



**Oleotecnica SPA v Kenya Ports Authority; Vynova Runcorn Uganda Limited (Interested Party)  
(Commercial Case E006 of 2024) [2024] KEHC 2205 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2205 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E006 OF 2024  
DKN MAGARE, J  
FEBRUARY 26, 2024**

**BETWEEN**

**OLEOTECNICA SPA ..... PLAINTIFF**

**AND**

**KENYA PORTS AUTHORITY ..... DEFENDANT**

**AND**

**VYNOVA RUNCORN UGANDA LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed this case claiming for the following prayers: -
  - a. A declaration by the high court that the acts and misrepresentation by the defendants amounted to fraud.
  - b. A declaration that the contract between the plaintiff and the defendant was invalidated by the fraud(sic)
  - c. An order of immediate release of the shipment to the plaintiff
  - d. An Order of Injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party(sic) from releasing, dealing, offering for sale or otherwise releasing in any whatsoever the shipment/goods/items under the bill of lading No. MEDUGN26xxxx to either the defendants whether by themselves their agents, servants, employees, invitees, and or otherwise
  - e. Costs and interest of the suit be awarded to the Plaintiff
2. The court was not amused by the use of the word otherwise several times in one prayer.



3. The Defendant and interested parties were served. The Court directed the matter proceed by way of case stated. This was also informed by the fact that in any case the Plaintiff was going to admit their statement and documents. I had certified the matter to be heard *ed bene esse*, due to the increase of port and other charges.
4. The Interested Party is supposedly a corporation carrying on business in Uganda. They neither appeared nor defended the course. The interested parties were not opposed to the suit subject only to their dues.
5. It was the Plaintiff's case that the defendant made an order by fraudulently holding itself out as a legitimate company in Uganda but it emerged that there were no records of such a company. It was also submitted that the address of the defendant was fictitious, false, and nonexistent. The defendant is said to have ignored communication from the Plaintiff.
6. They state that the contract was dubious and entered by fraudulent misrepresentation in the name of a nonexistent entity. It was their case that payment had not been made for the goods.

### Analysis

7. The burden of proof was on the Plaintiff. This is set out in section 107-109 of the *evidence act*. The sections provide 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
8. Indeed, in the case of *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September, the Supreme Court stated as doth: -
  - “62. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the latin phrase *onus probandi* and when we talk of burden we sometimes talk of onus.
  63. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
    1. . Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is



making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

9. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“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.”

10. 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained.”

11. In the case of *Peri Formwork Scaffolding v White Lotus Projects Limited* [2021] eKLR, Justice Mabeya stated as doth: -

6. In *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to *Halsbury's Laws of England*, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact.



Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

7. In *Rosaline Mary Kabumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

8. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.

12. The duty to proof the case lay on the plaintiff notwithstanding the non- appearance of the defendant. This burden was discharged from the plethora of the evidence I have seen.

13. This case is part of the increased lapses in Maritime trade where, the fraudsters use names similar to established companies in Europe and USA taking advantage of language barriers, to import and defraud shippers. They are using Uganda as a destination. It appears to be a lapse resulting from the relaxed trade laws in that country. It is my hope that the state parties of the in the East African community can start uniform criteria for importation. Adopting the use of the tax authority’s personal identification number can stem these fraudulent transactions. I digress.

14. Under Sections 41 and 42 of the *Sale of Goods Act*, the Plaintiff retains title to the goods since they have an unpaid seller’s lien. The Sections provide as doth; -

“41.

(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases

—

- a. where the goods have been sold without any stipulation as to credit;
- b. where the goods have been sold on credit, but the term of credit has expired;
- c. where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder unless the part delivery has been



made under such circumstances as to show an agreement to waive the lien or right of retention.”

15. In this case, without payment, and with the person contracting being fiction, then the Plaintiff is entitled to claim and return its goods.
16. I find the Plaintiff, on the facts before me has proved its case. I am informed by the following cases.
17. In the case of *Ginegar Plastic Products Ltd v Victrex Ltd & another* [2021] eKLR, the court, Njoki Mwangi J stated as follows: -

“ 19. In considering if the plaintiff still has good title to the consignment of goods after issuing a bill of lading in the name of the defendant, it is necessary to look into the value attached to the said document. Lexis Navigator Dictionary states as follows in regard to bills of lading-

“A Bill of lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship. The signed bill of lading is handed over to the shipper, who may either hold onto it or transfer it to a third person. During the voyage and transit, the bill of lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the goods. This person named in the Bill of lading as the person to whom the delivery of goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of lading, he is usually known as the holder or endorsee of the Bill of lading. The holder of the bill of lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner’s lien for freight. A bill of lading issued by the ship owner’s agent in the absence of any contract of carriage is a nullity.” (emphasis added).

20. In instances like the present one where the plaintiff has proved that the consignment of goods was obtained fraudulently, it is evident that the plaintiff through the bill of lading number 204673855 cannot pass good title to the defendant for the said consignment. I am in agreement with Mr. Mugambi that the plaintiff has established the existence of a dubious contract with the defendant which was initiated through fraudulent misrepresentation of facts. The confirmation order, invoice and the bill of lading attached to the affidavit of the plaintiff’s deponent proves the plaintiff’s case.

18. In *Junca Gelatines S.L v Hilton Ingredients (U) Ltd* [202] eKLR, justice Njoki Mwangi stated as doth: -

“ 22. Since the order for the consignment of goods was made fraudulently the title in the goods did not pass to the defendant. It is my finding that the plaintiff has discharged its burden of proof on a balance of probability.”



19. In the end, I am satisfied that the defendant did not pay for the consignment, the same was fraudulently ordered. The court cannot give effect to an illegality. The contract for sale was thus void *ab ignition*. There is nothing parties can add to make the contract legal having been void. In the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

20. The upshot of the foregoing, is that I have reached an inevitable conclusion that the suit is merited and is accordingly allowed with costs.

### **Determination**

21. I therefore make the following orders: -

- a. It is declared that the goods being, the consignment in Container No. DFSU267xxxx, FCIU5098xxxx, FCIU268xxxx, TRHU218xxxx and TCLU209xxxx loaded at the Port of Genova, Italy under Bill of Lading No. MEDUGN2xxxx belong to the Plaintiff as an unpaid seller.
- b. The contract between the plaintiff and defendants is void *ab initio*
- c. An order is hereby issued for immediate release the consignment in Container No. DFSU267xxxx, FCIU5098xxxx, FCIU268xxxx, TRHU218xxxx and TCLU209xxxx loaded at the Port of Genova, Italy under Bill of Lading No. MEDUGN26xxxx to the plaintiff for return to the country of origin or transshipment
- d. An Order of Injunction is hereby issued restraining the Interested Parties taking, releasing to the Defendant parting with possession, other than to the Plaintiff or alienating, auctioning, dealing, disposing of, or in any other manner interfering with the consignment in Container No. DFSU267xxxx, FCIU5098xxxx, FCIU268xxxx, TRHU218xxxx and TCLU209xxxx loaded at the Port of Genova, Italy under Bill of Lading No. MEDUGN26xxxx. The goods should be released only to the plaintiff
- e. Costs of the suit of are awarded to the Plaintiff together with the cost of transshipment.
- i. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Mr. Ochieng for the Plaintiff

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Mr. Cheruiyot for KPA



No appearance for KRA and URA

Court Assistant - Brian

