



REPUBLIC OF KENYA



**Ngobi v Kenya Ports Authority & 2 others (Civil Case 87 of 2013)
[2025] KEHC 13261 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 87 OF 2013
DKN MAGARE, J
SEPTEMBER 29, 2025**

BETWEEN

BOB THOMSON DICKENS NGOBI PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

MAERSK KENYA LIMITED 2ND DEFENDANT

KENYA REVENUE AUTHORITY 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 15.07.2013, the plaintiff sought an avalanche of orders against the following bodies:
 - a. A mandatory order to compel the defendants to release to the plaintiff unconditionally forthwith motor vehicle Registration Number Highlander CHS JTEES 4XXX9 2XXX8 1X and all items parked inside to wit a gas cooker, a lawn mower and a clipper.
 - b. The 2nd Defendant be ordered to issue to the plaintiff a letter of release unconditionally forthwith for the motor vehicle Registration Number Highlander CHS JTEES4XXXXX819 and all items parked inside to wit a gas cooker, a lawn mower and a clipper.
 - c. The 1st defendant be ordered to bear all demurrage and/or charges as may be due to the 2nd defendant from the date the container MSKU 0388801 was irregularly removed from its premises on 12.10.2011.
 - d. In the alternative the court do assess the fair and equitable demurrages charges that should be paid by the plaintiff on quantum merit basis.



- e. The 1st defendant be ordered to pay USD 5,131 being the amount the plaintiff would have recovered and/been reimbursed by the owners of other goods lost from container MSKU 0388801.
 - f. The 1st Defendant be ordered to compensate the plaintiff for damages caused to motor vehicle Registration Number Highlander CHS JTEES4XXXXXX819.
 - g. General damages.
 - h. Costs of this suit.
 - i. N/a
 - 1. The plaint as drafted indicated Kenya Ports Authority and Maersk Kenya Limited as defendants. Summons to enter appearance indicated Kenya Revenue Authority as a 3rd defendant. Subsequently the defendants were listed as follows:
 - a. Kenya Ports Authority
 - b. Maersk Kenya Limited
 - c. Kenya Revenue Authority.
3. A notice of preliminary objection dated 25.04.2014 and Chamber Summons dated 22.04.2014 were ordered to be heard together before the application for injunction dated 3.3.2014.
4. Meanwhile the 3rd defendant was introduced to the case on 26.11.2013. The matter then dragged on until 26.06.2016 when the preliminary objection was argued. A ruling was delivered in respect of the objection on 22.12.2017. This had the result of the suit against the 1st defendant being dismissed. They departed from proceedings leaving the 2nd and 3rd defendants.
5. The court ordered the suit to proceed between the plaintiffs and the 2nd and 3rd defendants. The matter then came before me for hearing on 20.3.2024.

Evidence

6. The Plaintiff, Bob Ngobi (PW1), testified that he is an officer with the United Nations and adopted his statement dated 18th July 2013, producing documents at pages 24–98 of the record as exhibits. He stated that he shipped container MSKU 0388801 aboard Maersk Mission, destined for Mombasa, which contained his personal effects including a Toyota Highlander (2009), a gas cooker, a trimmer, and a lawn mower. Upon discharge, the container was placed in the custody of KPA pending clearance, and he explained that clearance could not be obtained without settlement of charges and issuance of a release order. He was to pay USD 37,000. But due to a detention order and accruing demurrage, the container was not released. He emphasized that Maersk bore no responsibility for the subsequent theft, and that his grievance lay with KRA and KPA, which in his view failed to prevent the unlawful removal of the container that was later recovered as a police exhibit.
7. PW1 further testified that he travelled with his UN passport in connection with the matter. Referring to page 38 of the plaintiff's bundle, he stated that the goods in the container were not foodstuffs, though pages 64 and 65 appeared to indicate otherwise. He produced a letter dated 11.1.2015 requesting release of his vehicle. He explained that KPA had custody of the vehicles in 2013, though he could not confirm when KRA assumed possession. He also referred to correspondence at page 94 of the bundle relating to the container.



8. DW1, Brian Deche Mwachuro, an officer of KRA, testified for the 3rd defendant. He confirmed that the goods arrived in accordance with the manifest and were placed in the custody of KPA and KRA. He stated that clearance is the responsibility of the consignee or his agent, which entails payment of charges and issuance of a release order by the shipping line. No such release order was ever issued in this case owing to non-payment of demurrage. While acknowledging that the consignment was lost after discharge, he denied any liability on the part of KRA, explaining that physical custody rested with KPA, whereas KRA's role was limited to the legal clearance of goods. He further clarified that destruction of goods occurs only when cargo is condemned as unfit by agencies such as KEBS or Port Health, which was not the case in respect of this container.
9. The 2nd defendant adopted KRA's evidence.
10. Subsequent to the pleadings, on application by the Plaintiff the court made the following orders:
 - a. The Plaintiff is hereby authorized to access motor vehicle Registration Number Highlander CHS JTEES4XXXXX819 and value the same through Automobile Association of Kenya (AA) and file a further list of documents related thereto and testimony be produced only in respect thereto.
 - b. The defendants are directed to release to the plaintiff directly or through his authorized agents the motor vehicle Registration Number Highlander CHS JTEES4XXXXX819 forthwith to facilitate transit to Uganda, subject to (iii) and (iv) below.
 - c. The release order will be made subject to payment or undertaking to pay the freight and shipping charges, demurrage, and other charges due or getting appropriate waivers, if any.
 - d. The plaintiff to comply with requirements of the law in relation to transit goods.
 - e. The 3rd Defendant to issue the Plaintiff with a zero manifest to enable conclusion of the matter.
 - f. The Plaintiff's case be reopened only in the next hearing date to produce any document from his exercise.
 - g. The orders issued herein shall automatically lapse by 6/11/23.
 - h. Costs in the cause.
11. These orders were subsequently extended to 31.1.2024. Before long, I was confronted with an application to amend the plaint as I was writing this judgment. I made the following orders:
 - a. The application dated 27/4/2025 lacks merit and is accordingly dismissed with costs of USD 100 each to the second and third Defendants, payable within 30 days.
 - b. Judgment shall be delivered on 18.09.2025.

Submissions

12. The Plaintiff filed submissions dated 28.4.2025 by which it was submitted that the Plaintiff proved a case for negligence, breach of duty of care, causation, foreseeability and damage against the 3rd Defendant. Reliance was placed on Caparo Industries PLC v Dickman (1990) 1 AA ER 568.
13. It was further submitted that the 3rd Defendant allowed loopholes that criminals used to easily cause losses to the Plaintiff by the illegal release of container MKSU 0388801.



14. The Plaintiff further submitted that there was a direct connection between the losses suffered by the Plaintiff and the loss of the container due to negligence of the 3rd Defendant. They cited *Elijah Ole Kool v George Ikonya Thuo (2001) KLR*.
15. The 2nd Defendant also filed submissions dated 14.5.2025. It was submitted that there was no cause of action against the 2nd Defendant as the consignment was discharged at the port of Mombasa and placed in the custody of KPA and the 3rd Defendant.
16. It was further submitted that it was not the 2nd Defendant's power to grant the physical possession of the Plaintiff's consignment to the Plaintiff save for settling the charges under contract. The 2nd Defendant did not however, cite any authorities.
17. On its part, the 3rd Defendant filed submissions dated 16.5.2025. It was submitted that the Plaintiff's witness admitted during the hearing that the Plaintiff had not settled the charges due to the 2nd Defendant to enable issuance of a release order. That the 3rd Defendant would not issue a transit bond without a release order.
18. The 3rd Defendant submitted that the 3rd Defendant was not liable for loss of the Plaintiff's motor vehicle and other goods in the subject container and would not be compelled to pay any demurrage or damages. The 3rd Defendant did not cite any authorities.

Analysis

19. The matter raises two issues; that is liability for each of the parties. It must be recalled that in Kenya, there can be no liability without fault. Therefore each party's fault must be set out in full, in the chain of events. In *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258* the Court of Appeal held:-

“There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

The fault has to be pleaded and proved by evidence at the hearing.”
20. The 1st Defendant's case was dismissed for being time barred. Effectively the following prayers went with them.
 - a. A mandatory order to compel the defendants to release to the plaintiff unconditionally forthwith motor vehicle Registration Number Highlander CHS JTEES 4XXX9 2XXX8 1X and all items parked inside to wit a gas cooker, a lawn mower and a clipper.
 - b. The 1st defendant be ordered to bear all demurrage and/or charges as may be due to the 2nd defendant from the date the container MSKU 0388801 was irregularly removed from its premises on 12.10.2011.
 - c. The 1st defendant be ordered to pay USD 5,131 being the amount the plaintiff would have recovered and/been reimbursed by the owners of other goods lost from container MSKU 0388801.
 - d. The 1st Defendant be ordered to compensate the plaintiff for damages caused to motor vehicle Registration Number Highlander CHS JTEES4XXXXX819.
 - e. General damages
 - f. Costs of this suit.



- g. N/a
21. In effect the prayers remaining in the suit are:
- a. A mandatory order to compel the defendants to release to the plaintiff unconditionally forthwith motor vehicle Registration Number Highlander CHS JTEES 4XXX9 2XXX8 1X and all items parked inside to wit a gas cooker, a lawn mower and a clipper.
 - b. The 2nd Defendant be ordered to issue to the plaintiff a letter of release unconditionally forthwith for the motor vehicle Registration Number Highlander CHS JTEES4XXXXX819 and all items parked inside to wit a gas cooker, a lawn mower and a clipper.
 - c. In the alternative the court do assess the fair and equitable demurrages charges that should be paid by the plaintiff on quantum meruit basis.
 - d. General damages
 - e. Costs of this suit.
22. The 2nd defendant was the shipping line. They brought the cargo well and placed the same in custody of the 1st Defendant who is no longer in the suit. There was no fault pleaded. They then raised their charges of USD 370,000. They also have a claim over the container. An order for stripping was made and released to them. There is no indication whatsoever that the plaintiff as the shipper was not entitled to pay shipping line charges and demurrage charges. The plaintiff admitted that he did not pay the charges in time. Therefore, demurrage charges were due and owing.
23. The Plaintiff was under duty to lead evidence as to the manner in which the 2nd and 3rd Defendants were liable for the breach of contract, tort or duty and as a result of which the Plaintiff suffered the alleged loss. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he stated that:
- [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.
- in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.
24. It was not enough for the Plaintiff to throw to this court pleadings and fail to establish by way of evidence the culpability of the 2nd and 3rd Defendants. This was even more crucial in light of the developments following the removal of the 1st Defendant as a party. On the proof of the allegations of breach of contract in *Raghibir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with



divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

25. The Plaintiff had the duty to prove the facts that he asserted and which were primarily in his knowledge. On this subject, Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya 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.

26. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

27. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. This was the finding of the court in *Evans Nyakwana – vs- Cleophas Bwana Ongaro* [2015] eKLR where it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the [Evidence Act](#), Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the [Evidence Act](#) provides the burden lies in that person who would fail if no evidence at all were given as either side.”

28. The question then is what amounts to proof on a balance of probabilities. *Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

29. The more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of



probability. As was held by Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 as doth:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

30. The Plaintiff had to lead evidence such that this court could find it more probable than not that the allegations in the Plaint happened in order to discharge the burden. PW1 did not blame the 2nd Defendant as it was his testimony that the consignment was not in the possession of the 2nd Defendant and that the Plaintiff did not pay demurrage charges which remained unpaid. I am fortified by the reasoning of court in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR. The Judges of Appeal held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

31. A party is bound by its pleadings. Upon the removal of the 1st Defendant as a party, the Plaintiff was under duty to establish a clear cause of action against the 2nd and 3rd Defendants. The Plaintiff pleaded that the consignment was placed with KPA and the 3rd Defendant and his submissions did not link the 2nd Defendant to any fault as to allege negligence or breach of statutory duty or contract. The Plaintiff was thus bound to plead the manner in which the 2nd Defendant was to blame which he failed. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

- “ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002*



where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

32. The Plaintiff was bound by his own pleadings and it was not the duty of this court to enter upon any inquiry into the case other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSO 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] *Current Legal Problems* at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadingsfor the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

33. The absence of pleadings bespeaking blame or liability on the part of the 2nd Defendant meant that any evidence advanced against them was unfounded and unsupported. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the



court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

34. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent Presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu & INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

“In *Belgore Versus Ahmed*(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -

Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

35. The pleadings and evidence of the Plaintiff also failed to bring out the fault of the 3rd Defendant to enable the court to draw an inference of blameworthiness. I say so because as observed elsewhere in this judgment, there is no indication whatsoever that the plaintiff was not entitled to pay shipping line charges and demurrage charges.
36. Further, the plaintiff admitted that he did not pay the charges in time. Therefore, demurrage charges were due and owing and I find no basis for the attempt to blame the 3rd Defendant.
37. Similarly, this court finds no basis to reduce the charges levied by the 2nd defendant. In the plaintiff's words, the 2nd Defendant was not to blame.
38. The suit is thus entirely not merited.

Determination

39. In the upshot, I make orders in the following terms: -
- a. The suit is not merited and is dismissed.
 - b. The 2nd and 3rd defendants shall have the costs of the suit.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF SEPTEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Macharia for the Plaintiff

Mr. Ondego for the 2nd Defendant

Ms. Chelangat for the 3rd Defendant

Court Assistant - Michael



M. D. KIZITO, J.

