



REPUBLIC OF KENYA



**Polythene Industries Limited v Kilimanjaro Carvings Export Ltd (Civil Suit E239 of 2023)
[2025] KEHC 8644 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E239 OF 2023**

H NAMISI, J

JUNE 20, 2025

BETWEEN

POLYTHENE INDUSTRIES LIMITED PLAINTIFF

AND

KILIMANJARO CARVINGS EXPORT LTD DEFENDANT

JUDGMENT

1. By Plaintiff dated 24 May 2023, the Plaintiff commenced proceedings against the Defendant, seeking the following reliefs:
 - i. The unpaid amount for goods worth Kshs 10,440,463.87;
 - ii. The accumulated penalties of Kshs 10,925,096.23
 - iii. Costs of the suit
 - iv. Interest on (i) and (ii) above
 - v. Such further relief as the Honorable Court may deem fit and just to grant.
2. The Plaintiff's case is that it had been supplying goods to the Defendant for a period of about 6 years preceding this suit. Over that period, parties had developed a relationship that allowed for credit terms. The credit terms were that the Defendant would clear payment of the debt within 60 days, failure of which, the outstanding amount would attract a penalty of 1.5% of the whole amount every single day.
3. The Plaintiff pleaded that between 19 September 2018 and 1 March 2019, it supplied assorted goods to the Defendant worth Kshs 10,440,463.87. The goods were collected by the Defendant upon receiving the invoices, and receipt was acknowledged by the Defendant by signing on the delivery notes.



4. The Defendant purported to make payments vide cheques of Kshs 2,000,000/-, but the same were dishonoured by the Bank when presented by the Plaintiff. It was the Plaintiff's claim that the debt accumulated a penalty of Kshs 10,925,096.23.
5. The Plaintiff called one witness, Harish Patel, the Sales Manager. He adopted his witness statement dated 24 May 2024, which rehashed the contents of the Plaintiff's claim. He confirmed that the goods supplied to the Defendant were brown khaki bags and carrier bags. The witness produced his bundle of documents which included the invoices, delivery notes and letter of authority.
6. The Defendant entered appearance. They filed their statement of Defence, denying the Plaintiff's claim in toto. In particular, the Defendant denied the existence of a business relationship as described by the Plaintiff. The Defendant further pleaded that if at all the parties entered into a binding contract, then the Defendant discharged its end of the bargain and was not indebted to the Plaintiff at all.
7. The Defendant did not call any witness.
8. Parties filed their respective submissions, which I have carefully considered.

Analysis & Determination

9. Three issues arise herein for determination, namely:
 - i. Whether there was breach of contract by the Defendant;
 - ii. Whether the Plaintiff is entitled to the reliefs sought;
 - iii. Who should bear the costs of this suit?
10. With respect to the existence of and subsequent breach of contract, the Plaintiff submitted that it was mutually agreed that upon delivery, all accounts would be settled within a period of sixty days. In the event of default, a daily penalty of 1.5% would be applicable on all overdue accounts. It was the Plaintiff's submission that in pursuance of the said agreement and between the months of January 2021- April 2021, the Plaintiff made deliveries which deliveries were acknowledged as evidenced by the Plaintiff's List of documents dated 24 May 2023 and further list of Documents dated 7 October 2024 produced as exhibits before this Court.
11. The Defendant argued that the Plaintiff failed to prove the existence of the contract, and, therefore, failed to prove its claim. The Defendant relied on the case of *E.P Communications Ltd -v- East Africa Courier Services Ltd* [2019] eKLR.
12. It was the Defendant's submission that the Plaintiff still has a duty to prove its case on the preponderance of probability despite the defence not summoning any witness to testify. The Defendant contended that the Plaintiff had failed in this duty.
13. The *Evidence Act*, Cap 80, gives guidance on the issue of the burden of proof. Section 107 of the 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.



14. Section 108 of the 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.”
15. Finally, 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.”
16. From the evidence adduced by the Plaintiff in the form of the bounced cheques and the email correspondence, it is clear that there was relationship between the parties, despite the Defendant’s denial of the same. The Plaintiff produced an Account Opening Form/Credit Application Form filled in by the Defendant on 21 May 2018. The form indicates the contact person from the Defendant as Ravindra N. Shah and bears the company stamp. The requested credit limit is Kshs 1,000,000/= and credit period is 30 days. Attached to the Form are copies of the Certificate of Incorporation of the Defendant company, the CR12 indicating its Directors and shareholders, copy of KRA Pin Certificate, copies of Passport of Ravindra N. Shah, copy of ID card of Mohamed Hussein Dosani as well as copies of their respective KRA Pin Certificates. This evidence was not disputed by the Defendant. It is, therefore, my considered view that the Plaintiff has proved the existence of a contractual relationship between the parties.
17. Turning to the breach of contract, the Plaintiff produced copies of purchase orders, delivery notes and invoices. The Plaintiff submitted that it had produced sufficient evidence to establish a claim for breach of contract against the Defendant. The Defendant relied on the case of Squirt Enterprises Kenya Limited v Daystar University [2017] eKLR, where it was held that;

“The Plaintiff having exhibited delivery notes to prove its case, the burden of proof shifted to the Defendant.,
18. Further, the Plaintiff relied on the case of Safarilink Aviation Limited v. Trident Aviation Kenya Limited & Another [2015] eKLR, where Hon.Mabeya,J, held that “...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true...”
19. In the case E.P. Communications Limited v East Africa Courier Services Limited [2019] eKLR the Court stated that a delivery note is proof of delivery of goods, that invoices alone do not prove delivery or receipt of goods and that in the absence of a delivery note or other evidence of receipt of the goods, it becomes doubtful whether the goods were actually delivered.
20. In this instance, the Plaintiff produced Delivery Notes that were signed by not stamped. The name of the person receiving the goods appears on some delivery notes but not on all. Similarly, some notes bear a stamp, although the stamp reads “Kamongo Waste Paper Limited”. The Plaintiff also produced Customer Statements and a general ledger for the Defendant’s account.
21. Based on this evidence alone, I would be inclined to agree with the Defendant that the Plaintiff has failed to demonstrate the breach of contract and that the sums demanding are, indeed, owing to the Plaintiff. Based on this evidence, the Plaintiff may have supplied the goods. But as the Court in E.P. Communications Limited v East Africa Courier Services Limited (supra) stated, “courts of law act on



hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.”

22. However, there is a smoking gun! The Defendant issued cheques to the Plaintiff which bounced when presented to the bank for encashment. The cheques were:

Cheque Number date Amount

- i. 552058 10/12/2018 250,000
- ii. 551947 10/12/2018 176,676
- iii. 551859 12/12/2018 54,868
- iv. 552059 13/12/2018 250,000
- v. 551741 14/12/2018 176,679
- vi. 551741 14/12/2018 226,770
- vii. 001672 31/12/2018 700,000
- viii. 001673 31/12/2018 700,000
- ix. 001674 31/12/2018 600,000
- x. 001675 31/01/2019 900,000
- xi. 001676 31/01/2019 900,000
- xii. 001677 31/12/2018 900,000
- xiii. 001678 31/12/2018 800,000

23. These payments alone amount to Kshs 6,634,993/=. The Defendant did not call any evidence to rebut the claim.

24. Further, in the email correspondence produced by the Plaintiff, there are two emails from the Defendant acknowledging the debt. In the email dated 23 October 2019, one Babu Shah from the Defendant company wrote to the Plaintiff and states:

“We are aware of the outstanding debt with yourselves. We regret that we have not been able to settle the same to date and we thank you for your patience until now. We are however trying our best endeavours to settle the same in good time and not take advantage of your kindness.”

25. In the email dated 31 May 2021, the Defendant, through Babu Shah, wrote to the Plaintiff as follows:

“...I once again apologise for such a delay in settling my outstanding of approximately Kshs 10 million. The reason is due to the delay in the sale of my property...”

26. Both emails were not denied by the Defendant. in fact, this evidence was so damning that the Defendant didn't even address it in its submissions. Without evidence to the contrary, the Defendant is indebted to the Plaintiff. I find, therefore, that from the totality of the evidence presented, the Plaintiff has proved, to the required standard, that the Defendant is indebted in the sum of Kshs 10,440,463.87.



27. Turning to the issue of interest, the general rule is that, a party cannot charge interest if it is not provided for in the contract or unless the right to charge interest was agreed to when the deal was made as held in the case of. (see *King Road Paving and Land Scaping Inc v Plati* [2017], ONSC 557.)
28. In this instance, the Plaintiff has not produced any document between parties indicating agreement between the parties to charge penalty interest at the rate of 1.5% per day.
29. In the case of *Ramji Ratma & Company Limited v Attorney General* [2020] eKLR, the Learned Judge opined thus:

“However, common law seeks to remedy a party who has suffered loss due to delayed payment, where there is no contractual clause on interest. Indeed, the courts have come to accept without requiring special proof that, a party who has been deprived of use of his or her capital for a period of time has suffered loss, as held in the case of; *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4)SA 551 (SCA) and that in the normal cause of events, such a party will be compensated for his loss by an award of mora interest.

In the case of; *Crookes Brothers Limited v Regional Land Claims Commission & Others* Case No. 590/2011, the Supreme court of South Africa, held that;

“(14) Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date”.

Similarly, it was held in the case of; *Bellairs v Hodnett & another* 1978 (1) SA 1109, that;

“under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of mora interest seeks to compensate the creditor.

In the case of *Crookes Brothers Limited* (supra) the court stated that, the term mora simply means delay or default. When the contract fixes the time for performance, mora (mora ex re) arises from the contract itself and no demand (interpellatio) is necessary to place the debtor in mora. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (interpellatio) becomes necessary to put the debtor in mora. This is referred to as mora ex persona. (See *Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) paras 11 & 12.)

30. The purpose of mora interest, as stated in the cited case, is to place the creditor in the position that he or she would have been in had the debtor performed in terms of the undertaking. I, therefore, find that the Plaintiff is entitled to interest on the outstanding sums.
31. In the premise, I enter judgement in favor of the Plaintiff as against the Defendant in the following terms:
 - i. The unpaid sum of Kshs 10,440,463.87
 - ii. Interest on the sum in (i) above at court rates from the date of filing suit until payment in full;
 - iii. Costs of the suit and interest thereon at court rates from the date of this judgement until payment in full.

DATED AND DELIVERED AT NAIROBI THIS 20 DAY OF JUNE 2025.



HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Kabui h/b Mr. Gitahi..... for the Plaintiff

N/A..... for the Defendant

Libertine Achieng Court Assistant

