



REPUBLIC OF KENYA



**Alchemy Incorporation Ltd v Joggen Plastics Kenya Limited & 2
others (Commercial Appeal E122 & 147 of 2024 (Consolidated))
[2025] KEHC 3193 (KLR) (Commercial and Tax) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 3193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E122 & 147 OF 2024 (CONSOLIDATED)
CJ KENDAGOR, J
JANUARY 27, 2025**

BETWEEN

ALCHEMY INCORPORATION LTD APPELLANT

AND

JOGGEN PLASTICS KENYA LIMITED 1ST RESPONDENT

MOSES MBURU GATOMBO 2ND RESPONDENT

ANN WAIRIMU WANJIRU 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon. C.K Cheptoo, Principal
Magistrate, delivered on 3rd May, 2024 in the Chief Magistrates
Court Milimani, Commercial MC COMMSU Case No. E358 of 2023)*

JUDGMENT

Introduction

1. The Appellant delivered some goods to the 1st Respondent on diverse dates between January 31, 2021 and April 27, 2022. However, the parties do not agree on their legal relationship with respect to the supplied goods. The Appellant claimed that the 1st Respondent was its customer and the buyer of the delivered goods. On the other hand, the 1st Respondent claimed that it was neither a customer of the Appellant nor the buyer of the supplied goods. Instead, it claimed that it was an Agent of the Appellant and it received the goods to sell on behalf of the Appellant. The 2nd and 3rd Respondents are Directors of the 1st Respondent.



2. The Appellant claimed that the Respondents failed to pay for the supplied goods whose balance due amounted to US\$51,092.40 (Kshs.6,902,583.24/=) as of 31st May, 2023. It sued the Respondents and sought judgment against them jointly and severally for the said sum together with interests at Commercial rates from 1st December, 2022 until payment in full. The Respondents filed a defense in which they denied the debt and maintained that the 1st Respondent was an Agent of the Appellant and not a customer. They also claimed that the trial Court did not have jurisdiction to hear and determine the matter.
3. The trial Court delivered a judgment on 3rd May, 2024 in which it held in favor of the Appellant. It entered judgment in favour of the Appellant as against the 1st Respondent for US\$25,546.20 (Kshs.3,451,291.62/=). It held that the Court had jurisdiction as provided for in Section 15 (c) of the *Civil Procedure Act*. It also held that there was no agency relationship between the Appellant and the 1st Respondent. Lastly, it held both the Appellant and the 1st Respondent equally liable for the financial loss and shared the damages between them.
4. The trial Court found that one of the terms of the contract of supply between the Appellant and the 1st Respondent was that the 1st Respondent had to pay 80% of the purchase price before the Appellant releases the clearing documents to the 1st Respondent. It also found that the Appellant released the clearance documents prior to the said payment. In its evaluation, the Court found that the Appellant's act of releasing the clearance document prior to the said payment amounted to a contractual breach and was equally to blame.
5. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 7th May 2024 and registered as HC. COMMA No. E122 of 2024. It listed the following Grounds of Appeal;
 1. That the learned Magistrate erred in law and in fact, misdirected herself and ignored the Appellant's testimony, evidence, and submissions in arriving at the Judgment, to the Appellant's prejudice.
 2. That the learned Magistrate erred in law and in fact and exhibited bias when she on the one hand found that the Appellant had proved its case on a balance of probabilities and on the other hand finding that the Appellant was not entitled to recover the full liquidated amount claimed.
 3. That the learned Magistrate erred in law and in fact and exhibited bias when she ignored the Appellant's evidence on the 2nd Respondent's admission of the Appellant's claim.
 4. That the learned Magistrate erred in law and in fact and exhibited bias when she found that the Appellant was in breach of contract for agreeing to vary its terms of engagement with the 1st and 2nd Respondents.
 5. That the learned Magistrate erred in law and in fact and ignored the Appellant's evidence and the 2nd Respondent's testimony in failing to appreciate that the Appellant and the 1st Respondent had mutually agreed to vary the terms of their agreement, particularly, on the requirement that 80% of the purchase price be paid by the 1st Respondent before clearance documents would be released to it by the Appellant.
 6. That the learned Magistrate erred in law and in fact and exhibited bias when she penalized the Appellant for agreeing with the 1st Respondent to vary the terms of their contract.



7. That the learned Magistrate erred in law and in fact, exhibited bias and misdirected herself when she introduced the notion of damages whereas the Appellant's case was a liquidated claim.
 8. That the learned Magistrate failed, completely, in her duty to analyze the Appellant's case based on the evidence in court, before arriving at the determination that both the Appellant and the 1st Respondent were liable for breach of contract.
 9. That the learned Magistrate erred in law and in fact, misdirected herself and ignored the Appellant's evidence in dismissing the suit against the 2nd and 3rd Respondents.
6. It asked the Court to set aside the Judgment of the Honourable Magistrate and allow the Appellant's suit in the subordinate Court as prayed in the Plaint dated May 10, 2023. It also asked for the costs of the Appeal and the suit in the subordinate Court.
7. The 1st Respondent was also dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated May 31, 2024 and registered as HC. COMMA No 147 of 2024. It listed the following Grounds of Appeal;
1. That the learned Magistrate erred in fact and law in dismissing the existence of an agency relationship, the resultant effect that the whole Judgment was a miscarriage of justice.
 2. That the learned Magistrate misinterpreted the facts by not adequately considering the causative link between the [Appellant's] breach and the [Respondent's] full non-performance of their contractual obligations.
 3. The trial Court did not consider the principles of unjust enrichment, leading to an inequitable outcome where the [Appellant] benefited from their own breach to the Detriment of the 1st Respondent.
 4. All in all, the learned Magistrate misdirected herself in law and fact so as to occasion miscarriage of justice.
8. It asked the Court to set aside the Judgment and Decree of the lower Court in favour of the Appellant delivered on 3rd May 2024. It also asked the Court to dismiss the Appellant's claim against the 1st Respondent.
9. The Court consolidated the two appeals, HC.COMMA No. E122 of 2024 and HC.COMMA No 147 of 2024. No. E122 of 2024 is the lead file. Thus, for the purposes of this Appeal, the term Appellant refers to the Appellant in No. E122 of 2024, while the term 1st, 2nd, and 3rd Respondents refers to the 1st, 2nd, and 3rd Respondents in No. E122 of 2024.
10. The appeal was canvassed by way of written submissions.

Appellant's Written Submissions

11. The Appellant submitted that it was entitled to recover the full liquidated amount claimed of US \$51,092.40 (Kshs.6,902,583.24) as opposed to the US\$25,546.20 (Kshs.3,451,291.62) awarded to it by the Trial Court. It argued that the trial Magistrate was wrong to hold that both the Appellant and the 1st Respondent were equally liable for the liquidated amount claimed. It argued that the 1st Respondent should have been held solely liable for the entire sum because it did not prove that it had paid for the goods it received from the Appellant.



12. In addition, it argued that the trial Court was wrong to find that the Appellant breached the contract by releasing the clearance documents before the payment of the 80% remaining balance. It submitted that the Appellant's act of agreeing to release the clearance documents to the 1st Respondent prior to its payment of 80% of the purchase price, amounted to variation and not breach of contract.
13. It also argued that the 2nd and 3rd Respondents ought to be held personally liable for the debt owed by the 1st Respondent in favour of the Appellant. It submitted that the two failed to promote the success of the 1st Respondent to the interest of the Appellant while carrying out their duties. It also submitted that the 2nd and 3rd Respondents were guilty of fraudulent trading because they had no intention of paying for the goods supplied.

Respondent's Written Submissions

14. The Respondent argued that the trial Court should not have awarded the Appellant the sums awarded because the Appellant was not entitled to the award. It also argued that the Appellant failed to prove that the goods were supplied to the 1st Respondent on credit. It submitted that the goods were released pursuant to an agency agreement to avert loss. It argued that the 1st Respondent could not have accepted goods at a loss and yet it was common knowledge between the parties that the prices had declined. It urged the Court to find that on a balance of probabilities and based on the circumstances, it is more probable that the goods were released under an agency relationship based on the declining prices.

Issues for Determination

15. I have considered the grounds of appeal and submissions by both counsels for the parties and I am of the view that the issue for determination is;

a). Whether the Appellant is entitled to recover the full liquidated amount claimed.

16. It is trite law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

Whether the Appellant is entitled to recover the full liquidated amount claimed

17. The Appellant submitted that the 1st Respondent should have been held solely liable for the entire sum because it did not pay for the goods. I have relooked at the available evidence to ascertain whether the Appellant is entitled to recover the entire US\$51,092.40 (Kshs.6,902,583.24) as prayed for in the Plaint. From the evidence on record, I have ascertained that the 1st Respondent indeed received the goods in question. It admitted as much in its director's (Moses Gatombo) witness statement dated



- 31st January 2023. The director also admitted the same in his oral testimony in Court, although he maintained that he received the goods as an agent, and not a customer.
18. This Court is also been invited to determine whether there was an agency relationship between the Appellant and the 1st Respondent as alleged by the latter. I have reviewed the conversation between the parties before the release of the goods and I could not ascertain that the Appellant had expressly, or by implication, appointed the 1st Respondent as its agent in the transaction. To the contrary, in my view, the evidence on record reveals that the relationship between the two was that of a seller and a buyer. I have seen the documents produced as exhibits by the Appellant, including the Sale and Supply of Goods Contract, which referred to the 1st Respondent as the ‘The Buyer.’
19. The said Sale and Supply of Goods Contract provided inter alia that;
- i. The port of destination in respect of the goods sold was Mombasa (CFR Mombasa) Kenya from any port China;
 - ii. The buyer would pay 20% advance payment and the balance as against the copy of documents;
 - iii. The Plaintiff would ship the goods as soon as possible.
20. The above terms are clearly captured in an invoice dated 7th March, 2022. The invoice refers to the Appellant as the Seller, while it refers to the 1st Respondent as the Buyer. It also outlines how the Buyer was to make payments for the goods. Based on this evidence, in my view, the parties entered into an agreement for the supply of goods, wherein the Appellant was the seller and the 1st Respondent the buyer. Thus, I agree with the lower Court’s finding that the 1st Respondent received the said goods, and it received them as a Buyer and not as the Appellant’s agent.
21. The next issue for this Court to determine is whether the 1st Respondent paid for the goods. The Appellant claimed that the Respondents failed to pay for the supplied goods whose balance due amounted to US\$51,092.40 (Kshs.6,902,583.24/=) as of 31st May, 2023.
22. The parties admit that at the time the 1st Respondent received the goods, the value of the consignment had decreased due to external intervening events, namely, the Covid-19 Global Pandemic, which caused the drop in price for PVC. The Appellant admitted the issue of the fall in price for PVC as evidenced in their conversations presented in Court as exhibit. The Appellant’s Director Ankit Makek admitted as much in his oral testimony in Court. The 1st Respondent’s testimony that the prices had reduced due to the effects of Covid- 19 were not controverted. Due to these intervening factors, which could not be attributed to human fault, it is evident that the value of the goods had decreased by the time the 1st Respondent received the goods.
23. In addition, the Court notes that the value of the goods decreased before property in the goods could pass from the Seller to the Buyer. According to the terms of the contract of Supply, the Court deduces that ownership of the goods would pass from the Appellant to the 1st Respondent upon the payment of the 80% of the purchase price. In the circumstances of this case, I take the view that ownership of the goods passed to the 1st Respondent once it received the goods. This was at the point when the 1st Respondent was given the ownership documents to clear the consignment at the port.
24. In the interest of justice, it would be unfair for the Court to order the 1st Respondent to pay the entire sum as per the original valuation. This is especially so given that the value of the goods decreased before ownership could pass to the Buyer (1st Respondent) and that the decrease in value was caused by a global pandemic, which cannot be attributed to the 1st Respondent’s fault.



25. The factual circumstances of case reveal that the parties were at a precarious position. From the evidence, the 1st Respondent was not financially able to pay the 80% value of the purchase price and intimated that it was ready to pay for the demurrages. In its testimony in court, it stated that it was ready to forfeit the 20% deposit and forgo the entire consignment. On the other hand, the Appellant admitted that it did not want to keep the goods any further because the prices were dropping.
26. In the copy of the conversation produced in Court, the Appellant stated as follows: “Price for PVC is dropping, we cannot wait more as advance payment is only 20% and if you can clear cargo on time demurrage is Too high.” The Appellant’s witness, PW1 admitted this in Court and stated as follows; “Our customers are finding problems and that is when we issued the documents. On page 167 message at 9:29 am from me. I stated that the price of PVC was dropping. We were winding off they would not pay for the cargo since we were in person we were winding since the prices drops.”
27. The Court of Appeal in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another* [2014] eKLR dealt with the issue of frustration of contracts and quoted from Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897 where it was stated that;
- “As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach.”
28. In my view, and given the unique circumstances of the case, the Appellant ought to have subjected the goods to a second valuation at the time the 1st Respondent received the goods to determine their worth at that time. It did not do that. There is no evidence on the percentage by which the price of PVC had dropped. On the other hand, the 1st Respondent ought to have demonstrated how the drop in the price of PVC had impacted the resale of the supplied goods. It did not. It also did not provide evidence that the 1st Respondent paid any amounts towards the clearance of the outstanding 80%. Both parties failed to the extent outlined above.
29. Although this court finds that the Appellant did not ascertain the value of the goods at the time the property in the goods passed to the 1st Respondent, it appreciates that allowing the 1st Respondent to escape his contractual obligations would amount to unjust enrichment. In the interest of justice, I find that the Appellant should be allowed to recover half the claim, that is, US\$25,546.20 (Kshs.3,451,291.62/=). I thus uphold the lower Court’s Judgment though for different reasons.

Disposition

30. The Appeal is hereby dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 27TH DAY OF JANUARY, 2025.

C. KENDAGOR JUDGE

In the presence of:

Court Assistant: Beryl



Mr. Mungai Ndungu Advocate for the Appellant No attendance for the Respondent

