



**Mingyang Solar Co. Limited v Synthomer Trading Limited; Kenya Ports Authority & 2 others (Interested Parties) (Commercial Suit E004 of 2024) [2024] KEHC 10321 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 10321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL SUIT E004 OF 2024  
F WANGARI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**MINGYANG SOLAR CO. LIMITED ..... PLAINTIFF**

**AND**

**SYNTHOMER TRADING LIMITED ..... DEFENDANT**

**AND**

**KENYA PORTS AUTHORITY ..... INTERESTED PARTY**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**COSCO SHIPPING COMPANY ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff, a Limited Liability Company duly incorporated in China. The Defendant is a Limited Liability Company incorporated in England. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are State Corporations established under the relevant laws in Kenya. The 3<sup>rd</sup> Interested Party is a company incorporated under the laws of Kenya.
2. Through an agreement dated 9/8/2023, the Plaintiff agreed to sell to the Defendant solar panels worth USD 378,029.52. The goods which were in 5 containers no. TRHU4316260, DFSU7455047, TRHU5397712, TRHU7276670 and OOCU8383761, under the Bill of Lading No. OOLU8894674950, were shipped from the Port of China to the Port of Mombasa for onward transmission to Uganda. The draft Bill of Lading was sent *via* email to the Defendants, for purposes of paying 100% for the good within 10 days after the receipt of the B.L as per the agreement.



3. The Plaintiff came to learn that the Defendants using a forged Bill of Lading were able to clear one container no. OOCU8383761, without making any payments. Upon discovery of the fraud, the matter was reported to the 3<sup>rd</sup> Interested Party and the Police both in Kenya and Uganda.
4. The Plaintiff now seeks orders to have the unaffected containers be reshipped back to China. The Plaintiff also prays for Special and General damages, and costs of the suit.
5. The Defendant and the Interested Parties did not file their Statement of Defence. The 3<sup>rd</sup> Interested Party filed a Replying Affidavit to the Application which was filed together with the Plaintiff, which was dated 29/1/2024. The 3<sup>rd</sup> Interested Party had no objection to the containers being reshipped back to China save for payment of demurrage charges.
6. The 2<sup>nd</sup> Interested Party only filed the Notice of Appointment of Advocates dated 29/1/2024, but no pleadings were filed.
7. Since the suit was undefended, it was ordered that the matter be disposed of by way of affidavit and filed pleadings as prayed by the Plaintiff.
8. The issue for determination is whether the Plaintiff has proved its case on a balance of probabilities.

### **Analysis**

9. Whereas the Defendant and the Interested Parties failed to defend the suit, the burden of proof still remains with the Plaintiff. The Court of Appeal in the case *Charterhouse Bank Limited (under Statutory Management v Frank N. Kamau* (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”
10. This court shall consider the Plaintiff’s case on merits. It is a fact that the Defendant was a fraudster who managed to clear one consignment save for the 4 consignments currently under the custody of the Port Police. In *Black’s Law Dictionary* (Eighth edition) fraudulent misrepresentation is defined as;

“A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it”.
11. The Defendant cleared one container using a forged Bill of Lading and they did not pay for the goods. The Plaintiffs have already suffered loss. Particulars of fraud were pleaded and proved.



12. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, it was stated as follows;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

13. Having proved fraud on the part of the Defendant, I find that the Defendant was in breach of the agreement dated 9/8/2023. Further, I find that the Plaintiff is the rightful owner of the goods still being held at the Port Police in Mombasa. By denying the Plaintiff the reliefs sought for the reshipment of the remaining cargo, would be condemning it to further loss.

14. On the prayer for permanent injunction, the Defendant having fraudulently cleared one container without paying for the goods, the company must be stopped from continuing, or make any attempts to clear further containers.

15. The Plaintiff also sought for special and general damages. On Special damages, the law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR). The Plaintiff did not plead special damages nor were they proved. The prayer fails.

16. On General damages, the award is always at the discretion of the trial court. That discretion must however be exercised judiciously in accordance with the law. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:

...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...

17. However, I find that from the pleadings, it cannot be discerned the damages suffered by the Plaintiff considering there was no testimonial or documentary evidence in support of the same. The prayer fails.

18. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In the present circumstances, I see no reason why I should deny the Plaintiff costs of the suit.

19. The upshot is that this court makes the following orders: -

- i. The Defendant is found to be in breach of the contract dated 9/8/2023.
- ii. A permanent injunction is hereby issued against the defendant as per prayer No. “b” in the Plaintiff.
- iii. That an order of reshipment of the four (4) containers to China is hereby granted.
- iv. That order (iii) above is subject to payment of demurrage charges and statutory fees due and owing to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.
- v. That the prayer for Special and General damages is hereby dismissed.



vi. That costs of the suit to be borne by the Defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of: -

Njuguna Advocate for the Plaintiff

Cheruiyot Advocate for 1<sup>st</sup> Interested Party

Edgar Isutsa Advocate h/b for Chebola Advocate for the 2<sup>nd</sup> Interested Party

M/S Kagoni Advocate for 3<sup>rd</sup> Interested Party

Barile, Court Assistant

