



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NUMBER 143 OF 2018

KAPCHORUA TEA COMPANY LIMITED....APPELLANT

VERSUS

SAMUEL K. BUNGEI..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. C. M. Kesse (SRM) delivered on 31st October, 2018 in Kapsabet PMCC No. 106 of 2016 between Samuel K. Bungei vs Kapchorua Tea Co. Ltd)

J U D G M E N T

1. In the year 2004 Samwel K. Bungei a businessman in the transport industry at that time entered into an agreement with Kapchorua Tea Company Limited to collect fresh tea leaves from farmers and to deliver the same to the factory. He had four (4) motor vehicles, KAG 813X, KAT 578N, KAK 484H and KAV 687K. The agreement was in the following terms.

“KAPCHORUA TEA CO. LTD

GREENLEAF TRANSPORT (OUT GROWERS) CONTRACT

1. It is hereby agreed between Kapchorua Tea Co. Ltd. herein referred to as company and Mr./Mrs. Samwel K. Bungei ID No. 7168967 (Here in referred to as contractor) that work be carried out by the contractor as specified below:
 - (a) The contractor is to transport plucked green leaf from the small-scale holders (out growers) from the estate’s neighbourhood.
 - (b) The (transporter) contractor shall ensure the green leaf arrives in the factory fresh and in acceptable condition not later than 6.00 p.m. daily.
2. The contractor shall provide his own transport, personnel and materials in order to satisfactorily complete the specified work in clause no. 1 a – b above.
3. The contractor shall be paid Kshs. 1.00 (one shilling only) for every acceptable kilogram of green leaf delivered to the factory.
4. The contractor shall be required to submit an invoice for payment of the company once in a month (month-end).
5. The contract shall commence on 1st April 2004 and is renewable annually.
6. In the event that the contract is not being carried out satisfactorily in the opinion of either party, both parties shall be expected to give a one month’s notice.
7. On signing of the contract, the contractor confirms he holds all necessary and relevant statutory insurance for his employees and damages to the third party and meets all the statutory obligations and indemnifies the company for any damages that may arise through the negligence of the contractor.

8. This agreement is made on this day of 1st April, 2004.

Between

Contractor: Samwel Kiskogei Bungei Company: General Manager

Witnesses Godfrey Wanyonyi Representative: Robert K. Koech

1/4/2004

1/4/2004”

2. According to the Samuel, the defendant in blatant breach of clause 2 of the agreement wrongfully deducted the sum of Kshs. **1,695,036** from his dues for the work he had done, to pay its own green leaf clerk assigned to the his truck.

3. He instructed his lawyers to demand the sum from the defendant. By a letter dated 8th February 2015, the defendant’s General Manager wrote to him this;

“8th December, 2015

Mr. Samuel K. Bungei

P.O. Box 12,

NANDI HILLS.

Dear Sir,

DISCREPANCIES AND WRONG DEDUCTIONS OF CLERICAL WAGES/OVERTIME AND LUNCH ALLOWANCES

Reference is made to a letter dated 3.11.2015 from Terer and Company Advocates acting on your behalf alleging wrongful deductions of wages, overtime and lunch allowances amounting to Kshs. **1,695,036** towards payment of a Company Greenleaf clerk assigned to your truck which was engaged on contract to transport smallholder’s greenleaf to Kapchorua Tea Factory.

Our records for the period in question (2004 – 2011) indicate that a total of Kshs. **583,375.25** were indeed deducted from proceeds of your contract earnings towards payment of wages, among others for a turn boy as per item 2 of the signed greenleaf transport contract between yourself and the Company.

We are going through daily allocation entries for the period to establish whether any deduction may have erroneously been made towards payment of a clerk as alleged.

Meanwhile, we are instructing our lawyers to take up this matter.

Yours faithfully

For: Kapchorua Tea Co. Ltd.,

General Manager

Cc: V.A – Changoi

WTK – Nairobi

Terer & Company Advocates”

4. The matter was not resolved and by a plaint dated 11th February, 2016 he filed this suit seeking orders;

(a) A liquidated sum of Kshs. 1,695,035/=

(b) Costs of the suit and interest on both the liquidated sum as well as the costs from the date of the filing of this suit till payment in full.

(c) Any other and or further relief as this Honourable Court may deem fit and just to grant.

5. His prayers were premised on the grounds that the defendant had breached the said contract. He set out the particulars of breach thus.

(a) Deducted wages, overtime and lunch allowance amounting to Kenya Shillings One Million Six Hundred and Ninety Five Thousand and Thirty Six Shillings (1,695,036/=).

6. Vide its defence dated 28th June 2016, the defendant denied every allegation of breach and averred that indeed the sum of Kshs. 583,375/27 was deducted towards payment of turn boys (wages or overtime and lunch) assigned to and or allocated to the plaintiff's trucks on diverse dates.

7. The defendant also averred that the plaintiff's claim or suit was statute or time barred in line with the provisions of **Limitation of Actions Act** and they would be applying for the same to be struck out.

8. The plaintiff replied to the defence vide reply dated 22nd July, 2016, putting the defendant to strict proof the all the allegations. With regard to the issue of limitation, he simply denied the same.

9. The matter was heard by way of *viva voce* evidence. The plaintiff testified and called three (3) witnesses. The defendant called one witness.

10. In a judgment dated 31st October 2018, the learned trial magistrate after a summary of the evidence set out three issues for determination;

(a) Whether there existed an agreement between the plaintiff and defendant for the period ending the year 2004 – 2011 for transport services.

(b) Whether the defendant breached the said agreement.

(c) Whether the defendant is liable.

(d) Costs.

11. The learned trial magistrate allowed the claim with costs and interest on the following findings;

- That the contract between the parties was not disputed.
- That the defendant failed to establish the fact that any turn-boys or drivers were allocated to the plaintiff during the period of the contract.
- That the alleged deductions for spares and fuel advance by the defendant from the plaintiff's account were not a term of the contract, and no amendment of the contract to add a new term was annexed.

12. Aggrieved, the defendant filed this appeal on the following grounds as set out in the Memorandum of Appeal;

1. THAT the learned trial magistrate erred in law and fact in failing to dismiss the Respondent's suit in view of the evidence on record.

2. THAT the learned trial magistrate erred in law and fact in failing to make a determination on various legal issues and/or principles as raised in the pleadings.

3. THAT the learned trial magistrate erred in law and fact in failing to hold that the Respondent's claim for the period between year 2004 – 2009 was statute barred by dint of the Provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

4. THAT the learned trial magistrate erred in law and fact in completely misapprehending the issues in dispute between the parties from which the decision was to flow and/or be hinged on.

5. THAT the learned trial magistrate erred in law and fact in misapprehending the Law of Contract and the principles applicable therein.

6. THAT the learned trial magistrate erred in law and fact in awarding to the Respondent a liquidated sum of Kshs. 1,695,035/= when no evidence of how the same was arrived at was produced and/or availed in court.

7. THAT the learned trial magistrate erred in law and fact in disregarding the evidence given by the Appellant concerning the deductions that were made pursuant to the Contract/Agreement between the parties.

8. THAT the learned trial magistrate erred in law and fact in failing to hold that the Respondent was estopped by his conduct and in view of the evidence adduced by the Respondent's witnesses and Appellant's witnesses from disputing the deductions made by the Appellant.

9. THAT the learned trial magistrate erred in law and fact in failing to hold that the Respondent has not proved his case on a balance of probability as against the Appellant.

13. The counsel M/s Onyinkwa for the appellant, Terer & Co. for the respondent agreed to dispose the appeal by way of written submissions.

14. From the consideration of the submissions the following issues stuck out for consideration and determination:-

1. **On Limitation: Whether the plaintiff's claim was statute barred and whether the appellant failed to raise it before the subordinate court, whether it is estopped from raising it now.**
2. **On the terms of the Contract: Whether the terms of the written contract were varied by conduct of parties, and if so what the variations were; whether there was an amendment by of conduct of parties; whether the respondent was allocated any turn-boys, and advanced money for fuel and spares, outside the written contract and**
3. **Whether that conduct estops him from making these claims.**
4. **Whether the respondent proved his claim of Kshs. 1,695,036/= to the required standard.**
5. **Whether the appellant justified its deductions of Kshs. 583,375/27**
6. **What orders to issue?**
7. **Who to bear costs.**

15. On the first issue

It is submitted for the appellant that the contract between the parties was an annual contract, renewable annually and therefore each year from 2004 – 2011 was a separate contractual year. That the respondents claim therefore cannot be said to run from 2004 to 2011. It was 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 respectively. That time began to run from each year and from the time each the specific breach arose. It was also the appellant's position citing **Section 4(1) (a) of the Limitation of Actions Act** that each breach ought to have been raised within six (6) years of its occurrence. On this point the appellant cited the decision of the Court of Appeal in **Diana Katumbi Kilo vs Reuben Musyoki Muli (2018) eKLR** held that a cause of action in relation to a contract accrues from the **breach of contract**. *Majanja J. in B. Mathayo Obonyo vs South Nyanza Sugar Co. Ltd [2019] eKLR* where he adopted the reasoning in **South Nyanza Sugar Company Ltd vs Dickson Aoro Owuor [2017] eKLR** where the judge held;

“It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at the date of the alleged breach and not at the end of the contract period (emphasis ours).

16. The respondent's counsel argues that the appellant having not raised the issue of limitation at the trial is estopped from raising it now. Arguing that estoppel is a principle of justice and equity he relied on the case of **748 Air Services Limited vs Theuri Munyi (2017) eKLR**, where the court explored the history of the doctrine, and cited Lord Denning in the case of **McIlkenny vs Chief Constable of West Midlands [1980] All ER 227**, where he stated:

“We have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from **saying** something or other, or **doing** something or other, or **contesting** something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying estoppel is only a **rule of evidence**. If you go into another room you will find a different notice: estoppel can **give rise to a cause of action**'. Each room has its own separate notice. It is a mistake to suppose that what you find in one room, you will find in the others.” (Emphasis mine)

17. To reinforce the argument that the plaintiff had waived the application of certain parts of the contract, through his conduct and acquiescence, he relied on the case of **“Sita steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd. [2007] eKLR**, *Maraga J* (now Chief Justice) stated:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

18. On issue No. 1

It is not correct that the appellant did not raise this issue in the lower court. A perusal of the appellant's submissions before the subordinate court reveals that the issue of limitation was the first issue for determination in the appellant's submissions. The appellant had submitted:

“The **Limitation of Actions Act (Cap 22) Laws of Kenya under Section 4(1) (e)** provides that actions founded on contract cannot be brought after the end of 6 (six) years from the date on which the cause of action occurred.

As held in **Bosire Ogero Vs Royal Media Services (2015) eKLR**

“The law of Limitation of Actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in bringing of suits against them. The issue of Limitation goes to the jurisdiction of

court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.”

19. It is noteworthy that counsel for the plaintiff/ respondent did not address this issue nor respond to it in the submissions. Hence the defendant/appellant cannot be accused to have waived its right to seek the determination of the same issue on appeal. Of importance is the fact that the learned trial magistrate did not address the issue yet it challenged her jurisdiction to entertain the claim in the first place. It is trite, when jurisdiction is challenged; a court is bound to first address the issue before proceeding to determine the merits of the case. For emphasis I cite the words of *Nyarangi JA* in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. To properly answer the question posed by the first issue, it is necessary to examine the contents of the contract and the evidence around it. See **Selle vs Associated Boat Company Limited [1968] EA 123**. The plaintiff/ respondent’s testimony was that he signed the agreement on 1st April 2004. He produced his statement of account number 8017 with the defendant, and simply stated;

“This is my statement. They started deducting the same under page 1, they deduct Kshs. 4,692/=.”

He also filed what he termed as the summary of the deductions. Now here is the challenge. The documentary evidence was simply thrown at the court without any analysis. There was no effort to ‘kuchambua’ or analyse the same to demonstrate how the information in those documents supported his claim.

21. It was evident that the statement of accounts, which was marked as P. Exhibit 3, was the respondent’s key evidence. The record shows that in his evidence he made reference to it in that one sentence.

22. I went through the whole statement as is required. P. Exhibit 3 demonstrates that there was a statement for each year, for the years, 2009/2010, 2010/2011, 2011/2012, 2012/2013, 2013/2014, 2014/2015 running from 1st April to 31st March the following year. There was no statement from 2004/2005, 2006/2007, 2007/2008, 2008/2009.

23. From the statement for 2009/2010, the respondent claims breach began from page 1. I assumed that the breaches were the places highlighted in orange, and if so, it would appear the first deduction was made on **30th April 2009**. The plaint though dated 11th February 2016 was filed on **19th May 2016**. The plaint in court the file does not bear a court stamp but a perusal the filing fees payment receipt, number 6995802 for CMCC 106 of 2016 shows that payment for the plaint was received on 19th May 2016. According to the plaintiff/respondent, the contract started in 2004 and ended in 2011. He filed the suit in 2016. Without much ado, it stands out that by this time any claims from 2004 to 2010 were time barred. Why? Because the law speaks for itself. Any claims outside the six (6) year period allowed by **Section 4(1) (a) of the Limitations of Actions Act, Cap 22** would be statute barred leaving claims from May 2010 to 2011.

24. For the claims for the years 2004 to 2010, the plaintiff/ respondent ought to have sought extension of time before filing the suit.

25. On the second issue

It was submitted for the appellant that the respondent conceded to having made arrangements for advance on fuel and cash, actions that amounted to a variation of the terms of the contract, and he was estopped by his conduct. It was argued further that it was on the same terms that the appellant provided him with turn -boys for his trucks whenever he had none. And that the two parties by their conduct had gone ahead to vary the terms of the contract whereby the respondent would get cash advance, fuel and turn boys, and for which deductions would be made out of his monthly payout.

26. For the respondent it was submitted that the appellant had not produced any evidence to prove the claim that the parties had by way of their conduct amended the terms of the contract to include the provision of cash in advance, fuel and turn boys. That indeed there was such arrangement and none had been proved.

27. That these allegations were debunked by the testimony of the respondent turn boys, each of whom testified to establish that the respondent never received any turn boy from the appellant. That even the one whom the appellant alleged was assigned to the respondent, one Laban Juma Murambi testified as PW4. He told the court, was an employee of the factory personnel number 1882 and was not assigned to the respondent.

28. On its part, the appellant relied on the testimony of DW1, and the documentary evidence, showing that indeed the said PW4 was assigned to the respondent’s motor vehicle.

29. **DW1** produced a bundle of documents. There were some handwritten documents, which she labelled *daily works allocation sheets* and produced as– D. Exhibit 4. These hand written documents had no heading, no explanatory notes, and no certification. I noted that each has nine (9) columns. I perused them in the series in with highlighted row shows and noted the highlighted rows.

42/ infilling/ 3062/ 1882, 1969/ 2/ -/ -/....

10TH MAY 2010

2/KAG..../Infilling/3062/1882, 1962/2/- - -/2/...

UNDATED page

/H/weeding/3011/1028....1882/11/ / /11/

Upon considering these highlighted rows, I made the assumption that they were intended to demonstrate that no. 1882 had been assigned to work for the respondent on the specified dates. In her testimony, DW1 only urged the court to look at the documents. However, as can be seen from the plain extracts above, there is no nexus was made between the respondent and no. 1882's work on those dates.

30. There is D. Exhibit 3. Again in bears no heading and no explanatory notes. This one had seven (7) columns. The highlights in highlighter green are demonstrated in the following rows:

12/4/2007						
T. Boy KAT 578N		1	-	-	1	

18/7/2007						
T. Boy KAT 578N		1	-	-	1	
26/10/2006						
T. Boy KAG 034H		1			1	
T. Boy KAT 578N		1			1	

31. Again these extracts from the register as testified to by the DW1 do not demonstrate a pattern, only two (2) motor vehicles are mentioned four times on three dates, one twice in 2007, another once in 2006. It is alleged that these records demonstrate that the respondent was assigned a turn-boy on each of those dates. However, this cannot be said to be a document that speaks for itself. To establish an arrangement, the appellant needed to show the corresponding documents for instance, evidence of payments made to the alleged turn-boys on the material dates connecting those to work done on the appellant's trucks. Again, having introduced what appears to have been a counter claim, it was up to the appellant to demonstrate that indeed, the deductions they made were related to the provision of turn boys, this is more so, because the respondent's complaint was very specific, that money was deducted to pay a **leaf clerk**.

32. In my view, from the foregoing evidence there is nothing to support the claim that there was a change of *modus operandi* in the performance of the contract to include the provision of turn boys to the respondent. The evidence simply suggests that on four (4) occasions in 2007 and in 2010, two of the respondent's motor vehicles were assigned a turn boy. It is also clear that it is only in one of those times that number 1882 appears there. Hence, there is no sufficient evidence on record to demonstrate that indeed the appellant assigned a leaf clerk to the respondent, or turn-boys, to warrant any deductions in that regard, or in any event, to amount to conduct that amended the terms of the contract to that extent.

33. With regard to fuel and other advances, there was no complaint from the respondent. In fact, his own evidence in the statement, marked P. Exhibit 3 contains deductions for diesel and advance on diverse dates, but these are not highlighted for the court's attention, neither are they complained about in the plaint.

34. On the third issue

He who asserts must prove. It was argued that the Respondent had failed to discharge both his legal and evidentiary burden of proof of the facts he had alleged in his case the standard required, which is on a balance of probabilities. On this, the appellant relied on Section **107 of the Evidence Act Cap 80 Laws of Kenya** speaks to this. **Section107. 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.”

35. The appellant also relied on the case of **Kirugi & Another vs Kabiya & 3 Others [1987] KLR 347** where the Court of Appeal reiterated the position as to proof in civil cases. It stated that the burden is always on the plaintiff to prove his case on a balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

36. So what evidence did the plaintiff/respondent place before the court? The plaintiff/respondent needed to prove that Kshs. 1,695,036/= had been deducted from his account. The plaintiff/respondent filed what he called a summary/analysis of the deductions together with his submissions. This here is a reproduction of that summary styled '**Analysis of the deduction**'

WAGES/OVERTIME AND LUNCH

YEAR	WAGES PER MONTH KSH	NO. OF CLERKS/TURNBOYS	TOTAL WAGES OF CLERKS PER MONTH KSH	TOTAL WAGES PER YEAR KSH	OVERTIME PER YEAR KSH	LUNCH PER YEAR KSH
2004/2005	4,803/=	1	4,803	57,636	21,600	14,400
2005/2006	5,187/=	2	10,374	124,488	43,200	28,800
2006/2007	5,601/=	2	11,202	134,424	43,200	28,800
2007/2008	6,162/=	3	18,486	221,832	64,000	43,200
2008/2009	6,778/=	2	13,556	162,672	43,200	28,800
2009/2010	7,456/=	3	22,368	268,416	64,000	43,200
2010/2011	8,201/=	1	8,201	98,412	21,000	14,400
TOTAL	44,188		88,990	1,067,880	300,800	201,600
TOTAL DEDUCTIONS: 1,695,036/=						

TOTAL DEDUCTION FROM 2004 TO 2011

TOTAL DEDUCTIONS OF WAGES FOR TURNBOY/CLERK FROM 2004/2011	1,067,880
TOTAL DEDUCTIONS OF OVERTIME FOR TURNBOY/CLERK FROM 2004/2011	300,800
TOTAL DEDUCTIONS OF LUNCH FOR TURNBOY/CLERK FROM 2004/2011	201,600
TOTAL DEDUCTIONS OF WAGES FOR TURNBOY/CLERK FROM 2004/2011	124,7565
TOTAL	<u>1,695,036/=</u>

37. In his testimony, the plaintiff/ respondent made no effort to draw a nexus between this summary and his account P. Exhibit 3. I painstakingly looked for the figures in the analysis in the statement of account P. Exhibit 3. I found nothing to connect the two. The statement of account has highlighted figures, but these are not explained either in the respondent's testimony or in any other place. No nexus was made between the summary that is in the submissions and the statement of account produced as key evidence. In any event, the respondent did not produce any statement of accounts for the years **2004 – 2009** and therefore his summary for those years simply drops from the sky. For the years 2010 – 2011, the statements I have before me do not bear any correlation with the summary.

38. Finally, nothing was produced to show that this was the respondent's account. The account name is Kapchorua Tea Company Limited. In his testimony the respondent merely stated;

“This is my statement account number 8017 statement from the plaintiff’s account.”

So, what the respondent produced as P. Exhibit 3 was not his actual account but the appellant’s account bearing in it what he terms his account. However, once again, no effort was made to explain the figures in the statement. A perusal of the statement shows that it contains charges for diverse items including ‘*diesel, electricity charge, transport (Bungei, Ernest Masud, and Mutai’s Pluckers) EFT payments, wages, petrol, Pauline wages, recoveries, firewood splitting*’. Clearly, the respondent made little effort to prove his claim. This being a liquidated claim, specifically pleaded and denied required to be proved specifically. If the numbers were in the statement, it was up to the respondent to pull them out and place them before the court, if there was other documentary evidence, he needed to place it before the court. Simply plucking the appellant’s statement and highlighting some numbers and preparing a summary without the explanation cannot be proof.

39. From the record, it is evident that the learned trial magistrate did not make an analysis of the documentary. There is no mention of the statement relied by the plaintiff/ respondent in support of his claim or how she arrived at the decision that he had actually established that Kshs. 1,695,036/= had been deducted from his account. I would say that though not excusable, it is understandable, because the manner in which these exhibits were presented reduced them to just documents with figures. Be that as it may, these documents formed the basis of the plaintiff’s claim and were the key evidence that he relied on, without analyzing them there was no basis, for the trial court’s decision that the plaintiff/respondent had proved his claim.

40. The plaintiff is bound by his pleadings. It was his case that deductions were specifically made from his account to pay a leaf clerk. He did not mention the said leaf clerk in his testimony. He did not produce a single document to show that indeed deductions were made to pay a certain leaf clerk. Moreover, if the alleged leaf clerk in question is PW4, then, his own evidence was that this person was paid salary by the company, the appellant in this case. There was no evidence establishing any connection between the salary the PW4 was paid by the appellant to the respondent’s Kshs. 1,695,036/= In any event, DW1 confirmed that PW4 was an employee of the company and produced his pay slips to confirm that indeed he was paid by the appellant, and although there was evidence to suggest that twice PW4 may have been assigned as turn boy to the respondent, there was no evidence that he was paid 1.6 million deducted from the respondent’s dues. The respondent’s proposal in his ‘analysis of deductions’ that deductions were made to pay turn boys is not supported by his pleadings. His plaint spoke about a leaf clerk and not turn boys. Clearly therefore the respondent did not establish that Kshs. 1,695,036/= was deducted by the appellant at all, or to pay a leaf clerk in its employ.

41. The appellant confirmed certain deductions, which included payment for fuel, cash advances, and payment for a turn boy among others. There was no admission of any payment to a leaf clerk. The amount admitted by the defendant/appellant does not form part of the 1.6 million claimed as it is clearly indicated it was for other things. The appellant did produce exhibits, showing that the respondent had received fuel in advance, spares for his motor vehicles, which he conceded, and it appears that is why he did not contest that part of the defence in his testimony.

42. The totality of my findings is that the plaintiff/respondent did not prove his case to the required standard. The appeal succeeds.

43. Costs

Each of the parties simply threw documents at the court without any analysis or explanation. Neither deserves costs.

Right of appeal 30 days.

Dated and delivered virtually this 7th December 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Edna

For Appellant: Mrs Kosgei

For Respondent: Mr. Chesoni