

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E214 OF 2025**

**BIDCO AFRICA LTD ..... APPELLANT**

**- VERSUS -**

**A.A. SALAT TRANSPORTERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ABDI AHMED SALAD ..... 2<sup>ND</sup> RESPONDENT**

(Being an appeal from the judgment and decree of **Hon. E.N. Angima RM** delivered on the 24/9/2025 in the **Nyando CMCC No. E242 of 2022, Bidco Africa Ltd v A.A. Salat Transporters Limited & Onother**)

**J U D G M E N T**

1. The appellant filed suit against the respondents vide an amended plaint dated **16/10/2024** seeking judgment to the tune of **Kshs. 2,447,467/-**, costs of the suit with interest.
2. The respondents having been served, as per the affidavit of service dated **26/4/2024**, failed to enter appearance and the trial court entered interlocutory judgment on the **18/7/2024** and the matter proceeded to formal proof.
3. In its judgment, the trial court found that the appellant failed to produce the agreement allegedly entered into between itself and the respondents and as such there was no evidence on the claims alleged and that the appellant had

therefore not proved its case. The trial court therefore dismissed the appellant's claim.

4. Being dissatisfied with the said Judgment/decreed, the appellant lodged this appeal vide the Memorandum of Appeal dated **29/9/2025** raising nine (9) grounds of appeal that may be summarized as follows: -

- a) That the learned trial magistrate erred in law and in fact in finding the appellant had failed to prove its case on a balance of probability and proceeded to dismiss the suit with cost.*
- b) That the learned trial magistrate reached a wrong decision in law and fact contrary to the weight of evidence before her specifically exhibits 13, 14, 15, 16, 17, 18 & 20 as per the list of documents dated 17/11/2022.*
- c) That the learned trial magistrate erred in law and in fact in concluding the appellant had failed to prove its case on a balance of probability yet the appellant's evidence was unchallenged and/or unrebutted.*
- d) That the learned trial magistrate erred in law and in fact by misdirecting herself and failing to find the appellant's insurance*

*company; Kenindia Assurance Company was entitled to recover from the respondent under the doctrine of subrogation.*

5. The respondents did not take part in these proceedings despite being served. In support of the appeal, the appellant submitted that the trial court erred in failing to find that the respondent acted negligently while handling its consignment and breached the agreement between them leading to a loss of 16,560 metric tonnes valued at **Kshs. 2,467,026/-**.
6. That the trial court erred in law and fact in failing to apportion liability to the respondent and the court should proceed to hold the respondent 100% liable for the loss of the appellant's consignment. That the appellant provided evidence of loading the cargo into the respondent's vehicle registration number **KCD 040L**. That under the doctrine of subrogation, the insurer can only exercise the rights and have access to those remedies available to the insured.
7. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses testify. See **Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

8. The appellant's case before the trial court was vide an amended plaint dated **16/10/2024** in which it sought judgment to the tune of **Kshs. 2,447,467/-** which was the value of the cargo that was allegedly being transported by the respondent on the **24/2/2019** in motor vehicle registration number **KCD 040L, Mercedes Benz/ZC 0265** that was involved in a self-involving accident at Othoo area near Ahero trading Centre.
9. That the parties had entered into an agreement dated **12/11/2001** for transport of loaded goods. That the said case was being brought on behalf of its Insurer, Kenindia Assurance Company Limited in exercise of its subrogation rights. The respondents failed to take part in the proceedings despite service and notice of the suit.
10. **Pw1, Faith Mutinda**, the appellant's claims officer testified on its behalf. She adopted her witness statement dated **29/5/2024** as her evidence in chief and produced the list and bundle of documents dated **17/11/2022** as PExhibits 1-21. That they had brought the suit under the doctrine of subrogation.
11. The applicable law as to the burden of proof is set out under **Sections 107, 108 and 109 of the Evidence Act**. In **Mumbi M'Nabea v David M. Wachira [2016] eKLR**, the Court of Appeal stated: -

*“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:*

*“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.” The above provision provides for the legal burden of proof.*

*However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:*

*“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.”*

*The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance*

*Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280*

*where it was held that:*

*“Whereas under section 107 of the Evidence Act, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”*

12. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, it was 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.”***

13. From the foregoing, it is clear that the duty of proving the averments contained in the plaint lay squarely with the appellant. The appellant testified in support of its case adopting the statement of its Claims Officer, **Faith Mutinda**, as its evidence in chief wherein she reiterated the averments in the statement of claim. The appellant’s claim remained uncontroverted as the respondent failed to take part in the proceedings despite service.
14. In its judgment, the trial court dismissed the appellant’s suit on account that the appellant failed to provide the agreement between the parties dated **12/11/2001** and further that there was no evidence filed in court on the claims referenced as assessor’s fees, investigations fees and copy of records.
15. The appellant’s appeal is anchored on the fact that the trial court ignored the evidence of the agreement between itself and the respondent that it had produced as exhibit 20.
16. I have perused the Record and note that the agreement dated **12/11/2001** referred to by the appellant was indeed between the parties. However, the same was for ***transportation of vegetable oils and fats and/or other suitable edible fats/liquid products from the Company’s storage tank in Mombasa***

*to company's Thika factory. It is stipulated that the motor vehicle to be used exclusively is registration number KAM 945L/ ZB 7027.*

17. It is evident that the aforementioned details do not match the appellant's claim. It is trite that even in cases where a party fails to file a response to a claim brought forth against them, the plaintiff still has to prove its case.
18. In the present case, the evidence relied on by the appellant in support of its claim, the agreement dated **12/11/2001**, does not support the said claim. Consequently, the appellant failed to prove its case before the trial court and the trial court cannot be faulted.
19. The upshot is that the appeal lacks merit and is hereby dismissed with no order as to costs.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 25<sup>th</sup> day of **March, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**