



Kiwaka General Merchants Limited v Principal Secretary, Ministry of Interior and Coordination of National Government & 2 others (Commercial Case E059 of 2023) [2025] KEHC 13343 (KLR) (Commercial and Tax) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E059 OF 2023
AA VISRAM, J
SEPTEMBER 25, 2025**

BETWEEN

KIWAKA GENERAL MERCHANTS LIMITED PLAINTIFF

AND

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION
OF NATIONAL GOVERNMENT 1ST DEFENDANT**

**COMMISSIONER GENERAL OF KENYA PRISONS SERVICE 2ND
DEFENDANT**

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. By a Plaint dated 20th December, 2022, the Plaintiff filed this suit stating that it entered into a contract with the Defendants on 21st December, 2021, to supply and deliver raw materials for motor vehicle number plates under Tender No. SDC/28/2021-2022. This contract was set to run until 31st December, 2022, but because the raw materials were not available locally and their shipment would take months, the Plaintiff imported and stored a bulk supply in anticipation of orders.
2. The Plaintiff claimed that before the contract could lapse, the 1st Defendant issued a directive in October 2022 that the existing number plates would be replaced with new digital plates, which effectively terminated the contract. The Plaintiff stated that it was never formally notified of this transition or termination and as a result of this action, the raw materials the Plaintiff had imported



- could no longer be used, which caused them to suffer a loss. The Plaintiff argued that the Defendants breached the contract by not formally terminating it or notifying the Plaintiff of the new changes.
3. The Plaintiff is seeking Kshs. 131,118,000.00/- in damages which amount it stated, represents the money spent on purchasing the raw materials. The Plaintiff also seeks the costs and interest of the suit.
 4. The Defendants filed a defence dated 29th May, 2023, generally denying the Plaintiff's claim. They denied the existence of a contract between the parties and that if at all materials were procured, then the same was procured without a contract. Thus, the Defendants aver that they cannot take delivery of that which they neither validly contracted nor ordered for. They denied that the Plaintiff suffered any loss and damage, and urge the Court to dismiss the suit with costs.
 5. The matter was set down for hearing where the Plaintiff relied on the testimony of its director, Stephen Kimani Kamau (PW 1). He adopted his witness statement dated 21st December, 2022, and produced the Bundle of Documents dated 20th December, 2022, and 21st September, 2023.
 6. The Defendants relied on the testimony of Paul C. Kisang (DW 1), an officer with the State Department for Correctional Services within the Ministry of Interior and National Administration. He adopted his witness statement dated 7th December, 2023, and produced the Bundle of Documents dated 6th December, 2023. After the hearing, the court directed the parties to file written submissions which form part of the record.

Analysis and Determination

7. The starting point in civil proceedings is that the standard of proof is on a balance of probabilities. Further, the burden of proof rests with Plaintiff. The court is therefore guided by the principle that he who alleges must prove. Denning J., in *Miller v Minister Of Pensions* [1947]2 All ER 372 discussed the burden of proof and he stated as follows: -

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

8. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in Sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provide as follows: -

107. 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.

108. Incidence of burden.



The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(Also see Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR))

9. From the parties' submissions, I find that the following are the abridged issues for the Court's determination: -
- i. Whether the suit ought to be struck out for failure to comply with Order 4 rule 1 (4)?
 - ii. Whether there existed a contract between the parties?
 - iii. In the event the above is affirmed, was there a breach of contract?
 - iv. Is the Plaintiff is entitled to damages?
 - v. Whether the directive issued by the Cabinet Secretary of the 1st Defendant is subject to contract agreement?
 - vi. Which of the parties ought to bear the costs?

Whether the suit ought to be struck out?

10. During cross-examination, the Plaintiff admitted that he had not placed any documentation before the Court to show that he was duly authorised to commence the suit on behalf of the Plaintiff. The Defendant on its part submitted that the suit had not been authorized by the Company, contrary to the Civil Procedure Rules.

11. Order 4, rule 1(4) provides as follows: -

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(4) Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

12. It is clear from the provision, which is stated in mandatory terms, that for a company to file a suit, there must be a verifying affidavit sworn by an officer of the company stipulating that he or she is duly authorized under the company's seal to verify the affidavit in respect of the suit. Such a person, would of necessity require to be authorized by a resolution of the Board of Directors or the members under seal of the company, in order for the suit to be instituted.

13. Clarifying the position on the question of authorization in the decision of the Court of Appeal in the case of Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR where the Court of Appeal stated thus: -

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

14. The court went on to clarify that the net effect of the above position was that: -

“it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority,



the onus being on the party making the allegation to prove it. A bare statement that the Plaintiff or Applicant was not authorized would not be sufficient.”

15. Guided by the above, the Plaintiff having deponed that he was duly authorized, and in the absence of contradictory evidence in relation to the same, I am satisfied that the suit is properly before the Court. I will therefore proceed to the remaining issues.

Existence of a Contract

16. The Plaintiff argued that a valid, legally binding contract existed with the 1st Defendant, as confirmed by both a written agreement and the testimony of DW 1. Looking at the evidence, it is indeed correct that DW 1 admitted and confirmed that the parties entered into a contract vide Tender No. SDC/28/2021-2022 for the supply and delivery of number plate raw materials. He stated that the items in the contract were to be delivered upon the receipt of a Local Purchase Order (LPO) by the Plaintiff. Given the above, it is evident to me that there existed a contract between the parties.

Breach of Contract

17. The Plaintiff stated that the Defendant breached the contract by not formally terminating it, or notifying the Plaintiff of the new changes replacing the existing number plates with new digital plates. The Defendants submitted that they fulfilled their obligations under the Contract. They state they issued three LPOs, for which the goods were delivered and paid. They argued that the Plaintiff's decision to procure surplus raw materials was "at the Plaintiff's own volition" and not based on any request from them, accordingly, they are not in breach of contract.
18. During cross examination the Plaintiff admitted that the Contract was subject to LPOs issued by the Defendants on an "as and when required" basis. Such that if the Defendants required raw materials, they would issue an LPO, and the Plaintiff would then make a delivery based on the LPO.
19. PW 1 admitted that the quantity and time of delivery was to be determined by the Defendants based on the LPOs, and that after the goods were delivered, the Plaintiff would raise invoices. PW 1 further admitted that the Plaintiff had no evidence that the Defendants had ordered further materials beyond those set out in the issued LPOs, and that the Plaintiff had been paid for all LPOs issued by the Defendant.
20. Based on the evidence I therefore agree with the Defendant's submission that the procurement for surplus raw materials beyond those issued by way of LPO was at the Plaintiff's own volition. The Defendant had not requested for further goods and may not be held liable to pay for the same. Based on the record, the final LPO issued to the Plaintiff by the Defendants is dated 28th January, 2022, which the Plaintiff admitted had been paid.
21. In my view, in a contract where the supply of goods is determined by LPOs, the LPO serves as the formal instruction or authorization for the supplier to deliver the specified goods or services. These contracts are often framework agreements, standing offers, or open purchase agreements, where the overall terms including pricing, quality standards, delivery terms are pre-agreed, but the actual supply is triggered only when an LPO is issued. Therefore, without an LPO, the supplier is not obligated or authorized to deliver goods, and the the procurer is not obligated to pay for them.
22. As regards, the termination of the Contract, the Plaintiff admitted that the Contract was for a fixed term of one year, namely, between 21st December, 2021 and 21st December, 2022. The Plaintiff testified that the 1st Defendant's Cabinet Secretary issued a directive effectively terminating the Contract. However, no such directive was produced by the Plaintiff and the court was therefore unable to



ascertain whether or not the directive amounted to an unprocedural termination of the Contract. In the absence of the evidence, I am unable to find breach of contract on the part of the Defendant arising from the said directive.

Payment for Surplus Materials

- 23. Having found that the Defendant did not issue any LPOs for the surplus material allegedly bought by the Plaintiff, the logical conclusion is that there is no legal obligation for the Defendant to pay for the surplus raw materials purchased by the Plaintiff. The material was purchased outside of the terms of contract between the parties. Further, having admitted that the Contract was for a fixed term, I do not think that liability may be incurred for purchases that took place either before or after the contractual period.
- 24. For the avoidance of doubt the above findings negate any claim for damages on the part of the Plaintiff. Finally, I see no reason to depart from the ordinary rule that costs follow the event. The same shall apply.

Conclusion and Disposition

- 25. Based on the reasons set out above, I find and hold that the Plaintiff's case is without merit. The same is hereby dismissed with costs to the Defendants.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lisper

..... for Plaintiff

..... for 1st Defendant

..... for 2nd Defendant

..... for 3rd Defendant

