



**EC Insulator Jiangxi Co Ltd v Roy & 6 others (Civil Suit E001 of 2024)
[2024] KEHC 1519 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E001 OF 2024
DKN MAGARE, J
FEBRUARY 19, 2024**

BETWEEN

EC INSULATOR JIANGXI CO LTD PLAINTIFF

AND

**MATTHEW ROY 1ST DEFENDANT
PAUL GREGORY 2ND DEFENDANT
JEFF BATTLES 3RD DEFENDANT
DERRICK A JENSEN 4TH DEFENDANT
WAYNE GRANT 5TH DEFENDANT
QUANTA SERVICES INC 6TH DEFENDANT
ENBRIDGE SERVICES UGANDA LIMITED 7TH DEFENDANT**

JUDGMENT

1. The Plaintiff pleaded that they are a corporation established and carrying on business in China. The 1st, 2nd, 3rd, 4th and 5th Defendants are described as supposedly American nationals and representatives of the 6th Defendant. The 6th Defendant is said to be a corporation that supposedly carries on business in the United States of America.
2. The 7th Defendant is supposedly a corporation carrying on business in Uganda.
3. The Plaintiff pleaded that on 5th May 2023, the Plaintiff received an email from the 1st Defendant representing himself as a representative of the 6th Defendant who informed the Plaintiff that the 6th Defendant was looking for a supplier who could supply 12,000 33KV ceramic insulators to the 7th Defendant, their supposed client. They continued correspondence with the 1st to 5th Defendants via email and WhatsApp believing them to be representatives of the 6th Defendant towards finalizing



a sale of the ceramic insulators. It was on 16th May 2023, that Plaintiff received a Purchase Order No. QNTxxxx15 for 12,000 33KV Porcelain Insulators with spindles worth USD 183,600 under the letterhead of Quanta Services Inc. showing that it had been approved by the 6th Defendant and that the same was to be delivered to the 7th Defendant.

4. It was the Plaintiff's case that they approved the Purchase Order on 17th May 2023 under the belief that the 6th Defendant was to be responsible for the payment of the goods upon delivery to the 7th Defendant where it was agreed between the Plaintiff and 6th Defendant, that the terms of payment be 100% cash against documents via Bank. They agreed that the Bank of America as the most appropriate bank for the transaction.
5. The goods would be shipped to Mombasa, Kenya and thereafter delivered to Uganda where the 7th Defendant was appointed as the consignee of the goods on behalf of the 6th Defendant. On 18/8/2023, the Plaintiff shipped the first batch of goods Invoice No. EC12307102 worth USD 91, 800 to the 7th Defendant on behalf of the 6th Defendant through Evergreen Line in 4 Containers Numbers TxxxxX31, EIxxxx42, EIxxxx11 and EGxxxx57 under Bill of Lading No. EGxxxx59.
6. On 20th August 2023, the Plaintiff dispatched the second batch of goods Invoice No. ECxxxx27 worth USD 91, 800 to the 7th Defendant on behalf of the 6th Defendant through Orient Overseas Container Line in 4 Containers Numbers CSxxxx38, OOxxxx30, OOxxxx24 and UExxxx74 under Bill of Lading Number OOxxxx60 11.
7. After shipping the goods, the Plaintiff submitted its bank details and documents supplied by the 6th Defendant to the Bank of America for payment at which point they were notified that the details were incorrect and could not be traced. shortly thereafter it also learnt that the 7th Defendant had already collected the first batch of goods delivered through Evergreen Line in 4 Containers Numbers TxxxxX31, EIxxxx442, EIxxxx11 and EGxxxx57 under Bill of Lading No. EGxxxx59 without any payment. It was at this point that the Plaintiff investigated through bank tracing and realized that it had been defrauded of its goods.
8. The Plaintiff reported at Wuyuan County Police Station in China under Case No. 2023100031. However, it was already too late as the goods had already been shipped.
9. The Plaintiff took steps to stop the delivery of the remaining consignments to the 7th Defendant by first reporting the matter to the Criminal Investigations Directorate Uganda Police Force and also writing to Orient Overseas Container Line asking them not to deliver the remaining consignments to the 7th Defendant. They were notified that the bill of lading to the consignment was not a negotiable document and their obligation was to deliver the goods to the named consignee upon presentation of the original bill of lading. The vessel carrying the consignment arrived at the Port of Mombasa on 23rd September 2023.
10. The matter was ordered to proceed by way of case stated. Initially, I issued interim orders. Upon being served, the Respondents did not enter appearance nor file defence. They prayed for several prayers.
11. They filed humongous submissions essentially regurgitating the contents of the plaint.
12. They submitted that other courts have dealt with similar cases. Justice J.A Makau in *Rotem Kimyevi Maddeler Sanayi ve Ticaret AS v Sunland Chemicals Uganda Limited* [2019] eKLR proceeded to determine the said case based on affidavit evidence under the provisions of Order 19 Rule 1 of the *Civil Procedure Rules*, 2010.
13. Further, in the case of *Ginegar Plastic Products Ltd v Victrex Ltd & another* [2021] eKLR, Lady Justice Njoki Mwangi employed the selfsame approach.



14. They prayed that the court place reliance on the Affidavit of George Magu Mutitu as the plaintiff's evidence. I have perused the evidence and I am of the considered view that even where the suit is not opposed, the plaintiff retains the burden of proof. 11. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

15. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“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 probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

16. I note that the Respondent made orders for goods half of which they have taken. The balance is in situ but unpaid for. The Plaintiff has an unpaid seller's lien. Under section 41 of the *Sale of Goods Act*, an unpaid seller is entitled to hold on the goods and rescind the contract.

17. Section 41 of the *sale of Goods Act* provides as doth: -

“Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is anywhere the goods have been sold without any stipulation following cases ...

a. entitled to retain possession of them until payment or tender of the price in the following cases –

- a. where the goods have been sold without any stipulation as to credit;
- b. where the goods have been sold on credit, but the term of credit has expired;
- c. Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

18. The Plaintiff has proved their case.



Determination

19. The upshot of the foregoing is that the court makes the following orders: -
- a. It is hereby declared that the consignment that was shipped in Containers Numbers CSxxxx38, OOxxxx30, OOxxxx24 and UExxxxX74 under Bill of Lading Number OOxxxx60 is the property of the Plaintiff and the Defendants have no right to it.
 - b. A permanent injunction is issued restraining the Defendants from taking possession of the consignment that was shipped in Containers Numbers CSxxxx38, OOxxxx30, OOxxxx24 and UETU5227874 under Bill of Lading Number OOxxxx60.
 - c. An order is hereby issued directing Orient Overseas Container Line to release the consignment that was shipped in Containers Numbers CSxxxx38, OOxxxx30, OOxxxx24, and UExxxx74 under Bill of Lading Number OOxxxx60 to the Plaintiff and the consignment be repatriated back to the country of origin or such other destination of the Plaintiff's choice, subject to payment of all request shipping line charges, port charges and taxes.
 - d. The Plaintiff to have costs of the suit of USD 2,672/= together with costs of repatriation, taxes, port charges, and shipping line together with interest at court rates.
 - e. The file is closed.

**DELIVERED, DATED, AND SIGNED AT MOMBASA ON THIS 19TH DAY OF FEBRUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Juma for the Plaintiff

No Appearance for the Defendant

Court Assistant - Brian

