

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
HCCC E065 OF 2022

SINOHYDRO CORPORATION

LIMITED.....PLAINTIFF

VERSUS

SHENGTAI COMPANY

LIMITED.....DEFENDANT

JUDGMENT

1. This suit was brought by the plaintiff which describes itself as a multinational Chinese state corporation with a duly registered branch office. It was commenced by way of a plaint dated 15th February 2022, seeking entry of judgment against the defendant for: -

- (1) **Kshs. 38,500,000.00/-**
- (2) **Interest on (a) above at court rate from the date of filing suit until payment in full.**
- (3) **Costs of this suit.**

Plaintiff's case

2. The plaintiff's case is that it has been involved in major infrastructure projects in Kenya since its registration in 2007.

In 2019, the Government of Kenya engaged the plaintiff, as the main contractor, to construct the Kenya Marsabit Water Supply and Water Sewerage Project.

3. Through oral and written contracts, the plaintiff contracted the defendant to supply wood formwork. The written contract was executed by the parties on 10th April 2019.

4. The particulars of the contracts were that:-

(1) The defendant would deliver the wood formwork to the project site in Marsabit camp on 10th April 2019 and on other successive dates as was orally agreed by the parties.

(2) The wood formwork would be new and of good quality.

(3) The consideration for the wood formwork covered by the written contract was Kshs. 13,000,000/- and Kshs. 25,500,000/- for the oral contract.

5. On diverse dates between 11th April 2019 and 1st August 2020, the plaintiff paid the defendant Kshs. 38,500,000/- as consideration for wood formwork.

6. The plaintiff claims that despite payment, the defendant acted fraudulently and in breach of the contracts.

7. The particulars of breach and fraud are:-

- (1) Failing to deliver any wood formwork to the plaintiff despite receiving full consideration and being given enough time to deliver.
- (2) Making fraudulent oral representations that it had the ability to deliver wood formwork when it did not.
- (3) Making fraudulent excuses for failing to discharge its contractual obligations

Defence

8. The defendant filed its statement of defence dated 29th March 2022, denying the existence of the oral contract for Kshs. 25,500,000/-. However, it admitted that it agreed to supply wood formwork under the written contract for Kshs. 13,000,000/-.

9. The defendant averred that on diverse dates between 17th April 2019 and 6th August 2021, it invoiced the plaintiff. Upon payment, it delivered to the plaintiff all the contracted and invoiced wood formwork and plywood for which the plaintiff's representatives signed delivery notes. The defendant also indicated that it incurred costs for transportation.

10.The defendant claimed that on 10th April 2019, the parties entered into a contract through which the plaintiff rented its warehouse located at L. R. No. 12581/7, Wu Yi Road, Athi River, 86 for three years. The consideration was Kshs. 18,000,000/-. The purpose was to store materials for the execution of the Kenya Marsabit Water Supply and Water Sewerage Project under the Kenya Towns Sustainable Water Supply and Sanitation Program TWSB/ADB/003/2017-2018.

11.The defendant averred that pursuant to an agreement for sale dated 3rd September 2019, the plaintiff acquired Prime Mover Reg. No. KBN 055A through Shengtai Company Limited as intermediary at Kshs. 3,000,000. That, however, the plaintiff neglected to take possession of it from the defendant's warehouse.

12.The defendant admitted receipt of the payments made by the plaintiff to its Diamond Trust Bank Account Number 0450360001. However, it claimed that the payment was Kshs. 36,500,000/- for the following:-

a.	Wood Formwork	Kshs. 13,000,000/-
b.	Plywood	Kshs. 2,500,000/-

c.	Rented Warehouse	Kshs. 18,000,000/-
d.	Prime Mover Reg. No. KBN 055A	Kshs. 3,000,000/-
Total		Kshs. 36,500,000/-

13. The defendant further averred that the plaintiff separately paid Kshs. 2,000,000/- to the defendant's sole director/ shareholder, Gong Linmei, through her Diamond Trust Bank Account Number 0014197001 on 20th August 2019 for transportation of the construction materials from the rented warehouse.

Reply

14. The plaintiff filed a reply to defence dated 9th April 2022, joining issue with the defendant's defence save for its admissions. It denied receipt of invoices, that the defendant had delivered any wood formwork or plywood to it, or that its representatives had signed any delivery notes. It also denied entering into a contract dated 10th April 2019 for rent of a warehouse. Further, it denied that it entered into the agreement dated 3rd March 2020 for the sale of a prime mover.

Evidence

15. Hearing commenced on 25th February 2025. The plaintiff called four witnesses. **Zhang Yang (Mr. Yang), PW1**, the project manager of the **Marsabit Water Infrastructure Project**, adopted his witness statement dated 20th February 2025, reflective of the plaint, which was marked as **PExh1**. He produced the plaintiff's list and bundle of documents dated 15th February 2022, marked as **PExh.2**.

16. **Mr. Yang** stated that he was employed by the plaintiff as an intern in 2009 and that he rose to project manager in 2017. He stated that he has served in the position to date.

17. **Mr. Yang** stated that in 2019, the plaintiff and the defendant entered into both oral and written contracts for the supply of wood formwork. That the defendant was required to deliver the wood formwork to the project site on 10th April 2019 and other successive dates. That from 11th April 2019 to 1st August 2020, the plaintiff paid the defendant Kshs. 38,500,000/- as consideration. However, the defendant failed to deliver any wood formwork, made fraudulent oral representations that it had the ability to deliver and made fraudulent excuses.

18.**Mr. Yang** reiterated that the contracts for renting the warehouse and for the purchase of the prime mover were not signed by the plaintiff's project manager, **Meng Xianjun**, who was the only person authorized to do so.

19.Paragraphs 13 and 14 of the witness statement (in relation to the document examination report) were expunged from the record following an objection from defence counsel.

20.Upon cross examination, **Mr. Yang** restated that the company authorized the filing of the case. He claimed that it issued written authorization via email but indicated that the same was not filed as it is not relevant.

21.**Mr. Yang** admitted that the two Equity Bank remittance advices dated 22nd October 2019 and 10th October 2019 for Kshs. 900,000/- each to the defendant were to different Banks (**Guardian Bank Limited** and **Standard Chartered Bank Limited**) but the same account number **0102487887600**. He stated that he had to confirm the correct bank account with his accountant.

22.**Mr. Yang** admitted that he did not personally see or receive the material from the defendant. He explained that the plaintiff's materials and equipment manager receives the

items, which the storekeeper then records. He clarified that he relied only on the records. He denied having seen any delivery notes from the defendant. He also denied that the plaintiff had any employees named **Mutisya** or **John**.

23.**Mr. Yang** stated that the plaintiff borrowed materials from its sister company to finish the work. He noted that the name of its sister company was of no relevance.

24.The plaintiff also called **Jacob Oduor (Mr. Oduor)** as **PW2**. He produced the document examination report dated 21st February 2024 that he prepared and it was marked as **PExh3**.

25.**Mr. Oduor** testified that he is a document examiner trained by DCI Forensic Document Examination Laboratory - Nairobi, the National Ribat University on Forensics Evidence Institute - Khartoum Sudan, Foster and Freeman Forensic Equipment Company in the United Kingdom and Regula Forensic Science System in the Republic of Latvia - East Europe.

26.At cross examination, **Mr. Oduor** stated that through a letter dated 1st February 2024, the plaintiff's counsel, **Mr. Owiti** asked him to become a witness. He denied that he was paid for the work. He stated that he only received Kshs.

5,000/- as reimbursement of expenses incurred in the preparation of the report.

27.The plaintiff further called **Dathe Wako Guracha (Mr. Guracha)**, its storekeeper at Marsabit, as **PW3**. He adopted his witness statement dated 12th March 2023, marked as **PExh.4** as his evidence.

28.**Mr. Guracha** testified that he was employed by the plaintiff as its storekeeper, where he worked from January 2019 to August 2022. He also testified that his duties involved receiving goods purchases and record-keeping of goods coming in and out of the store facility. Those goods would be delivered at the store with delivery notes and he would counter-check to confirm the goods matched the quantity and description listed in the delivery note. Thereafter, he would take the delivery notes and invoices to the site manager for signing. Once signed, the trucks would be inspected to confirm whether it had any goods and thereafter released. He stated that although he had the authority to sign the delivery notes, the manager was always on site to sign them.

29.**Mr. Guracha** stated that he had never seen the documents, invoices, drivers and motor vehicles on the delivery notes produced by the defendant. He also stated that the goods listed in the delivery notes were not delivered.

30.Upon cross-examination, **Mr. Guracha** stated that he did not know the defendant. He maintained that he neither received invoices nor materials or goods from the defendant in Nairobi, reiterating that the plaintiff only has one warehouse in Marsabit. He also stated that he does not have the authority to do so.

31.The plaintiff called **Meng Xiang Jun (Mr. Xiangjun)** as **PW4**. He adopted his witness statement dated 12th March 2023, marked as **PExh.5**. He stated that he was the plaintiff's project manager from 2018 to 2020. He also stated that he had a power of attorney from the plaintiff to perform the functions of the project manager at the Marsabit project. The power of attorney was signed by **Mr. Sheng Dong**.

32.**Mr. Xiangjun** stated that his duties included the negotiation, drafting, review and signing of any contracts of supply of goods from third parties. He also stated that he had the right to delegate the authority to sign the contracts,

but he did not do so, because he was in Kenya between October 2018 and June 2020.

33.**Mr. Xiangjun** denied signing the prime mover sales agreement dated 3rd September 2019 on behalf of the plaintiff. He stated that the signature is different from his known signature and was forged.

34.At cross-examination, **Mr. Xiangjun** indicated that the power of attorney ended in March 2020 because he left Kenya, and a new project manager was appointed. He maintained that without his written authentication, any document signed on behalf of the plaintiff are invalid. However, he admitted that he could not authenticate any documents when he left Kenya.

35.**Mr. Xiangjun** indicated that he signed the contract for wood formwork on 10th April 2019. He indicated that the defendant was to deliver the wood formwork and the plaintiff was to pay in advance. He also indicated that the defendant used various reasons to demand advance payment, such as to buy equipment, materials and for contingency.

36.**Mr. Xiangjun** stated that the written contract was the only contract and that there were no other verbal contracts.

When asked about the claim that there were other oral agreements, he could not remember.

37.**Mr. Xiangjun** stated that during his tenure, the project was delayed because the defendant did not supply material. He claimed that the plaintiff was issued with certificates of delay, but did not produce them as they were not relevant.

38.Upon re-examination, **Mr. Xiangjun** stated that there were oral contracts due to the many variations; however, only one written contract; that he left the company before the oral contracts became formal; and that the last paragraph of the power of attorney would terminate upon new employment.

39.The defendant called one witness, **Gong Linmei (Mr. Linmei)**, as **DW1**. He adopted his initial and further witness statements dated 29th March 2022, 20th July 2023 and 20th July 2023 as his evidence. He also produced the defendant's bundle of documents dated 29th March 2022. They were marked as DExh1, 3 and 2 respectively.

40.**Mr. Linmei** stated that he is a director of the defendant. He admitted that he did not provide proof of his directorship. He acknowledged that the defendant received Kshs. 36,000,000/- from the plaintiff. That out of that amount,

Kshs. 2,000,000/- was paid to the director's personal account.

41.**Mr. Linmei** stated that Kshs. 13,000,000/- was for wood formwork, which the defendant supplied. He mentioned that there were delivery notes produced in proof. He, however, admitted that some of the delivery notes provided were not clear copies and that they were not signed by the recipients.

42. When asked to confirm the value of the wood formwork supplied as per the delivery notes, **Mr. Linmei** claimed that he was not the one who had calculated. He was unable to confirm that the wood formwork supplied was worth Kshs. 13,000,000/-. Yet, he mentioned that Kshs. 2,500,000/- worth of plywood was supplied.

43.**Mr. Linmei** admitted that the agreement for lease of the warehouse for Kshs. 18,000,000/- that was produced was not signed. He also acknowledged that the lease does not state that the plaintiff is the tenant. He confirmed that he did not produce a lease or title to confirm the defendant's proprietorship of the warehouse.

44.**Mr. Linmei** stated that he was paid the purchase price for the prime mover registration number KBN 055A which was

owned by **Yuin**. However, he admitted that he did not produce a copy of the logbook. He also confirmed that the vehicle was not transferred to the plaintiff. He stated that the plaintiff did not take the vehicle due to this case and that it is in the defendant's warehouse.

Submissions

45.The plaintiff filed initial and supplementary written submissions dated 13th March 2025 and 16th April 2025 respectively.

46.The plaintiff submitted that it is undisputed that the parties entered into contracts under which the defendant was to supply it with wood formwork.

47.The plaintiff highlighted that the defendant admits to the existence of a written contract at paragraph 6 of its defence and also admits receiving Kshs. 13,000,000/- as consideration for the written contract.

48.It also highlighted that the defendant admits to receiving a total of Kshs. 38,500,000/- from the plaintiff at paragraphs 7 and 8 of its defence. Its witness, **Gong Linmei**, also admitted to receiving the money during cross-examination.

49.The plaintiff further contended that the defendant never delivered any goods, but forged documents and the contracts for rent of its warehouse and for the purchase of the prime mover to cover up its failure.

50.The plaintiff relied on the following cases:-

- (1) **Bernard Philip Mutiso v Tabitha Mutiso [2022]**
eKLR
- (2) **Fubeco China Ltd v Naiposha Company Ltd & others [2015] KEHC 8360 (KLR)**
- (3) **James Mangeli Musoo v Ezeetec Limited [2014]**
eKLR

51.The defendant filed written submissions dated 25th March 2025. It argued that there was no authority to commence legal proceedings from a resolution passed by the company or its board of directors.

52.The defendant also argued that the plaintiff's witnesses, **Zhang Yang** and **Dathe Wako Guracha** did not provide letters of appointment to the respective positions in the plaintiff and therefore, their affiliation to the plaintiff cannot be ascertained.

53.The defendant submitted that the plaintiff has not discharged the standard and burden of proof for the claim. It contended that the bank statements and wire transfers tendered by the plaintiff are not admissible as they do not conform to **Section 106B of the Evidence Act.**

54.The defendant relied on the following cases:-

- (1) **Eye Company (K) Limited v Erastus Rotich t/a Vision Express [2021] eKLR**
- (2) **Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR**
- (3) **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR**
- (4) **Cornelia Elaine Wamba v Sheti Ent. Kenya Ltd And Another (Civil Case 754 of 2005) [2008] eKLR**
- (5) **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR**

Analysis and Determination

55.The core issues for determination are:-

- (1) **Production of documents**

- (2) **Whether the plaintiff authorised the filing of this suit;**
- (3) **Whether the defendant has proven delivery of wood formwork of Kshs. 13,000,000/- and ply wood of Kshs. 2,500,000/-;**
- (4) **Whether the plaintiff entered into the agreement for lease of the defendant's warehouse for Kshs. 18,000,000/- and for the purchase of the prime mover for Kshs. 3,000,000/-**
- (5) **Whether the plaintiff has proven that there was an oral agreement for the supply of wood formwork valued at Kshs. 25,500,000/-.**

Production of documents requested

56. Through a notice to produce dated 3rd May 2022, the defendant requested for particulars. The defendant faulted the plaintiff for failing to produce its registration documents, authority to commence the suit on behalf of the state corporation, letter instructing **Rapando & Odunga Advocates** to institute the suit and the contract between the plaintiff and the Government of Kenya for the

construction of Kenya Marsabit Water Supply and Water Sewerage Project.

57.The defendant argued that the documents which it requested to be produced are relevant to this case and are within possession and/ or control of the plaintiff. It asserted that by refusing to produce information and documents, the plaintiff has denied the court primary and direct evidence.

58.The plaintiff counter argued that these documents are not relevant to the proceedings.

59.Discovery is limited to the documents that are relevant to the matters in controversy. The party that seeks the particulars or documents to be furnished is required to ***“delineate how the omitted particulars if any, have incapacitated the claimant from rendering his/her statement of response and/or occasioned a prejudice” and “ensure that what is being sought for does not fall in the bracket of what amounts to and/or constitutes a Fishing Expedition” Habiba Ali Mursai & 4 others v Mariam Noor Abdi [2021] eKLR***

Registration documents

60.The defendant sought the plaintiff's registration documents.

However, in its defence, the defendant admitted that it entered into a written contract with the plaintiff for the supply of wood formwork valued at Kshs. 13,000,000/-.

61.The defendant did not challenge the plaintiff's incorporation status or legal capacity either in its defence or in the submissions. It is my considered view that once the defendant acknowledged that it entered into the contract of supply with the plaintiff, it cannot, in the same breath, challenge its incorporation. Therefore, I find that the plaintiff's registration documents are not relevant to the issues in controversy.

Contract with the Government

62.The defendant also sought the production of the contract between the plaintiff and the Government of Kenya for the construction of Kenya Marsabit Water Supply and Water Sewerage Project. However, having admitted that entered into the contract of supply, the contract between plaintiff and the Government is not relevant to the issues in controversy.

Authority to sue

63.The defendant submitted that in Kenya, a company's authority to sue stems from a resolution passed by the company or its board of directors, which should be recorded in the minutes.

64.On its part, the plaintiff submitted that the company does not need board resolutions to commence a suit against any party. That, in any event, the plaintiff produced a power of attorney executed by the chairman of the plaintiff's board of directors, granting **Mr. Jun** authority to deal with all the matters related to the project.

65.The plaintiff relied on **Fubeco China Ltd v Naiposha Company Ltd & others [2015] KEHC 8360 (KLR) (Ruling 18/9/2014)**, where this court observed thus:-

“[17]] Let me be emphatic on this issue that, I am aware of ample decisions of the court, and I can cite an example; the case of BUGERE COFEE GROWERS LTD v SEBAUKA & OTHERS (1970) EA 147 where the court held that a company authorizes the commencement of proceedings by resolution of the company or by way of minutes of its board of directors. However, I find a lot of persuasion in the thread of thinking, in the Ugandan case of UNITED ASSURANCE CO. LTD v ATTORNEY GENERAL: SCCA NO. 1 OF 1998 where the Supreme Court of Uganda held that it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members to sit and resolve to instruct Counsel to file proceedings on behalf of the

company, “Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has power of the board to act on behalf of that company, in this case of Caroline Wairimu Kimemia, ...she is a director of the defendant company and she duly authorized the advocates on record to commence the application. That fact is not denied and am surprised the person laying the objection is the plaintiff and not the defendant company. There is no material from the other directors denying the authority of Caroline as a director ..”

66.The plaintiff further cited **Article 159(2)(d) of the Constitution**, which obligates this court to administer justice without undue regard to procedural technicalities.

67.The court notes that alongside the plaint through which the plaintiff commenced this suit, it filed a verifying affidavit sworn by its project manager, **Gai Baide**, on 18th February 2022. **Mr. Baide** deposed that he was duly authorized to swear the affidavit on behalf of the plaintiff.

68.The court also notes that neither the plaintiff nor its directors have raised any objection to the filing of the suit. It is the defendant who has requested production of the authority to commence the suit on behalf of the state corporation and a letter instructing **Rapando & Odunga Advocates** to institute the suit.

69. Accordingly, the documents requested in this regard are not relevant.

70. Therefore, guided by the above case, the court is not persuaded that the defendant has shown that the suit was filed with no authority to sue as claimed by the defendant.

Plaintiff's claim for Kshs. 38,500,000/-

71. The plaintiff's claim is for Kshs. 38,500,000/-, being a refund of the money paid to the defendant under a written contract for supply of wood formwork valued at Kshs. 13,000,000/- and oral contracts for the supply of wood formwork valued at 25,500,000/-.

72. The plaintiff produced a copy of the agreement dated 10th April 2019. It also produced copies of bank remittance advices for payments totalling Kshs. 38,500,000/- made between 11th April 2019 and 1st August 2020.

Admissibility of bank statements

73. The defendant contended that the Equity Bank Statements tendered by the plaintiff are not certified by the issuing Bank or notarised as required and that they do not comply with

the conditions of admissibility of electronic records under section 106B of the Evidence Act.

74.The plaintiff countered that the bank statements and receipts it produced are not electronic evidence to be subject to section 106B of the Evidence Act.

75.However, the defendant's witness, **Mr. Linmei**, acknowledged that the defendant received Kshs. 36,000,000/- from the plaintiff. That out of that amount, Kshs. 2,000,000/- was paid to the director's personal account.

76.According to the defendant, the Kshs. 36,000,000 was for:-

- (a) Wood formwork valued at Kshs. 13,000,000/-
- (b) Plywood worth Kshs. 2,500,000/-
- (c) Rent for the warehouse of Kshs. 18,000,000/-
- (d) Prime mover Kshs. 3,000,000/-.

77.This amount totals to Kshs. 36,500,000/-.

78.Based on the admission, the defendant cannot again turn around and challenge the admissibility of the bank statements.

Remittance to a strange bank account

79.The defendant challenged the validity of a remittance advice dated 22nd October 2019, for Kshs. 900,000/- payment to Guardian Bank Account Mombasa Branch Account Number **0102487887600**. It contended that the said Bank Account Number is similar to that of the defendant's **Standard Chartered Bank** at Yaya Branch and that it does not have a Bank Account at **Guardian Bank** Mombasa Branch.

80.During trial, the plaintiff's witness **Mr. Yang** admitted that at pages 16 and 17 of its bundle of documents, the two Equity Bank remittance advices dated 22nd October 2019 and 10th October 2019 for Kshs. 900,000/- each to the defendant were to different Banks (Guardian Bank Limited and Standard Chartered Bank Limited) but the same account number 0102487887600. He stated that he had to confirm the correct bank account with his accountant.

81.Therefore, the defendant has successfully challenged the remittance advice for the Kshs. 900,000/- paid to Guardian Bank Limited.

Whether the defendant has proven delivery of wood formwork of Kshs. 13,000,000/- and ply wood of Kshs. 2,500,000/-

82.The defendant averred that between 17th April 2019 and 6th August 2021, it delivered the contracted and invoiced wood formwork and plywood. It produced delivery notes which it claimed were signed by the plaintiff's employees.

83.The plaintiff contended that the defendant did not deliver any wood formwork.

84.The defendant produced copies of invoices and delivery notes bearing different dates. It claimed that the delivery notes were signed by the plaintiff's agents or employees named **Zhang Yankai, Stanley Ngugi, Zhou Lize** and **Joseph**.

85.I have studied the defendant's exhibits. In respect of the wood formwork valued at Kshs. 13,000,000/-, the defendant exhibited delivery notes numbers 1052, 1071, 1098 and 2478 at pages 13 to 17. These delivery notes are not very clear, they are not signed by the recipient or accompanied by invoices.

86.During trial, the defendant's witness, **Mr. Linmei** could not confirm the value of the wood formwork supplied as per the delivery notes.

87. Therefore, the court finds that the plaintiff has proved its claim for the Kshs. 13,000,000/- paid to the defendant for wood formwork.

Plywood of Kshs. 2,500,000/-

88. In respect of the plywood valued at Kshs. 2,500,000/-, the defendant exhibited:-

- (a) invoice no. 0614 and delivery note no. 1041 both dated 19th August 2020 for timber valued at Kshs. 84,000, signed by the recipient, Stanley Ngugi.**
- (b) invoice no. 0500 and delivery note no. 2454 both dated 28th July 2020 for timber valued at 758,100, not signed by the recipient.**
- (c) invoice no. 0452 and delivery note no. 2467 both dated 1st July 2020, for timber valued at Kshs. 1,350,000 and transport of Kshs. 100,000/-, not signed by the recipient.**
- (d) Invoice no. 132 and delivery note no. 0532 both dated 6th August 2021 for marine ply worth Kshs. 73,100/-, signed by the recipient.**

(e) Invoice no. 0423 and delivery note no. 0278 both dated 15th March 2021 for marine ply worth Kshs. 84,000/-, signed by the recipient, Stanley Ngugi.

89.The court finds that the unsigned delivery notes are not sufficient to prove that the plaintiff received the goods supplied. Therefore, the defendant has only proved that it supplied the plywood supported by the signed delivery notes described under sub-paragraphs (a), (d) and (e) above.

90.Accordingly, the court finds that the defendant has proved that it supplied plywood of 241,100/-.

Whether the plaintiff entered into the agreement for lease of the defendant's warehouse for Kshs. 18,000,000/- and for the purchase of the prime mover for Kshs. 3,000,000/-

91.As earlier captured, the defendant claimed that part of the funds received from the plaintiff were in respect of an agreement for lease of the defendant's warehouse for Kshs. 18,000,000/- and for the purchase of the prime mover for Kshs. 3,000,000/.

92.The plaintiff denied that it entered into the contracts for lease of the defendant's warehouse and for the purchase of the prime mover. It claimed that the contracts were not signed by it.

93.The defendant exhibited a copy of an agreement for lease of its warehouse for Kshs. 18,000,000/- for 3 years.

94.**Mr. Oduor, PW2** produced a document examination report dated 21st February 2024 prepared by him. According to the report, the signatures on the two contracts were not matching the signature of **Mr. Meng Xiangjun** on the Power of Attorney and the contract for wood formwork dated 10th April 2029.

95.The defendant filed grounds of opposition dated 14th March 2024 challenging, in the main, the reliability of the Power of Attorney, which was signed in China but not notarized. It also challenged the document examiner's expertise in Chinese alphabetical characters and handwriting. It further questioned the consideration of change of signature over time, lack of supporting documents to prove his expertise and failure to subject the report to image enhancement and magnification procedures.

96. However, during the trial, the defendant's witness, **Mr. Linmei** admitted that the agreement for lease that was produced was not signed. He also acknowledged that the lease does not state that the plaintiff is the tenant.

97. Accordingly, the court finds that the defendant has not proven that there was an agreement for lease of the warehouse between it and the plaintiff.

98. The defendant exhibited a copy of a prime mover sale agreement dated 31st September 2019 in respect of the prime mover registration number KBN 055A. At the trial, **Mr. Linmei** stated that the prime mover was owned by **Yu Qingbao**. That however, the purchase price was paid directly to him. He confirmed that the plaintiff did not take the vehicle and that it was not transferred to the plaintiff.

99. One of the elements of a contract is consideration. However, the defendant failed to prove that consideration in the form of the prime mover passed to the plaintiff.

100. As such, the court finds that the defendant has not proven that there was an agreement for the purchase of the prime mover.

Whether the plaintiff has proven that there was an oral agreement for the supply of wood formwork valued at Kshs. 25,500,000/-.

101.The plaintiff claimed that it entered into various oral contracts for the supply of wood formwork valued at Kshs. 25,500,000/-. The defendant denied this.

102.The defendant admitted that it received Kshs. 36,000,000/- from the plaintiff, and claimed that it was for: -

- (a) Wood formwork valued at Kshs. 13,000,000/-
- (b) Plywood worth Kshs. 2,500,000/-
- (c) Rent for the warehouse of Kshs. 18,000,000/-
- (d) Prime mover Kshs. 3,000,000/-.

103.The total amount is Kshs. 36,500,000/- not Kshs. 36,000,000/-.

104.The defendant proved that it supplied the plaintiff with plywood valued at Kshs. 241,100/-. However, this amount is separate and has no bearing on the Kshs. 13,000,000/- paid for the wood formwork under the terms of the agreement of 10th April 2019.

105.However, the defendant failed to prove that it supplied the wood formwork of Kshs. 13,000,000/-. It also failed to prove

that the plaintiff entered into the agreement for lease of the defendant's warehouse for Kshs. 18,000,000/- and for the purchase of the prime mover for Kshs. 3,000,000/-.

106. On its part, the plaintiff's witness, **Mr. Xiangjun**, at cross-examination, could not recall any oral contracts. He stated that the parties only had a written contract for the supply of wood formwork. During, re-examination, he clarified that there were oral contracts due to the many variations and that he left the company before the oral contracts became formal.

107. **Sections 107 to 110 of the Evidence Act** provide as follows:-

“Section 107. (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. 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.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

108. From the foregoing, the court finds that the plaintiff has failed to establish the existence of the oral contracts to the required standard.

Disposition

109. In conclusion, the court enters judgment in favour of the plaintiff, against the defendant for Kshs. 13,000,000/- with interest thereon at the court rate (14% p.a.) from the date the said sum was paid to the defendant until payment in full. The evidence shows that the said sum was paid before

delivery in accordance with the contract and thus, was a real loss of opportunity and investment for the defendant to hold such huge sums of money with no intention of supplying the wood formwork, to the detriment of the plaintiff.

110.Costs to the plaintiff.

Dated, signed and delivered through Microsoft Teams online application this 25th day of September, 2025

**F. Gikonyo M
Judge**

In the presence of: -

- 1. Ms. Tambo for Plaintiff**
- 2. Mboya for defendant**
- 3. CA Kinyua**