that after reconciliation he orally communicated what the statements had revealed and he did not put it in writing. He testified that Ks. 21,479,496/- was the amount that was sought in the demand letter and he instructed his lawyer to respond to the same. He denied that he offered to sell to the plaintiff his maisonette due to his indebtedness, stating that he only gave them a copy of the title to hold as security as he reconciled the accounts.

21. He stated that he did not invite anyone from the plaintiff company to a meeting to reconcile the accounts. He denied that they disagreed over his offer to sell the property to the plaintiffs because in his view the property was worth Ks. 27,000,000/- and the valuer returned a price of Ks. 22,000,000/- He further testified that he made the payments between 19/12/2019 and 4/8/2020 and came to know about the case in August 2021 did not communicate to the plaintiff that the Ks. 4,100,000/- was in full and final settlement of the monies owed. That even as there was nothing in writing asking for security, he sent a copy of his title deed to the plaintiff's lawyers WhatsApp because the plaintiff asked for security. He admitted that a counterclaim of Ks. 4,100,000/- was filed against the plaintiff but that the same was filed without his consent despite paying the court fees and that he later changed his lawyer and withdrew the counter claim
22. At the close of the defendants' case, parties to file their submissions. The plaintiff filed their submissions through the firm of Messrs. Samba & Co Advocates whereas the Defendant filed submissions through the firm of Messrs. JL Cheruiyot & Company Advocates.

### **Plaintiff's submissions**

23. Learned counsel for the plaintiff submitted that the Defendant did not contest the particulars of any of the invoices or statements. Counsel pointed out that PW1 stated that the Defendant's running account was No. 500547 which is clearly marked on the statement in the Plaintiff's trial bundle dated 14<sup>th</sup> June 2024. He explained that the statement shows that the total value of goods supplied was Kshs. 21,479,496.47/=. Further, that DW1 admitted receiving a letter demanding payment of the sum on the statement. He explained that he had a financial crisis and immediately engaged the directors of the Plaintiff to indulge him settle the debt by other means or in kind.
24. Counsel submitted that the Plaintiff supplied the goods whose value is claimed and that the Plaintiff's evidence was uncontroverted. Further, that PW1 stated that DW1 offered him maisonette at Eldoret in settlement of his company's debt to the Plaintiff but put a value of Kshs. 27,000,000. That is what informed the valuation of the maisonette to ascertain if it was worth that amount. He stated that the allegation that he only sent a scan copy of the title deed for the maisonette to counsel to serve as security for the money owed is ridiculous as there was no application filed seeking the Defendant to provide security and a scan copy of the title sent to Counsel would not mean anything.
25. Counsel urged that from the demeanour of the witness, his previous conduct of lying while under oath and seeking to recover Kshs. 4,100,000/= from the plaintiff by falsely claiming to have advanced money to the plaintiff tells everything about the character of DW1, as a dishonest and most unreliable person. He further submitted that the Defendant did not write or orally question the correctness of the sum claimed in the invoices and statements. That the said money was as a result of his orders contained in Local Purchase Orders to the plaintiff. He urged that the defendant received a demand letter but never responded to it. Further, that if the amount of money demanded was incorrect the first thing to do was to respond to the letter and voice concern over incorrectness of the sum claimed. After the Plaintiff testified and tabled evidence of the supply of goods to the Defendant, it was incumbent upon the Defendant to prove the goods or some part of them was not supplied but instead, the Defendant



only talked about unilaterally reconciling the account to establish indebtedness of only Ks 4,100,000/-. Counsel stated that no such reconciliation report was produced and the witness did not say if it was done by himself or a professional accountant.

26. Citing Section 107 and 108 of the *Evidence Act* and the cases of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR and *Giver & 5 others v Kenya Medical Research Institute & 3 Others* (2020) eKLR on burden of proof, counsel urged that the defence was hollow and it did not contradict the Plaintiff's case. Further, that the Defendant acknowledged it owed the Plaintiff and the sum of Kshs. 4.1 million as shown in paragraph 7(b) of the statement of defence dated 15/3/2022. Counsel urged that the plaintiff had proved its case against the Defendant on a balance of probabilities and urged the court to enter judgment as prayed in the plaint.

### **Defendants' submissions**

27. Learned counsel for the defendant submitted that term "burden of proof "was defined by the High Court in *Kimani (Suing as the Administratrix of the Estate of Amos Kanina Kimani - Deceased) v Mwangi* (Civil Appeal 120 of 2021) 12024] KEHC 2434 (KLR) (7 March 2024). He urged that the plaintiff has the burden of proof in respect of the alleged debt; that is; the defendant ordered the goods, the goods were delivered and collected by the defendant's agents, employees, an invoice was issued for each delivery and that the defendant has not paid for the specific invoices.
28. He stated that it is settled law that the standard of proof in civil case is that of a balance of probabilities as was held by the Court in *Eastern Produce (K) Ltd - Chemomi Tea Estate v Bonfas Shoya* [2018] eKLR (cited with approval in the case *u/Tam no v Simon & 2 others* (Civil Appeal 22B of 2021) [2023] KEHC 1690 (KLR) (10 March 2023). Further, that the plaintiff has the duty to prove the following three elements of the alleged supply of goods and indebtedness; :
1. The defendant ordered the alleged goods by way of LPOS;
  2. The goods were actually delivered to the defendant and/ or collected by the defendant's agents or employees. The plaintiff must prove this by way of delivery notes; and
  3. The plaintiff did issue invoices which were acknowledged by the defendant
29. Counsel referred the court to the decision of Justice F, Gikonyo in *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR and urged that the holding in that case clearly demands that the plaintiff must produce delivery notes as evidence that goods were delivered to and/ or received by the defendant- It is a matter of record and was conceded by Mr. Harish Patel (PW1) that the plaintiff did not produce even a single delivery note for the goods allegedly supplied to the defendant. He invited the court to find that the Plaintiff did not prove its case on this fact.
30. Additionally, counsel submitted that with regards to the statement of account produced by the plaintiff as PEX1 - 20 and titled "Financial Statement for Varsani Merchandised Ltd Account for the period 1<sup>st</sup> January, 2017 and 5<sup>th</sup> February, 2019 the court should be guided by the holding in *E.P Communications Limited*, (supra), specifically paragraphs 14 and 15 of the judgment. Further, that it is clear that the plaintiff's Statement of Accounts was prepared solely by the Plaintiff. That in the absence of any additional evidence, the same cannot be said to evidence to prove the alleged debt. He additionally posited that in any case, the defendant in its defence and testimony has never acknowledged the alleged debt. He submitted that the invoices produced by the plaintiff as PEX1 to 20 have never been acknowledged by the defendant whether in writing or in its pleadings. He pointed out that some of the details on the invoices including Lorry registration number KBR 647 was not proven to belong to the Defendant or any of its agents and, that the invoices have not been linked to



the defendant in any way. He urged that therefore, the defendant cannot be said to be indebted to the totality or any of the invoices.

31. Counsel urged that paragraph 7A of the defendants' witness statement speaks for itself and nowhere in that paragraph does the defendant acknowledge the entire debt being claimed. That the defendant acknowledged some level of indebtedness which it later paid after reconciliations. In response to the submission that the defendant did not contest the particulars of the invoices and statements produced by the plaintiff, counsel urged that it was a misapprehension of the principle that parties are bound by the own pleadings on the part of the plaintiff. He urged that the defendant's statement of defence clearly disputes the suit debt and its witness denies the debt. Further, that it is equally undisputed that the plaintiff did not produce any delivery note and as such, the alleged supply of goods was not proven. He reiterated that a statement of accounts without any additional evidence is not prove of the defendant's liability.
32. Counsel submitted that the evidence tendered by the plaintiff confirms that the plaintiff did not produce any local purchase order or any delivery note to prove the order and supply of the alleged goods. Additionally, counsel invited the court to consider this Court's (Hon. Justice Wananda Anuro) Ruling of 22<sup>nd</sup> March, 2024 where the learned judge in paragraph 36 of the ruling held that

“I have not found anywhere in the defence or in the affidavits where the Defendant has expressly acknowledged owing the plaintiff the sum of Kshs. 21,479,496.47 claimed by the Plaintiff. I therefore agree with the Defendant that the question of the extent of the Defendant's indebtedness is one for trial where the documents filed by the parties shall be subject to scrutiny and cross-examination”
33. He urged that this is further evidence that the defendant has never admitted owing the plaintiff the sums claimed in the suit. Additionally, he pointed out paragraph 38 of the Ruling of 22<sup>nd</sup> March, 2024 where the court clearly held that

“I cannot find any evidence that the Defendant has expressly conceded to the Plaintiffs claim.”
34. He urged that as indicated by the learned judge in the ruling, it was incumbent upon the plaintiff to adduce evidence during trial to prove the debt but the plaintiff failed to do so and the claim must fail.
35. Counsel posited that they have equally demonstrated that DW1 only offered his property title number; Eldoret Municipality Block 8/569(A3) as security for any indebtedness that would be found after reconciliation of accounts. The plaintiff's own Exhibit 21 (Valuation Report) clearly provides that the valuer was to advise on the property's market value for "mortgage purposes only." PW1 acknowledged the security nature of the property in his testimony. There was no formal offer of transfer of the property by the defendant to the plaintiff in settlement of the alleged debt.
36. Counsel urged the court to dismiss the suit with costs.

### **Analysis & Determination**

37. Having considered the pleadings as well as the submissions as herein above summarised, it is my considered opinion that the issue that arises for determination is
  - a. Whether there existed a business relationship between the parties
  - b. Whether the defendant owes the plaintiff any money for goods supplied
38. Sections 107(1) and (2) of the [Evidence Act](#) provides;



- (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.
39. Section 108 of the *Evidence Act* provides;
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
40. Section 109 of the Act provides;
- “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 lie on any particular person.”
41. In *Alfred Ndogi Mata vs Hellen Siemeko Adede (2005) eKLR*, the court stated that:
- “Legal disputes are determined on the basis of facts proved by evidence and law applied to the facts.”
1.
    42. The Supreme Court in the presidential petition case, *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ*, the supreme court stated thus; -
 

The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black’s Law Dictionary defines the concept as

      - (a) party’s duty to prove a disputed assertion or charge.... [and] includes both the burden of persuasion and the burden of production. [Emphasis mine]. With that definition, the next issue is: who has the burden of proof”

The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the *Evidence Act*, cap 80 of the Laws of Kenya, legislates this principle in the words: 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.
43. From the evidence on record there is no doubt and it is also not denied by the defendant that indeed there did exist a business relationship between the parties herein. The defendant also does not deny goods were supplied over time to them by the plaintiff during the relationship and he would pay for



- all the goods supplied as and when the payments fell due and that all the goods that were supplied in this instant case were paid for which assertion the plaintiff refutes.
44. The above being the case, in light of the provisions of Sections 107-109 herein above reproduced and in conformity with the case law cited, the only question that the Court needs to answer is whether the plaintiff has sufficiently demonstrated by way of the evidence adduced that he did supply the goods as alleged, that the same were received by the defendant who then failed to pay for them.
45. In support of his case that goods were supplied to the defendant, the plaintiff produced as exhibits invoices addressed to the defendant. The plaintiff's testimony was that the invoices and goods were received by one Julius Mwangi who was a transporter contracted by the defendants on their behalf. The defendants have denied this assertion by the plaintiffs. The court notes that the invoices are the only evidence that the plaintiffs availed in support of their case. Now the purpose of an invoice is that it is issued by a seller to request for payment for purchase. Once invoiced, the goods are delivered to the purchaser together with a Delivery Note and once the same is received, ideally the purchaser ought to sign the delivery note but even without the same being signed, a delivery note would be sufficient proof of delivery of goods.
46. In the instant case, the court notes that in the face of the denial by the defendants that they had contracted Julius Mwangi to collect goods from the plaintiffs on their behalf, the said Julius Mwangi was not called as a witness to testify to that effect on behalf of the plaintiffs. Further, no evidence was proffered to demonstrate that the signature on the said invoices and what the court supposes to be an Identity Card Number as well as the motor vehicle registration number indicated thereon all belonged to the said Julius Mwangi and that he made all these entries in his own hand.
47. Section 37 of the *Evidence Act* states:
- “Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”
48. The Court of Appeal in the case of *Five Continents Ltd v Mpata Investments Ltd* [2003] eKLR held:
- “The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the *Evidence Act*). It follows that the accounts analysis on which the learned judge relied has no evidential value.”
49. The defendant testified that between themselves and the plaintiffs, they were engaged in the supply of various goods and services for which he had accounts with the plaintiffs and this fact the plaintiffs did not controvert and/or deny. This notwithstanding, the plaintiffs not only did not avail any books of accounts that were kept over the various businesses that they were engaged in with the defendants, but they also did not avail to the court the books of accounts specific to the sale of goods the subject matter of this case to support the Statement of Account produced with respect to account No. 500527 which the plaintiff stated is the one that was opened with respect to the goods the subject matter of this case.
50. Further to the above, there was no cogent evidence availed by the plaintiff to negate their own evidence produced by way of the Valuation Report for LR No. Eldoret Municipality Block 8/569 that contrary to the evidence of the plaintiff by way of oral testimony that the property was offered to him by the defendant to sell for purposes of the recovery of the debt owed, the same, as indicated in the report, was



valued for mortgage purposes. This aspect of their own evidence then does not support their assertion that the defendant did owe the plaintiffs money for goods delivered and that the plaintiff did offer the property to the defendant to sell and recover the amounts owed.

51. The sum total of the above is that it is my finding that in discharging the two aspects of the burden of proof as described in the Raila Odinga case above the plaintiff's narration on their cause of action against the defendant has to a large extent discharged their burden of persuasion. In other words, they have done well in alleging. However, the exhibits produced in support of the said narration have failed to sufficiently discharge the burden of production which goes hand in glove with the burden of persuasion in order that they meet the requisite degree of proof cast upon any person who alleges the existence of a particular fact and/or set of facts to prove that those facts exist. They have therefore failed to prove their allegations to the required degree of proof which in this case is on a balance of probabilities. It is my considered opinion, that this being a case involving the purchase and delivery of goods paid for over time, then as of necessity it all boils down to numerous financial transactions made over time, and so the particular aspect of the burden of proof being the burden of production, i.e. availing the relevant documentation to support the assertions of deliveries made is in fact the most critical aspect of their case. The plaintiffs having failed in this regard, it is my finding then that they have failed to prove their case against the defendants on a balance of probabilities. Their case is therefore dismissed in its entirety with costs to the defendants.

**READ DATED AND SIGNED AT ELDORET ON 21<sup>ST</sup> MAY 2025**

**E. OMINDE**

**JUDGE**

