

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL APPEAL NO E165 OF 2023**

**YARA EAST AFRICA LIMITED.....1<sup>ST</sup>**

**APPELLANT**

**SAMUEL NAMALE.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**BHOLE PAN HOUSE ENTERPRISES LIMITED...1<sup>ST</sup>**

**RESPONDENT**

**TIMEWATCH LOGISTICS LIMITED.....2<sup>ND</sup>**

**RESPONDENT**

*(Appeal from the judgment of the Principal Magistrate Court of Kenya at Bungoma delivered by E.M. Ayuka (PM) dated 4/12/2023 in Bungoma CMCC No E006 of 2020)*

**JUDGMENT**

**1.** The 1st respondent purchased fertilisers worth Kshs 15,896,000 from the 1st appellant. The 1st respondent received fertilisers valued at Kshs 14,356,000, leaving an outstanding balance of Kshs 1,540,000. On 17/2/2019, the managing director of the 1st respondent inquired about the fertiliser, but was told it was out of stock. The appellant was blamed for failing to deliver the outstanding fertilisers.

**2.** The respondent's case was that the fertiliser was delivered to the 1st respondent on 18/2/2019. It issued a local purchase order seeking the remaining fertiliser. The first respondent then provided details of the truck (KCC 828E) and the driver (Abraham Kipchirchir) who was to collect the goods. They

loaded the fertiliser onto the truck, and the driver signed the delivery note. The details of the truck and driver were forwarded to the appellants through Mr Sanken.

**3.** The 2<sup>nd</sup> appellant who was the 3<sup>rd</sup> defendant in the subordinate court denied that motor vehicle KCC 828 E carried the fertiliser.

**4.** The trial magistrate, after considering the evidence before him, found that the 1<sup>st</sup> appellant did not release any consignment of fertiliser to the 2<sup>nd</sup> respondent for delivery to the 1<sup>st</sup> appellant. As a result, he determined that the appellants owed the 1<sup>st</sup> respondent Kshs 1,540,000/-.

**5.** The appeal herein has been lodged by the appellants challenging the trial court's judgment for the following reasons:

- 1. The learned magistrate erred in law and in fact in finding that the 1<sup>st</sup> appellant did not deliver the fertiliser that was the subject of the suit in the trial court to the 1<sup>st</sup> respondent, despite overwhelming evidence that the fertiliser was delivered.*
- 2. The learned magistrate failed to consider the evidence provided by the 1<sup>st</sup> and 2<sup>nd</sup> appellant on the delivery of the fertiliser in determining the suit in the trial court.*
- 3. The learned magistrate erred in law and in fact in considering the evidence of the 2<sup>nd</sup> respondent in the trial court without first determining whether it had capacity/locus standi to provide such evidence.*
- 4. The learned trial magistrate failed to consider the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> appellant that the 2<sup>nd</sup> respondent was not the owner of the truck that collected the fertiliser and*

*could therefore not know if the fertiliser was collected or not.*

- 5. The learned magistrate erred in law and in fact in finding that the 2<sup>nd</sup> respondent was introduced to court and/or enjoined in the trial case by the 1<sup>st</sup> and 2<sup>nd</sup> appellant when the records of the court indicated that the 2<sup>nd</sup> respondent was introduced to court and/or enjoined in the trial by the 1<sup>st</sup> respondent.*
- 6. The learned magistrate erred in law and in fact in finding that the truck that delivered the fertiliser was in Uganda on the date the fertiliser was delivered (18<sup>th</sup> February 2019) delivering clicker to Tororo when the cargo manifest provided as evidence by the 2<sup>nd</sup> respondent indicated that the truck was at the Kenya Uganda border travelling to Tororo on 19<sup>th</sup> February 2019 and was empty (not carrying any clicker).*
- 7. The learned magistrate failed to note the baleful nexus between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent and the spirited efforts to mislead the trial court with the intention to defeat justice and defraud the 1<sup>st</sup> appellant.*
- 8. The learned magistrate relied on misleading evidence in making his determination.*

**6.** The appellant seeks that the judgment of the subordinate court be set aside.

**7.** The appellant submitted that they produced the local purchase order issued by the 1st respondent on 18/2/2019 as evidence that the 1st respondent ordered the fertiliser. They further provided the delivery note signed by the agent of the

1st respondent as proof of delivery, and the respondent did not dispute its authenticity. In *E.P. Communications Ltd v EA Courier Services LTD* [2019] eKLR, the court held in part that:

*“A delivery note is proof of delivery of goods... the purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by a purchaser to the seller to confirm, order and authorize the purchase.”*

**8.** The appellant contends that there was no evidence to prove that the 2nd respondent owned the truck; therefore, he could not have known whether the truck collected the fertiliser or not. In *Joel Muga Opinja v East African Sea Food Limited* (2013) eKLR, the court held that the most reliable way to establish ownership of a motor vehicle would be to produce a document from the register of motor vehicles indicating the registered owner.

**9.** The 2nd respondent did not provide documentation to prove ownership. The witness for the 2nd respondent testified that he was the actual owner of the truck. Therefore, it was unclear who had the capacity to be sued. The court was also misled into believing that the appellant had enjoined the 2nd respondent. The 1st respondent enjoined the 2nd respondent out of malice, with the intention to provide fabricated evidence.

**10.** They cited the case *Dormakana Limited v Architectural Supplies Kenya Limited* (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment), where the court held that when two stories are mutually destructive, before the onus is discharged, the court

must be satisfied that the story of the litigant on whom the onus rests is true and the other is false.

**11.** The 1st respondent, in their submissions, denied owning motor vehicle KCC 828E. No evidence was presented by the appellants to show that they received instructions to release fertiliser to the truck. DW3 produced an entry manifest confirming the truck's clearance back to Kenya from Tororo. He was at the border on the 17th and returned on the 19th. The 3rd respondent was introduced into these proceedings after the 1st appellant filed a statement of defence, and the 2nd appellant disclosed details of the truck in his statement.

### **ANALYSIS AND DETERMINATION**

**12.** This is a first appeal. It is established law that the duty of the first appellate court is to re-assess the evidence presented in the subordinate court, both on points of law and fact, and to arrive at its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424].

**13.** Serah Sanket Kumar (Pw1) testified that she is a director of the 1st respondent and reiterated the contents of the plaint. She stated on cross-examination that she did not know the 2nd respondent, as it had never transported their goods. They would sometimes use transporters provided by the 1st appellant, while other times it would send a motor vehicle or transporter.

**14.** Samuel Namale (Dw1) testified that the details of the truck were forwarded to him by Mr. Sanket of the 1st appellant.

Pw1 stated that he did not know the owner of the truck. However, since the 1st appellant in the amended plaint indicated that the owner was the 2nd respondent, it implies she has been aware of the owner all along. Dw1 testified on cross-examination that he did

**15.** Nicholas Kipkorir Kurgat testified that the truck is owned by the 3rd defendant. Testifying in his capacity as director, he told the court that the company had never done business with the parties involved in the suit. He explained that the company is licensed to handle transit goods but not local goods. At that time, the truck was at Tororo Cement Limited in Uganda, delivering clinker. The alleged driver provided by the appellant had never been their driver.

**16.** The plaintiff initially sued only the 1st appellant. Subsequently, it amended the plaint to include the 2nd appellant and the 2nd respondent as the 2nd and 3rd defendants, respectively.

**17.** The 3rd respondent did not dispute that it owned motor vehicle KCC 828E. The 1st respondent, in its plaint, claimed that the vehicle was owned by the 2nd respondent. The appellants' response was that the details of the vehicle were shared by the 1st appellant. The 2nd respondent, in its defence, denied transporting any goods on behalf of the appellants and the 1st respondent. Although Dw1 testified that the vehicle was his, he was doing so in his capacity as the director of the 2nd respondent. Therefore, from the parties' pleadings, it is clear that the ownership of the said motor vehicle was not in dispute.

**18.** It should also be noted that the cargo manifest stamped by the Uganda Revenue Authority indicates that the 3rd defendant was the owner of the vehicle.

**19.** The cargo manifest produced by Dw3 was dated 19/02/2018, showing that it was at Malaba from Tororo. According to the 2nd respondent's invoice, the vehicle was loaded with clinker on 16/2/2019 and offloaded on 19/2/2019. Dw3 explained that he was at the Malaba border on the 18th, and he returned from Tororo on 19/2/2019. Dw3 referred the court to the Road user payment dated 18/2/2019, where payment was made at 2:35 p.m. at the border yard in Uganda. He also produced a licence showing that the vehicle is not licensed for local goods transit.

**20.** While the appellant argued that the 2nd respondent's vehicle was in Mombasa on 18th February 2019, the 2nd respondent presented documentary evidence proving otherwise, indicating that on that date the vehicle was in Malaba en route to Tororo.

**21.** It is now established that the burden of proof lies on the person who makes the allegation. This is concisely outlined in sections 107-109 of the Evidence Act, Cap 80 Laws of Kenya, as follows:

*"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."*

**22.** In the locus classicus case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the court 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."*

**23.** The appellants produced delivery notes signed by the alleged driver of the motor vehicle in Mombasa. However, it was impossible that the vehicle to have been in both Mombasa and Malaba at the same time. The 2nd respondent provided receipts, a manifest, and a schedule indicating that the vehicle was not in Mombasa on 18th February 2019. Although the appellants presented a delivery note signed by an alleged agent of the defendant, the evidence suggests that this was unlikely. The testimony and evidence provided by the respondents favour their case, as they submitted documents

stamped by a third party, Uganda Revenue Authority, confirming that the vehicle was from Tororo.

**24.** Therefore, I find no fault in the trial magistrate's decision in determining the appellants' liability. Consequently, I conclude that the appeal lacks merit and is hereby dismissed. The 1st respondent shall bear the costs of the appeal.

**Dated, Signed and Delivered at BUNGOMA this 28<sup>th</sup> day  
of October 2025**

**R.E. OUGO  
JUDGE**

**In the presence of:**

**Miss Janira h/b for Mr. Mogutu -For the  
Appellant**

**Miss Akinyi h/b Mr. Mukisu -For the  
Respondent**

**Wilkister -C/A**