



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 341 OF 2012**

**SWILA RESORTS LIMITED .....PLAINTIFF**

**VERSUS**

**UNIVERSAL FREIGHTS AND LOGISTICS (KENYA) LIMITED .....DEFENDANT**

**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. The suit was instituted by way of Plaint filed on 29<sup>th</sup> May, 2012 and dated 22<sup>nd</sup> May, 2012 together with the Plaintiff's witness statement and list and bundle of documents also dated 22<sup>nd</sup> May, 2012. The Defendant filed a Defence on the 16<sup>th</sup> July, 2012 together with a counterclaim dated 12<sup>th</sup> July, 2012. A reply to defence and defence to counterclaim was filed on 28<sup>th</sup> September, 2012 and dated 24<sup>th</sup> September, 2012.
2. An amended plaint dated 14<sup>th</sup> May, 2014 was filed on 19<sup>th</sup> June, 2014 primarily changing the name of the Plaintiff to **Swila Resorts Limited** from **Honourable Sammy Weya**.
3. The matter was thereafter scheduled for hearing on the 16<sup>th</sup> December, 2014; 29<sup>th</sup> January, 2015 and 20<sup>th</sup> March, 2015 but did not proceed on any of those occasions.
4. The Plaintiff claims a liquidated amount of Kshs. 1,479,878.35 from the defendant pursuant to payments allegedly made to the defendant as the plaintiff's clearing agent in the year 2011, and USD 18,093 being the alleged value of goods allegedly lost.

**PRELIMINARIES**

5. Before I go further in this judgment it is important to state some preliminary issues regarding the hearing of this suit, noting that the defendant did not participate in the hearing leading to this judgment.
6. On 16<sup>th</sup> December, 2014, this matter was scheduled for hearing. The plaintiff was ready to proceed but M/S Oeri holding brief for M/S Ngisa sought an adjournment which was granted on the condition that the defendant pays the costs, including air transport costs of the plaintiff. M/S Oeri sought to appeal that decision on costs.
7. On 29<sup>th</sup> January, 2015, when the matter was again scheduled for hearing M/S Oeri asked the judge to

recuse himself from this matter on allegation that the judge on 16<sup>th</sup> December, 2016 had made punitive orders on costs against the defendant, and that the judge was already prejudiced. The application was dismissed. Upon the dismissal M/S Oeri sought further adjournment of the matter on the grounds that she required time to make application to cease acting for the defendant. That application was allowed. The court directed M/S Oeri to file her application. The hearing of the matter was then scheduled for 19<sup>th</sup> March, 2015.

8. On 26<sup>th</sup> February, 2015 M/S Oeri's application to cease acting for the defendant was granted as it was not opposed.

9. On 19<sup>th</sup> March, 2015 a M/S Machio came on record for the defendant, and successfully applied for adjournment on the grounds that she needed to familiarize herself with the matter. The court then directed that a new hearing date be fixed at the Registry. The Registry did not give a date. However, a date for hearing was finally given in court on 2<sup>nd</sup> November, 2015 in the presence of parties' advocates. The hearing was scheduled for 29<sup>th</sup> February, 2016. On that date a Mr. Mutai advocate was holding brief for Mr. Nzioka for the defendant. He sought adjournment on the grounds that Mr. Nzioka had just come on the matter for the defendant and needed more time to prepare for the hearing. This application was opposed by M/S Oyugi for the plaintiff. In its ruling the court dismissed the application and directed the hearing to proceed as scheduled. Mr. Mutai did not wait for the hearing on the grounds that his instructions were limited to applying for adjournment. So, the matter proceeded in the absence of the defendant.

### **THE PLAINTIFF'S CASE**

10. During the hearing, the Plaintiff called one witness, Samuel Weya, the Director of the Plaintiff Company. He adopted his witness statement together with the attached exhibits dated 22<sup>nd</sup> May, 2012 and filed on 29<sup>th</sup> May, 2012. The witness testified that he knew the Defendant Company, specifically a Mr. Daniel Ndambuki who was a director of the Defendant Company and the individual he had been dealing with. They had previously had successful dealings before and he had used him on other occasions as a clearing agent for goods imported by the Plaintiff Company into Kenya. The witness confirmed that payments had been made to the Defendant Company, and referenced the receipts attached in his bundle of documents. He testified that he sued the Defendant for failing to clear the consignments in a timely manner leading to unnecessary accrual of charges, and further failing to inform the Plaintiff of the delays, failing to pay the requisite storage charges, failing to pay penalties due to the Kenya Revenue Authority and charging over and above the clearing rates that was agreed between them. The witness listed his particulars of loss as totaling Kshs. 1,479,878.35. He further testified that some of the items were lost due to accumulated storage charges and fines, leading to goods worth USD 11,802 being auctioned and additional storage charges of USD 6,921 being levied against the plaintiff. The witness testified that he had tried to resolve the matter with the Defendant, and eventually referred the matter to the Kenya International Freight and Warehousing Association (KIFWA), the association responsible for the conduct of clearing and forwarding agents. He discovered that the Defendant Company's membership in the body had been revoked due to unpaid dues. The witness prayed for the liquidated amount of Kshs. 1,479,878.35, USD 18,093 and interest.

11. At the end of the Plaintiff's case, M/S Oyugi for the plaintiff applied for the dismissal of the defence and counter-claim as the defendant was not in court to prosecute the same. That application was granted by the court, paving way for the plaintiff to file submissions. The matter was then adjourned to 8<sup>th</sup> of March, 2016 to confirm filing of submissions. The court directed that the defendant's counsel be served with the notice of the mention, which was done as per the copy on the court record dated 3<sup>rd</sup> March, 2015 and received by the defendant's advocates on 4<sup>th</sup> March, 2016. In the finding of this court the defendant cannot therefore feign any ignorance of these proceedings.

### **ANALYSIS AND DISPOSITION**

12. I have carefully considered the plaintiff's suit and the submissions. The Defendant did not cross-examine the Plaintiff, nor did it present any evidence to substantiate its claim in the counterclaim or the averments in the defence. In the absence of a statement of defence and evidence to support the counterclaim, the Plaintiff's testimony stands uncontroverted.

13. Sections 107 and 108 of the Evidence Act are clear on the burden of proof and incidences of burden. The consequences of a party failing to adduce evidence is clear from decision of this Honourable Court. Lesiit J in **Motex Knitwear Limited v Gopitex Knitwear Mills Limited** [2009] eKLR quoted the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** stated

*“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.*

14. This court is satisfied that the plaintiff has proved its case on a balance of probability, and that there being no defence or counter-claim, the plaintiff is entitled to judgment as prayed in the Plaint.

15. The upshot is that judgment is hereby entered for the plaintiff against the defendant as prayed in the Plaint.

**That** is the judgment of the court.

**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2016**

**LADY JUSTICE G. NZIOKA**

**JUDGE**

**Present**