



Beyon Investment Limited & another v Sakuma Exports Limited t/a Sakuma Exim Dmcc & Sakuma Impex Limited & 4 others; Portside Freight Terminals (Interested Party) (Civil Suit E049 of 2024) [2025] KEHC 12099 (KLR) (9 June 2025) (Judgment)

Neutral citation: [2025] KEHC 12099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E049 OF 2024
F WANGARI, J
JUNE 9, 2025**

BETWEEN

BEYON INVESTMENT LIMITED 1ST PLAINTIFF

AHLAM COMMODITIES LIMITED 2ND PLAINTIFF

AND

SAKUMA EXPORTS LIMITED T/A SAKUMA EXIM DMCC & SAKUMA IMPEX LIMITED 1ST DEFENDANT

R & R FOODSTUFF TRADING LLC 2ND DEFENDANT

VITERRA INDIA PRIVATE LIMITED 3RD DEFENDANT

SHREE RENUKA SUGARS LIMITED 4TH DEFENDANT

MAERSK KENYA LIMITED 5TH DEFENDANT

AND

PORTSIDE FREIGHT TERMINALS INTERESTED PARTY

JUDGMENT

1. Through a re-amended plaint dated 5th November, 2024, the Plaintiff seeks for judgement against the Defendants jointly and severally as follows: -
 - a. A declaration that full payment having been made by the Plaintiffs, continued withholding of original Bills of Ladings Nos. 234070517, 234464876, 233558112 and 233557505 on the part of the Defendants is capricious, unreasonable, unfair, unlawful and amounts to unfair enrichment;



- b. An order directing settlement of all the Customs Warehouse rent, demurrages and storage charges incurred for the sugar consignment in 77 x 20” Containers under Bills of Lading Nos. 234070517, 234464876, 233558112, 233557505 and 5 x 20” Containers under Bill of Lading No. 233557435;
 - c. A mandatory injunction directing release of the 77 x 20” Containers under Bills of Lading Nos. 234070517, 234464876, 233558112, 233557505 and 5 x 20” Containers under Bill of Lading No. 233557435 to the Plaintiffs free of all custom warehouse rent, demurrages and storage charges;
 - d. Damages for loss of business opportunity and profits; and
 - e. Costs of the suit to be awarded to the Plaintiffs and the Interested Parties as against the Defendants.
2. Contemporaneously with the suit, the Plaintiffs filed a Notice of Motion Application dated 24th August, 2024 which was amended on 2nd September, 2024. The Plaintiffs sought a raft of interlocutory reliefs among them release of sugar consignment in 77 x 20” Containers free of demurrages and storage charges.
 3. In a ruling delivered on 9th September, 2024, prayer (2) in the motion was granted conditionally. Upon service of the orders, several other applications were filed. The 1st Interested Party (now the 5th Defendant) filed its application dated 13th September, 2024. In principle, it sought to stay this court’s orders of 9th September, 2024 and in the alternative, vary, set aside or discharge the said orders. Its grounds were that they had not been served with the application.
 4. The other application is the Plaintiffs’ application dated 16th September, 2024 which was a contempt application against the then 1st and 2nd Interested Parties for failing to release the consignment subject of the court orders. By consent of parties, the application dated 16th September, 2024 was withdrawn while the one dated 13th September, 2024 was held in abeyance to await the outcome of the main suit.

Pleadings

5. In their re-amended plaint, the Plaintiffs averred that between November and December, 2023, the 1st Plaintiff sourced for a consignment of sugar with the intention of importing the same to Kenya. To this end, a sales contract was entered between the 1st Plaintiff as the purchaser and the 2nd Defendant as the agent of the 3rd and 4th Defendants’ shippers of 3,105MT Brazilian brown sugar at a unit price of USD 642 totaling to USD 1,993,410.
6. It comprised of 62,100 bags in 115 x 20 FCL containers subject of Bill of Lading Numbers 233558112, 233557505, 233557435, 234070517, 234464876, 233558846 and 233558031. In the meantime, the 1st Plaintiff is said to have had financial/liquidity crisis and was able to pay and secure release of 15 containers of the sugar consignment in 10 x 20” FCL under Bill of Lading No. MUN/MBA/23/12111 and 5 x 20” FCL under Bill of Lading No. 233557435 out of the 115 x 20” shipped to the Port of Mombasa on board vessels operated and/or owned by the 5th Defendant and associated/affiliated companies and warehoused at the Interested Party’s Container Freight Station (CFS) in Mombasa
7. It is averred that the 1st Plaintiff got into financial predicaments and as a result, it approached the 2nd Plaintiff who agreed to bail it out. This was with concurrence of the 1st, 3rd and 4th Defendants. The Bills of Lading were amended to reflect the situation obtaining thereafter. Payments were then made by the 2nd Plaintiff. After the payments, the consignment subject of 15 x 20 subject of Bill of Lading



- No. 233558031 in 8 x 20” FCL were released. Despite full payment, further release of the consignment was not made. According to the Plaintiffs, they viewed the Defendants’ action as capricious, unfair, unlawful, unreasonable and high handed thus the reason they seek the court to intervene.
8. The Plaintiffs averred that the consignment in 10 x 20” containers subject of Bill of Lading No. MUN/MBA/23/12111 was released to the 1st Plaintiff but in a highhanded manner but to date, they withheld the consignment in 5 x 20” containers subject of Bill of Lading No. 233557435 which continues to accrue customs warehouse rent, demurrages and storage charges.
 9. Though earlier represented, the 1st to 4th Defendants and the Interested Party did not file any pleadings other than appearances and the Notice of Preliminary Objection already alluded to. For the 5th Defendant who was initially the 1st Interested Party filed its statement of defence and counter claim dated 30th October, 2024. This was severally amended with the last amendment being the one dated 3rd March, 2025. This was pursuant to leave granted on 20th December, 2024.
 10. Briefly, the 5th Defendant avers that sometimes in December, 2023, it was contracted to ship a consignment of sugar from the Port of Mundra, India to the Port of Mombasa. In acknowledgement of the shipping instructions, it issued five (5) Bills of Lading to the shippers. The details of the said Bills of Lading are well tabulated. According to the 5th Defendant, there were no consignees specified in the said Bills of Lading as were all “to order.”
 11. Accordingly, the 5th Defendant contends that the legal title to the consignment named in the respective bills could only pass from the original bill of lading holder, in its case the shippers to third parties if the Defendants could endorse their respective bills to the named third party. It avers that the shippers did not endorse their respective bills of lading to any third party and they thus remained “to order” bills of lading throughout.
 12. It states that the bills of lading were subject to Maersk standard terms of carriage (STOC). Some of the Maersk STOC applicable included who a merchant was and any person coming within the said definition was liable to it for fulfilment of all the obligations undertaken by the merchant in the bill of lading. Other applicable terms were that the 5th Defendant would exercise lien on the goods shipped any document relating thereto for all the sums payable to under the bill of lading.
 13. It contends that all the Defendants were merchants of the respective bills of lading for which they were claiming the sugar consignment under. Its position is that once the sugar consignment was delivered at the Port of Mombasa, it was the Defendants were required to clear the consignment through customs, gate the consignment out of the Port, deliver the consignment to its final destination and return the containers to it for re-use. This was to be done within a free time.
 14. It emphasizes compliance with free time since any delay leads to loss of revenue and impedes its operations. To discourage delay in clearing and returning containers, it charges a penalty called demurrage or detention. For demurrages, the same accrues where there is delay in clearing the containers while detention charges accrue when containers are cleared through customs, gated out of the Port but they are not returned within the stipulated time.
 15. Regarding free time, the 5th Defendant avers that the same lapsed on different dates for each of the bills of lading the last date being 10th June, 2024. It is its position that the consignment was not cleared from the Port of Mombasa within the stipulated time and it therefore accrued demurrage charges which is specifically pleaded. Its claim as against the Defendants is therefore demurrage charges amounting to USD 706,914.



16. It therefore prays for a declaration that they are not liable to the Plaintiffs in any way in the original action, a sum of USD 706,914 being the demurrage and detention charges that accrued by the sugar consignment, interest on USD 706,914 at court rates from 13th September, 2024 until payment in full and costs and interests on costs at court rates until payment in full.
17. The Plaintiffs had earlier before the further amendment filed their defence to the counterclaim. In a nutshell, they aver that it would be unjust and unconscionable to be made liable to pay demurrages, detention or storage charges occasioned by the deliberate inaction by the Defendants. They therefore prayed that the counterclaim be dismissed with costs.

Parties' Testimony

18. The Plaintiff called three (3) witnesses while the 5th Defendant called one (1). PW1, Hassan Abdi Mohamed, the Director of the 2nd Plaintiff Company. He adopted his witness statements as his evidence in chief and produced the documents as exhibits, and as listed in the list of exhibits.
19. On cross examination by the counsel for the 5th Defendant, he reiterated the contents of his witness statements. He further stated that he sued the 5th Defendant because he was holding the sugar. He said the goods were released to him after the court issued release orders.
20. He further stated that the demurrage charges were to be paid by the 2nd Defendant. He admitted that the shipping line should be paid for their services. He said he was claiming his goods as per the Bills of Lading produced in court.
21. PW2, Hussein Mohammoud Abdul, the Operations Director with the 1st Plaintiff gave evidence that the bought sugar from 1st to 4th Defendants. They were unable to pay for all the goods and that is when they got the 2nd Plaintiff to buy the rest of the goods. The goods were shipped to Kenya but held at the Interested Parties CFS. He prayed that the containers be released.
22. On cross examination, he admitted that by the time he was in talks with the 2nd Plaintiff, the goods were incurring demurrage charges. He said the same should be met by the shipper as they failed to release the Bills of Lading, hence the goods could not be cleared. He admitted that the 5th Defendant was not involved in the transactions but they were entitled to demurrage charges. He however faulted the 5th Defendant for holding the goods for lack of payment.
23. The 1st to 4th Defendant's case was closed. The 5th Defendant's witness, Faith Linah Kimanzi, the Coordinator, Customer Standards Department. She adopted her witness statement as her evidence in chief. She also produced the documents as per the defence list of documents. She said the 5th Defendant was not involved in the transactions between the Plaintiffs and the 1st to 4th Defendants.
24. The 5th Defendant was demanding demurrage charges as they delivered the cargo to Mombasa and clearance was not made in time. It was for the consignee to follow-up document to help in the clearance of the cargo with the shipper. She admitted that the 5th Defendant was holding the Plaintiff's property which had been fully paid for but

Summary of Submissions

25. The Plaintiffs filed two (2) sets of submissions. In their submissions dated 20th January, 2025, the Plaintiffs' first port of call was the issue of failure by the 1st to 4th Defendants and the Interested Party to file any pleadings in defence of their respective positions. Accordingly, the Plaintiffs submitted that their case against the said parties remained unchallenged hence uncontroverted. The Court of Appeal decision in SYT v TA [2019] eKLR was cited in support.



26. On the substance of the dispute, the Plaintiffs reiterated their pleadings on how the 1st Plaintiff had initially arranged for importation of sugar consignment in 115 x 20” containers. However, due to cash-flow challenges, it was only able to pay for 15 x 20” containers and the total amount of USD 220,000 was paid. The remittance advices confirming payment of the amounts were produced in evidence.
27. Reference was made to the contract signed between the 2nd Defendant and 1st Plaintiff with the 1st Defendant as agent of the 3rd and 4th Defendants being the shippers. The 1st Plaintiff was the consignee. This was produced in the bundle dated 24th August, 2024. The Plaintiffs submitted that the cash flow crisis arose when the sugar consignment in 115 x 20” containers had been shipped but had not yet arrived to the Port of Mombasa.
28. This issue is said to have been brought to the attention of shippers and the 2nd Plaintiff and thereafter, arrangements were made to have a new buyer and this is stated to have happened on 8th February, 2024 when the sugar consignment was already at the Port of Mombasa. The Plaintiffs contend that there was concurrence between them and the 1st Defendant on its own and as agent of the shippers (3rd and 4th Defendants). The concurrence was to the effect that the 2nd Plaintiff was to take over and purchase the sugar consignment subject of 100 x 20” containers.
29. The result of this arrangement was amendment of some of shipping documents being amended to have the 2nd Plaintiff as one of the notify party. As a result of the relevant manifest amendment with the 2nd Plaintiff being named one of the notify party, it is submitted that the 2nd Plaintiff would make payments for the 100 x 20” containers to the 2nd Defendant as per schedule at paragraph 10 the Re-amended plaint.
30. The 1st Plaintiff’s sugar consignment was thereafter released. However, it is only the 10 x 20” containers that were released. The other 5 x 20” containers were withheld until this court made orders on 20th December, 2024. It is the Plaintiffs’ position that the payment for the 15 x 20” containers long before shipment. As for the 2nd Plaintiff, it was submitted that its interest in the 100 x 20” containers became effective on 8th February, 2024 and payments for various containers were made from 23rd February, 2024 while the last payment was made on 23rd April, 2024.
31. They blame the Defendants for failing to provide original bills of lading or telex releases for consignment which had earlier been paid for while releasing for some paid later. They submitted that it is a matter of practice that a consignee can only take delivery on being issued with the original bill of lading, telex release or a court order. The 1st to 4th Defendants are blamed for failing to issue bills of lading or telex releases despite full payment having been effected. As for the 5th Defendant, it is blamed for putting restrictions in its release system thereby hindering the Plaintiffs from taking delivery.
32. Accordingly, the Defendants being the wrongdoers, it shall be unconscionable, unfair and unjust to make the Plaintiffs suffer in relation to demurrages, storage charges and custom warehouse rent. They aver that the offending parties being the Defendants should be made to bear all losses incurred effective the dates of their unlawful acts or inaction are from the dates payments were effected in respect of each bill of lading.
33. The Court of Appeal decision in *Maina & 87 Others v Kagiri* [2014] KECA 880 KLR was cited in support. They thus urged that the prayers sought in their re-amended plaint dated 5th November, 2024 and that the remedy for the 5th Defendant in terms of demurrages ought to be against the Defendants and in particular the 1st to 4th Defendants.



34. The Plaintiffs filed supplementary submissions dated 30th January, 2025. They submitted that there was no challenge that the 1st and 2nd Defendants were acting on their own and as agents of the 3rd and 4th Defendants. They equally submitted that the 1st Defendant's title is not disputed. To buttress this position, they made reference to the letter dated 28th March, 2024 wherein the 1st Defendant gave the 2nd Plaintiff an assurance that the 1st to 4th Defendants were to take responsibility for all demurrages for all Bills of Lading after receiving full payments for the same.
35. They further placed reliance on their supplementary list and bundle of documents dated 31st August, 2024 where they submitted that in June, 2024, the 5th Defendant wrote to the 1st Defendant and amongst other things recognizing the facts that shippers had not released Bills of Lading and thus cargo could not be released at destination despite full payments made.
36. Making reference to the demand letter dated 16th May, 2024, the Plaintiffs posited that they were advised by the 5th Defendant through email that it would not be in a position to release cargo without the Bills of Lading. It was the Plaintiffs' position that provision of Bills of Lading or telex releases is the sole responsibility of the Defendants and not the Plaintiffs. An email dated 22nd March, 2024 was referred to.
37. In conclusion, the Plaintiffs stated that they could not be held liable for the misunderstandings between the 1st to 4th Defendants and the 5th Defendant. They thus pray that the Defendants do jointly and severally bear the demurrage, storage charges and customs warehouse rent.
38. The 5th Defendant's submissions are dated 3rd March, 2025. After summarizing the pleadings on record, it began its submissions with the position that its claim against the 1st, 3rd and 4th Defendants was a liquidated sum of USD 706,914. It referred the court to the provisions of Order 10 Rule 10 of the Civil Procedure Rules to the effect that having entered appearance, the three (3) named Defendants did not file any defence and that the case against them should be deemed undefended or in default of defence.
39. More particular, placing reliance on Order 10 Rule of the Civil Procedure Rules, it sought for judgement to be entered in its favour as against the 1st, 3rd and 4th Defendants as prayed together with interests at court rates from 13th September, 2024 till payment in full.
40. On the Plaintiffs' claim, it states that the claim for sugar consignment in issue was based on a sales contract between the Plaintiffs and the shippers. The 5th Defendant was not a party to the said contract. It further submitted that though the Plaintiffs' claim was based on the sales contract, they did not provide any ownership documents authorizing Maersk to release the sugar to them.
41. It submits further that there was no consignee specified in the Bills of Lading subject of the sugar consignment as they were "all to order." According to it, the legal title to the consignment named in the respective bills of lading could only pass from the original bill of lading holder, that is the shippers, to third parties if the shippers endorsed their respective bills of lading with the name of the third party. According to the 5th Defendant, the shippers did not endorse their respective bills of lading with the names of the Plaintiffs or any other third party and they remained "To Order" bills of lading to date.
42. The 5th Defendant cited the case of *Ginegar Plastic Products Ltd v Vitrex Ltd & Another* [2021] KEHC 12891 [KLR] on the definition of a bill of lading. According to the 5th Defendant, the Plaintiffs did not Maersk with the original bills of lading endorsed in their names by the shippers. They submitted that only copies of the unendorsed "To Order" bills of lading were presented and that the court should not rely on the copies of bills of lading as Plaintiffs' prove of title of the sugar consignment.



43. It contended that the Plaintiffs sought to fully benefit from the said bills of lading and that this court ordered Maersk to release the cargo to them. It urged the court to go the full length and apply all the terms of the bills of lading on the Plaintiffs. This, they submitted would include ordering that they must be bound by Maersk's standard terms of contract attached to the said bills of lading. Accordingly, its position was that the court should not be seen to cherry pick some terms of the bills of lading to enforce only in the Plaintiffs' favour.
44. It submitted in depth on some of Maersk's standard terms of carriage applicable in the case among them the definition of who a merchant is and his liability. In concluding on the issue, it submitted that the Plaintiffs, the 1st, 3rd and 4th Defendants were merchants of the respective bills of lading under which they were claiming the sugar consignment and as such, they were liable to Maersk for all demurrage expenses incurred by the containers used to ship the consignment.
45. On its liability to the Plaintiffs, the 5th Defendant submitted that in their re-amended plaint, no wrong doing was attributed to Maersk. The blame is said to have arisen from submissions. As such, it was its position that submissions and evidence should not take the place of pleadings. According to it, evidence and submission must follow pleadings. Where an issue is not pleaded, it cannot form part of the court's decision.
46. Be that as it were, the 5th Defendant submitted that Maersk issued "To Order" bills of lading to the shippers and that it was the shippers' responsibility to endorse those original bills of lading with the Plaintiffs' names and then the Plaintiffs would present the endorsed bills of lading to Maersk and claim their cargo. It submitted that for unknown reasons, the shippers did not the bills of lading with the Plaintiffs' names.
47. The 5th Defendant's position was that Maersk could not issue delivery orders and/or demurrage invoices to strangers who had not presented the original bills of lading endorsed with their names. To do so would have been to act outside its contractual duties. It submitted that Maersk should not be penalized for adhering to the contract of carriage, the law and customs of international trade. It posited that the Plaintiffs wanted Maersk to bend the law in their favour and that is why the Plaintiffs were asked to get a court order.
48. In conclusion, it was submitted that Maersk was entitled to claim demurrage charges and therefore, judgement ought to be entered against all the Defendants jointly and severally as prayed in the counterclaim.

Analysis and Determination

49. I have considered the pleadings, the evidence tendered, the parties' rival submissions together with the authorities relied upon as well as the law and in my view, the following are the issues for determination:-
 - a. Whether the Plaintiffs proved their case to the required standard;
 - b. If the answer to (a) above is answered positively whether the 5th Defendant's counterclaim is merited and against whom; and
 - c. What is the order as to costs?
50. It is not in dispute that the 1st Plaintiff entered into a sales agreement with the 2nd Defendant for the importation of 115 x 20' containers of sugar consignment. The 1st Defendant was the agent of the 3rd and 4th Defendants (shippers). It is also not contested that as a result of cash flow challenges, the 1st



Plaintiff managed only to pay for 15 x 20” containers at a tune of USD 220,000. For the remaining 100 x 20” containers, the 2nd Plaintiff was offered the same.

51. Due to the aforesaid developments, several manifest amendments were done to have the 2nd Plaintiff being reflected as a notify party. This was with the concurrence of the 1st Plaintiff and the 1st Defendant on its own and as agent for the 3rd and 4th Defendants (shippers). The other issue not in contest is that the 2nd Plaintiff having taken over the responsibility for the remaining consignment paid the entire balance with the last payment being made on 23rd April, 2024.
52. Despite full payment, the consignment was not released to the Plaintiffs as anticipated and after several correspondences with no meaningful development, the Plaintiffs moved the court for several orders among them a mandatory order of injunction to have the sugar consignment released. Considering the nature of the orders sought some being final in nature, this court directed that the pleadings be served and the interlocutory application be heard.
53. The principles for granting a mandatory injunction are different from a prohibitory injunction in the sense that an Applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions. This is because issuance of a mandatory injunction in some circumstances concludes a case at the interlocutory stage.
54. For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109 wherein it was held that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.
55. This court being mindful of the requirements could not grant the mandatory injunction as sought ex-parte. In a ruling delivered on 9th September, 2024, the court being satisfied with the existing special circumstances being that the commodity in issue was sugar to be consumed by the members of the public allowed the release of the sugar consignment to the Plaintiffs.
56. However, to safeguard on the issue of demurrages and other charges, it was ordered that the Plaintiffs’ directors execute an undertaking such that in the event court finds them to be the wrongdoers, they would be bound to settle all accrued demurrage and other charges. This was duly complied with.
57. As submitted by both the Plaintiffs and the 5th Defendant, despite being duly served with the pleadings, the 1st to 4th Defendants and the Interested Party did not file any defences and as such, the cases against them were deemed closed without their evidence. As such, the Plaintiffs’ case against them and the 5th Defendant’s counterclaim is deemed uncontroverted.
58. It is trite that where a plaintiff gives evidence in support of his case but the defendant fails to call any witness in support of its allegations then the plaintiff’s evidence is uncontroverted and the statement of defence (if any) remains mere allegations. This was the holding in the case of Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. (as she then was) citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held thus: -

“...In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...”



59. In the present case, no statement of defence was filed by the aforementioned parties and I have no hesitation to hold that the evidence tendered was uncontroverted. However, despite the foregoing, a party alleging still has a duty to prove his or her allegations. This is the evidential burden required of any party alleging under sections 107 to 109 of the *Evidence Act*.
60. In the case of *Kirugi and Another v Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held as follows: -
- “...The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof...”
61. This being the case, the Plaintiff sought for several reliefs which are set out at the beginning of this judgement. It is not in dispute that the entire price for the purchase of the sugar consignment was fully paid. This was evidenced by the various remittances advice tendered by the Plaintiffs. This was not challenged even on cross examination and I find that having made full payments, there was no justification by the Defendants and in particular the 1st to 4th Defendants to hold on to the Bills of Lading in issue.
62. I also note that some of the reliefs sought are already spent as submitted by Counsel for the parties and I see no reason to dwell on the same.
63. On the issue of demurrage charges, having paid their dues within time, it will be extremely onerous to punish the Plaintiffs for actions attributable to third parties. Before addressing the counterclaim, the Plaintiffs have also sought loss of business opportunity and profits. It has been held in various decisions of this court and the Court of Appeal that loss of user/business opportunity or profits is in the nature of special damages. (See the Court of Appeal decision in *David Bagine v Martin Bundi* [1997] eKLR).
64. However, the same court in *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017) eKLR held as follows: -
- “...The appellant claimed both special and general damages. The special damages which did not include loss of user were particularized. The respondent in his defence denied that the vehicle was a public service vehicle that it warranted the appellant the alleged sum per day and that appellant was entitled to damages for loss of earnings. The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitution in integrum is applied in such cases...”
65. Considering the above decision and the evidence tendered by the two (2) witnesses who testified for the Plaintiffs, I am inclined to adopt the decision in *Samuel Kariuki Nyangoti*. This decision is recent as compared to the one for *David Bagine*. Secondly, the witnesses confirmed that the sugar was for purposes of retail into the Kenyan market. Having made payments as early as February, 2024, there was no reason for the Defendants not to release the original Bills of Lading or the telex releases.
66. It is common knowledge that the ever increasing inflation has a serious impact on products meant to be retailed. Had the consignment been released on time, it is expected that the Plaintiffs might have reaped



some profits and order more consignment. Therefore, the Defendants' actions and in particular, the 1st to 4th Defendants occasioned the Plaintiffs loss of business opportunity and profits.

67. As decreed in Samuel Kariuki Nyangoti (supra), these are general damages. These are awarded based on discretion but certain guiding principles must be put into consideration. In assessment of damages under this head, an award must reflect the trend of previous, recent and comparable awards. Looking at the outlay in terms of the money the Plaintiffs spent to acquire the consignment, I find that an award of Kshs. 10,000,000/= shall suffice under this head.

68. On the counterclaim, the 5th Defendant's claim is a liquidated one. As such, the provisions of Order 10 Rule 4 (1) of the Civil Procedure Rules come into play. It provides thus: -

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”

69. Though I do not see any request for judgement on record, I have no hesitation to find that the amount of USD 706,914 as sought in the further amended defence and counterclaim dated 3rd March, 2025 is well founded. The same shall attract interest at court rates from 13th September, 2024 until payment in full. For avoidance of doubt, the same is against the 1st to 4th Defendants.

70. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

71. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion.

72. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by



and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

73. Considering that the Plaintiffs were forced to institute this suit by the 1st to 4th Defendants, I award costs to the Plaintiffs and the 5th Defendant to be borne by the 1st to 4th Defendants.
74. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. Judgement is hereby entered in favour of the Plaintiffs as against the 1st to 4th Defendants as prayed in the re-amended plaint dated 5th November, 2024;
 - b. The 5th Defendant’s counterclaim as prayed in the further amended defence and counterclaim dated 3rd March, 2025 succeeds only to the extent that the customs warehouse rent, demurrages and storage charges are payable by the 1st to 4th Defendants;
 - c. Damages to the tune of Kshs. 10,000,000/= is awarded to the Plaintiffs payable by the 1st to 4th Defendants; and
 - d. Costs to the Plaintiffs and 5th Defendant payable by the 1st to 4th Defendants
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Plaintiffs

N/A by the 1st to 4th Defendants

Ms. Kitoo h/b for Mr. Mugambi Advocate for the 5th Defendant

N/A for the Interested Party

Ms. Getrude, Court Assistant

