



Ndungu t/a Welcome Car Hire and Transport v National Water Conservation & Pipeline Corporation (Commercial Case 775 of 2010) [2025] KEHC 8723 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 775 OF 2010
JWW MONG'ARE, J
JUNE 20, 2025**

BETWEEN

STEPHEN KINGARA NDUNGU T/A WELCOME CAR HIRE AND TRANSPORT PLAINTIFF

AND

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION DEFENDANT

JUDGMENT

Introduction and Background

1. By a Plaint dated 15th November 2010, the filed this suit against the Defendant seeking payment of Kshs.131,308,186.00/= for transport and construction equipment services rendered to the Defendant's dams and pumphouses between 2005 and 2009. The Defendant, through its defence dated 20th December 2010 admitted to the services but claimed they had been paid for and denied owing the sum claimed.
2. The matter was set down for hearing where the Plaintiff testified on his own behalf (PW 1) and he relied on his witness statement dated 9th December 2011 and produced two Bundles of Documents dated 9th December 2011(PEXhibit 1) and 2nd September 2020 (PEXhibit 2). PEXhibit 1 included a Letter dated 3rd December 2009 written by the Plaintiff to the Defendant, a summary of the Contract between the parties, bundle of invoices issued by the Plaintiff to the Defendant and a bundle of Local Purchase Orders(LPOs) receipts issued by the Defendant to the Plaintiff. PEXhibit 2 contains a bundle of invoices, LPOs and letters requisitioning the Plaintiff's services.



3. The Defendant did not call any witnesses or produce any evidence and the hearing proceeded ex parte despite notices being sent to the Defendant. After the hearing, the court directed that written submissions be filed but only those of the Plaintiff are on record. Together with the evidence on record, I will be making relevant references to the said submissions in my analysis and determination below.

Analysis and Determination

4. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in *Miller v Minister Of Pensions* [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

“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 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 in 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.”

5. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provide as follows:

107. Burden of proof.

- (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.

108. Incidence of burden.

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.

(Also see *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR).

6. As stated, the Defendant filed a defence but it did not call any witness or produce any evidence. This means that the Plaintiff's case remains unchallenged (See *Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers* [2001] KEHC 375 (KLR)) and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] KEHC 4017 (KLR)]. However, even though the Defendant failed to challenge the Plaintiff's case, the latter still has a duty to prove its case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Karugi & another v Kabiya & 3 others* [1983] KECA 38 (KLR) where it was stated that, “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”. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] KEELC 3981 (KLR) the Court held that, “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”



7. With the above in hindsight, I will now proceed to determine this matter and the Plaintiff has presented the following issues for the court's determination:
 1. Was the Plaintiff contracted by the Defendant to provide services as pleaded?
 2. What services were provided by the Plaintiff to the Defendant as admitted in the Defence?
 3. Does the Defendant owe the Plaintiff any money, and if so, how much?
 4. Is the Plaintiff entitled to judgment, and if so, in what terms?
 5. Who bears the costs of the suit?

Contractual relationship between the parties

8. The Plaintiff asserts that the contractual relationship is evident through the LPOs which constitute a legally binding contract when accepted by the seller and that the Defendant admitted the contractual relationship in para. 3 of its Defence. Further, that the LPOs also confirmed the availability of funds. Going through the record and the evidence, it is indeed correct that the contract between the parties is admitted by the Defendant in its defence and fortified by the LPOs which were accepted by the Plaintiff. I agree with the Plaintiff that this court, in *Tumaz and Tumaz Enterprises Limited v Magnate Ventures [2023] KEHC 21752 (KLR)* accepted the definition of an LPO as 'A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale.' I am therefore satisfied that based on the LPOs and admissions by the Defendant, the parties had a legally binding contractual relationship.

Services Provided by the Plaintiff

9. The Plaintiff submits that services, including transportation and equipment hire for dam and pumphouse construction, were provided between 2005 and 2009, as pleaded in the Plaintiff and admitted in the Defence and that details are in the unchallenged LPOs and Invoices produced. Going through the record and the evidence, it is also correct that the Defendant admits to the Plaintiff offering services including transportation and equipment hire for dam and pumphouse construction and I find that these were the services offered by the Plaintiff to the Defendant.

Amount Owed by The Defendant

10. The Plaintiff's demand letters initially sought Kshs.104,696,086.00/= (excluding VAT) and Kshs.21,000,000.00/= for jobs without LPOs, with an acknowledgment that reconciliation might change the figure. The Plaintiff and the final demand letter specified Kshs.131,308,186.00/= and that based on the rationalized bundle of LPOs and Invoices and the Plaintiff's affirmation at the hearing, the total claim is Kshs.126,580,590.00/= and that the Plaintiff seeks interest at court rates from the date of filing suit. The Plaintiff produced the aforementioned evidence that it is owed a total of Kshs.126,580,590.00/= and the same was never challenged by the Defendant either through payment receipts indicating that the invoices issued by the Plaintiff for the services rendered were paid. I therefore find that the Plaintiff has proven on a balance of probabilities that the sum of Kshs.126,580,590.00/= remains unpaid and is owed by the Defendant to the Plaintiff.

Reliefs Sought by The Plaintiff

11. As stated, the Plaintiff seeks judgment against the Defendant for: Payment of Kshs.126,580,590.00/=, Interest on this sum at court rates from the date of filing suit until full payment, Costs of the suit, with



interest from the date of judgment. I find that the Plaintiff has proved its case to the required standard on balance of probabilities and is therefore entitled to the aforementioned reliefs.

Conclusion and Disposition

12. In the upshot, I now issue the following final orders:

- a. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs.126,580,590.00/=
- b. The Plaintiff is awarded costs of the suit
- c. The Plaintiff is awarded interest at court rates on a) above from the date of filing suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JUNE 2025

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J.W.W. MONG'ARE

JUDGE

In The Presence Of:-

Mr. S. M. Mwenesi for the Plaintiff.

N/A for the Defendant.

Amos- Court Assistant

