



Rupal Colorchem Industries Company Limited v Innospec Ltd (Commercial Case E007 of 2024) [2024] KEHC 2188 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E007 OF 2024
DKN MAGARE, J
FEBRUARY 26, 2024**

BETWEEN

RUPAL COLORCHEM INDUSTRIES COMPANY LIMITED APPLICANT

AND

INNOSPEC LTD RESPONDENT

JUDGMENT

1. The Plaintiff, a limited liability company corporation incorporated and carrying on business in the Republic of India, filed suit claiming the return of goods imported into the country. The defendant was duly served but did not enter an appearance. I directed that the matter proceed by way of ‘case stated’.
2. The Plaintiff was a shipper of the impugned goods while the defendant was the importer. They claimed orders relating to bill of lading numbers Nav/Mba/06518.
3. They stated that the claim against the defendant purported to purchase, 6000kg of synthetic organic colouring sunset yellow 85% and 6000kg of Ponceau 4R 85%.
4. The Plaintiff filed submissions stating they have proved their case. They relied on the case of [Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu](#) [2012] eKLR, where GV Odunga as then he was stated as doth:-

“If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire vs. The Attorney General* Nairobi HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff.



The plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.”

5. On costs, they stated that the Supreme Court had set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

6. The Defendant passed as Innosept Limited of Cheshire United Kingdom with a fake address of Barclays Bank PLC.
7. From the documents, I find that about 1st March, 2023, the Plaintiff entered into a contract which it believed was with a company called Innospec Limited of Cheshire United Kingdom. In the contract the plaintiff agreed to sell and the Defendant agreed to purchase 6000Kgs of Synthetic Organic Colouring matter Sunset Yellow 85% and 6000 Kgs of Ponceau 4R 85% as the consignment at an agreed purchase price Usd 67,200/= and which consignment was to be shipped from the Port of Loading in Nhava Shevaa, India to the Port of Discharge, that is, Port of Mombasa Kenya.
8. The evidence shows that the Defendant impersonated the aid Innospec Limited of Cheshire United Kingdom and issued the plaintiff with a fictitious address of the nominee bank as Barclays Bank PLC. Unfortunately, there are no particulars of fraud as required under Order 2, rule 10 (1) of the *Civil Procedure Rules*:

- “(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing: -
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any



malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

9. However, the plaintiff remains an unpaid seller, who has a seller’s lien under section 41 of the [Sale of Goods Act](#). The said [Act](#) provides as follows:-

“ 41. Seller’s lien

- (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.”

10. The Defendant supplied a fictitious address of its authorized its Bank. As a result, the Bank of India released the full sets of the Original Bill of lading No. Nav/Mba/06518, the title to the consignment directly to the Defendants’ appointed nominee Bank’s address.

11. The Plaintiff learnt that the appointed nominee bank did not receive the original Bill of lading. The Plaintiff has reason to believe that the said original Bill of lading No. Nav/Mba/06518 has either been misplaced or the same is currently in the custody of the Defendant.

12. The Defendant did not pay or settle the purchase price of Usd 67200. The Plaintiff claims that they are not entitled to clear the consignment the subject of B/L No. Nav/Mba/06518. The plaintiff’s case was that the defendant had no right or title to the consignment, which was at the port of Mombasa awaiting clearance by the Defendant.

13. After perusing the Plaintiff and documents I am satisfied that the plaintiff has proved their case. The issue 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.”



14. 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.”

15. I therefore allow, the suit with costs of 4000 Usd together with transshipment costs.

Determination

16. The upshot of the foregoing is that I make the following determinations:-

- a. It is declared that the Defendant has no right to the consignment the subject Bill of lading Number Nav/Mba/06518 and that the consignment is lawfully the property of the plaintiff, as an unpaid seller.
- b. An injunction is hereby issued to restrain the defendant, their agents and assignees from taking possession or in any way interfering with goods or consignment under the bill of lading Number Nav/ Mba/06518.
- c. An order for the release of the consignment the subject of the bill of lading number Nav/ Mba/06518 on the plaintiff and/or to the plaintiff's appointed agent to be repatriated back to the country of origin or such other destination of the plaintiff's choice subject to payment of all taxes, port charges and shipping line charges and adequate indemnity against the holder in due course of the bill of lading.
- d. Costs of 4000 Usd together with transshipment costs.

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

KIZITO MAGARE

JUDGE

In the presence of: -

M/s Cootow & Associates Advocates for the Plaintiff

N/A for the Defendant

Court Assistant - Brian

