



**Kei Industries Limited v Young & 9 others (Civil Case E084 of 2023)  
[2024] KEHC 16894 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 16894 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E084 OF 2023  
F WANGARI, J  
FEBRUARY 16, 2024**

**BETWEEN**

**KEI INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**LARRY YOUNG ..... 1<sup>ST</sup> DEFENDANT**

**EDISON INTERNATIONAL GROUP ..... 2<sup>ND</sup> DEFENDANT**

**ETHAN KATO ..... 3<sup>RD</sup> DEFENDANT**

**KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 5<sup>TH</sup> DEFENDANT**

**AF BLACKMORE AND SONS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**MARK JONES LUBURWA MOSES ..... 7<sup>TH</sup> DEFENDANT**

**INTERNATIONAL FISH CANNERS (SCOTLAND LIMITED) AFRICAN  
BRANCH ..... 8<sup>TH</sup> DEFENDANT**

**MICHAEL WILLIAM GORDON ..... 9<sup>TH</sup> DEFENDANT**

**CMA-CGM ..... 10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff, a company duly incorporated in India engaging in cable manufacturing business. The 1<sup>st</sup> defendant fraudulently put himself as the representative of Edison International, a company incorporated in the United States of America, and the 2<sup>nd</sup> defendant as the as the subsidiary of the said Edison International.



2. The 1<sup>st</sup> defendant gave a purchase order No EIX5039 purportedly from Edison International for the supply of 540,000m earth cable worth USD 548,100. The 2<sup>nd</sup> defendant was to pay for the goods within 90 days from the date of Bill of Lading.
3. On 19/8/2023, the first lot of goods under the above mentioned purchase order was shipped from the Port of Nhava Sheva, India to the Port of Mombasa, Kenya with the 2<sup>nd</sup> defendant being the consignee in the Bill of Lading. The goods were discharged from the Mombasa Port on 22/9/2023 and taken by the 2<sup>nd</sup> defendant. The second lot of goods was shipped on 24/8/2023 and discharged in Mombasa on 8/9/2023, and the third lot of goods was discharged from the port of Mombasa on 13/10/23.
4. The 2<sup>nd</sup> defendant failed to collect the 2<sup>nd</sup> and 3<sup>rd</sup> shipment of goods despite several communications from the plaintiff. The plaintiff reached out to Edison International and that is when they were informed that the company did not have a subsidiary in Uganda and nor had they ordered any goods from the plaintiff. That is when it was realized that there was fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
5. In a similar situation as above narrated, the 7<sup>th</sup> defendant fraudulently represented himself as an employee of the 6<sup>th</sup> defendant company duly incorporated in the United Kingdom. The 8<sup>th</sup> defendant was given as the contact person of the 6<sup>th</sup> defendant company. The 7<sup>th</sup> defendant gave a purchase order purportedly from the 6<sup>th</sup> defendant for supply of cables worth USD. 241,240.81, the consignee being the 6<sup>th</sup> defendant in the Bill of Lading. The goods left the Port of Nhava Sheva India to the Port of Mombasa and discharged on 28/9/2023. The 6<sup>th</sup> defendant failed to collect the goods.
6. Upon the plaintiff contacting A.F. Blackmore and Son Limited in the United Kingdom, the company denied that they had any subsidiary in Uganda and that they had not ordered any goods from the plaintiff.
7. Similar to the above incidence, the 10<sup>th</sup> defendant presented himself as the employee of International Fish Cannery (Scotland Limited) a company incorporated in the United Kingdom, with the 9<sup>th</sup> defendant as the subsidiary of the said company. The 10<sup>th</sup> defendant gave a purchase order for supply of cables worth USD 304,455.90.
8. The goods were shipped from India to Mombasa and upon discharge on 1/10/2023, the goods were taken by the representatives of the 9<sup>th</sup> defendant as the consignee in the Bill of Lading. The plaintiff reached out to the International Fish Cannery (Scotland Limited) in the United Kingdom and they were informed that they had not put forward any purchase order and neither did they have a subsidiary company in Uganda.
9. The plaintiff reported the fraud to the Directorate of Criminal Investigations, the 4<sup>th</sup> defendant and the 11<sup>th</sup> defendant regarding Bills of Lading No. AMC2100104, AMC2113963 and AMC2113977.
10. The 4<sup>th</sup> defendant in its Statement of Defence dated 17/1/2024 denied the contents of the plaint and put the plaintiff to strict proof thereof. The 11<sup>th</sup> defendant in its Statement of Defence stated that it was the carrier of goods from India to Mombasa, and the plaintiff was the shipper. It denied any knowledge of the fraud as pleaded in the plaint. It prayed for costs. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants did not defend the suit.
11. Due to the urgency in the matter and the daily charges being incurred at the Mombasa Port, the matter proceeded by case stated. I have considered the pleadings and evidence on record and the issue for determination is whether the plaintiff's case has merits.



## Analysis

12. Whereas the defendants save for (4<sup>th</sup> and 11<sup>th</sup> defendants) failed to defend the suit, the burden of proof still remains with the plaintiff. The Court of Appeal in the case *Charterhouse Bank Limited (under Statutory Management v Frank N. Kamau)* (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

13. This court shall consider the plaintiff’s case on merits. It is a fact that the defendants save for the 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> defendants were fraudsters who passed as genuine buyers of the plaintiff’s goods. They managed to take two consignments save for the consignment currently under the custody of the 4<sup>th</sup> defendant and the 11<sup>th</sup> defendant. In *Black’s Law Dictionary* (Eighth edition) fraudulent misrepresentation is defined as;

“A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it”.

14. The plaintiff acted on the defendants misrepresentation by shipping the goods. They have already suffered loss consignments which were cleared by the 2<sup>nd</sup> and 9<sup>th</sup> defendants prior to the discovery that this was a fraudulent transaction on the part of the fraudulent defendants. Particulars of fraud were pleaded and proved.

15. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, it was stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

16. Having proved fraud, I find that the plaintiff is the rightful owner of the goods still being held at the Port of Mombasa. By denying the plaintiff the reliefs sought, would be condemning it to further loss.

17. It is important to note that the 11<sup>th</sup> defendant is an innocent carrier and was not involved in the fraud as pleaded and proved. The company need not be punished as it was an indirect victim of the fraud.

18. The plaintiff also sought for costs and interest. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion



on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR.

19. In the present circumstances, I see no reason why I should deny the plaintiff costs of the suit.
20. The upshot is that this court makes the following orders: -
  - i. The consignment held by the 4<sup>th</sup>, 5<sup>th</sup> and 11<sup>th</sup> defendants be released to the plaintiff for re-shipment back to India, but subject to payment of demurrage charges and other statutory charges within 45 days.
  - ii. That the 4<sup>th</sup> and 5<sup>th</sup> defendants to waive charges for the period within the 45 days' timeline.
  - iii. The plaintiff is a liberty to sue for recovery of damages which includes demurrage and statutory expenses, from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.
  - iv. That costs of the suit to be borne by the defendants in paragraph (iii) above.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of: -

Okello Advocate for the plaintiff

Muge Advocate for the 4<sup>th</sup> defendant

Ngaine Advocate for the 11<sup>th</sup> defendant

Salwa, Court Assistant

