



**Athi River Mining Limited v Total Kenya Limited (Civil Appeal  
305 of 2016) [2024] KEHC 7841 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7841 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 305 OF 2016**

**DAS MAJANJA, J**

**JULY 2, 2024**

**BETWEEN**

**ATHI RIVER MINING LIMITED ..... APPELLANT**

**AND**

**TOTAL KENYA LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. I. Gichobi, RM dated 3rd June 2016 at the Commercial Magistrates' Court, Milimani, in Civil Case No. 7214 of 2008)*

**JUDGMENT**

**Introduction and Background**

1. This is an appeal filed by the Appellant challenging the decision of the Subordinate Court dated 03.06.2016 where it allowed the Respondent's suit and entered judgment in its favour for Kshs 652,382.94 as pleaded.
2. In the suit before the trial court, the Respondent claimed that the Appellant owed it Kshs 652,382.94 on account of petroleum products sold and delivered by it to the Appellant at its request on 30.08.2006. The Respondent thus sought this sum together with interest. In its defence, the Appellant generally denied the claim. The matter was set down for hearing where the Respondent called it's in house counsel, Stephen Atenya (PW1) as its witness while the Appellant called its Finance Manager, Muriithi Kagwe (DW1) and its General Manager, Sales, Rishid Mishan (DW2). Thereafter, the parties supplemented their arguments by filing written submissions.
3. In its judgment, the trial court identified 5 issues for determination; competency of the witnesses, whether there was a contractual relationship between the parties, whether the Appellant owed the Respondent Kshs 652,382.94 and whether the Respondent was entitled to its claim. The Subordinate



Court held that the witnesses were competent to testify in as much as none of them ever worked in the Appellant's Kaloleni depot where the petroleum products were allegedly delivered. On the contractual relationship between the parties, the trial court noted that all witnesses confirm that such a relationship existed dating back to around the year 2000 to date and to the extent that oral orders were a great possibility like in this case.

4. As to whether the Appellant owed the Respondent the sum of Kshs 652,382.94, the trial court found that an initial invoice for 32,000 units of fuel oil 125cst was generated being the initial order valued at Kshs 1,070,540.80. However, since the entire product was not off loaded into the Appellant's tank, another invoice for Kshs 627,803.95 for 18,727 units of fuel oil 125cst was generated and sent to the Appellant for settlement being the value of what was actually off loaded. The Subordinate Court thus found that this was the amount owing as the Appellant never tabled any proof of payment and that the Appellant's witnesses confirmed that sometimes they pay in arrears. The trial court therefore concluded that the Kshs 652,382.94 as pleaded and prayed was proved by the Respondent.
5. The judgment is the subject of the appeal based on the Memorandum of Appeal dated 13.06.2016 which appeal has been canvassed by way of written submissions which I have considered and will make relevant references in my determination below.

### **Analysis and Determination**

6. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion (see *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123). The Appellant's appeal raises 8 grounds but in sum, it is faulting the subordinate court's appreciation of the evidence and findings and thus urges the court to allow the appeal and set aside the subordinate court's judgment.
7. As stated, the Appellant's claim was for a sum of Kshs 652,382.94 for petroleum products sold and delivered. I am in agreement with Appellant's submission that proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that "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" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* [2019] eKLR simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
8. In support of its case, the Respondent through PW1 produced inter alia invoices dated 30.08.2006 and 23.10.2006 and a statement of account dated 12.05.2008 as proof of the supply. PW1 stated that on the material day, the Appellant made a phone call request for the fuel but that the Respondent only offloaded half the quantity of the fuel requested into the Appellant's tank as the tank did not have enough space hence the reason why the invoice dated 30.08.2006 was for the sum of Kshs 1,070,540.80 and that of 23.10.2006 was for 627,803.95. On its part, the Appellant, through DW1 denied the supply stating that any supply made to it is guided by a standard system of procurement preceded by a written LPO from the Appellant to the Respondent and after delivery, a delivery note citing the order number. The Appellant faulted the invoices produced for not being signed or stamped by it and that the said documents produced do not speak for themselves as one cannot tell who delivered or received the products. However, DW1 admitted that he was not involved in the requisitioning of the fuel and that he could not confirm if delivery was made as he was not present in Athi River, Kaloleni at the time.



9. DW2 testified that in as much as the Appellant used to purchase products from the Respondent, he did not recall requesting the impugned supply. He also asserted that products are supplied to them based on their internal procurement processes signed by specific officers and that oral orders are prohibited in the Appellant's policy.
10. I have gone through the record, more so the evidence produced by the parties. The main issue in dispute was whether the Respondent supplied the petroleum products it claimed it supplied. As stated, it bore the burden of proving that it indeed supplied the products as claimed. From the said invoices and statement of account, it is not clear whether the said products indicated therein were received by the Appellant. The Respondent did not also produce any delivery note or such proof that the products were received by the Appellant. *Black's Law Dictionary* (10<sup>th</sup> Ed.) defines an invoice as 'an itemized list of goods or services furnished by a seller to a buyer, us. Specifying the price and terms of sale; a bill of costs'. It also defines 'Receipt' as 'the act of receiving something, esp. by taking physical possession <my receipt of the document was delayed by two days>. A written acknowledgment that something has been received; esp., a piece of paper or an electronic notification that one has paid for something.'
11. While I accept that it is not the work of a supplier to find out the internal workings of a company (see *Royal British Bank v Turquand* 1856 A 11 ER and *Samuel Mureithi Murioki & Another; v Kamahuba Limited* NRB CA Civil Appeal No 49 of 2012 [2018] eKLR), a party who claims to have supplied or delivered goods to another still has the burden of proving such delivery or supply. This court, in *E.P. Communications Limited v East Africa Courier Services Limited* [2019] eKLR 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. The invoices produced by the Respondent were not supported by any delivery note or notes to show receipt of the fuel stated therein. The Respondent 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. It is therefore my finding that the trial court erred in finding that the Appellant had not tabled proof of payment of the invoices when it had not interrogated whether the fuel was delivered in the first place.
12. On the statement of account produced to show the Appellant's indebtedness, the Court of Appeal in the case of *Five Continents Ltd v Mputa Investments Ltd* [2003] eKLR held as follows:

The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability (see Section 37 of the *Evidence Act*). It follows that the accounts analysis on which the learned judge relied has no evidential value.
13. In the absence of proof of delivery of the fuel, it was erroneous for the subordinate court to rely solely on the statement of account to find that the Respondent had proved its case.

## Disposition

14. From the totality of the evidence, I find and hold that the Respondent did not provide sufficient proof that it had delivered the subject petroleum products to the Appellant and as such, its claim for payment through the invoices and statement of account produced was unsupported.



15. I allow the appeal and set aside the judgment of the Subordinate Court dated 03.06.2016 and substitute it with a judgment of this Court dismissing the claim set out in the Plaint dated 14.11.2008 with costs. The Appellant is awarded costs of this appeal assessed at Kshs 30,000.00

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

