



REPUBLIC OF KENYA



**KENYA LAW**  
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**Corrugated Sheets Limited v Blue Nile (E.A.) Limited (Civil Suit  
E018 of 2021) [2023] KEHC 20105 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E018 OF 2021  
DKN MAGARE, J  
JULY 3, 2023**

**BETWEEN**

**CORRUGATED SHEETS LIMITED ..... PLAINTIFF**

**AND**

**BLUE NILE (E.A.) LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This is a claim for payment for money arising from supply of goods at the defendant's request Vide an Amended Plaint dated 28/9/2021 the Plaintiff sought the following: -
  - a. Payment for assortment of assorted roofing material - Kshs. 68,122,264.07
  - b. Costs.
  - c. Interest at prevailing Commercial rates.
2. The defendant filed suit and denied the claim. The matter came before me for hearing. I Decline an adjournment and ordered the parties to proceed. The parties proceeded and the plaintiff testified. The plaintiff produced a list of documents.

**Burden of proof**

3. The burden of proof is on whoever asserts. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any



particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

4. 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.”

5. 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.”

6. The witness Maurice Ouma, was an accountant. He stated that the defendants with are customers, they made sure that all machines were obtained through a local purchase order. They also maintained a full ledger activities of the Defendant in their books. The vehicles that were delivering the goods and their respective drivers signed. They produced as document 2 – 37 invoices for the supplies, [pages 38 – 61 delivery notes duly signed and exhibits 62 – 62 the Local Purchase orders.
7. The Defendant was paying by cheques till June 2019, when they were dishonored upon presentation. Some cheques were cleared in August, 2019. There were no cash replacement for exhibits 69 – 76 being unpaid cheques.
8. It is the Plaintiff’s statement that for all outstanding balances they have sales invoice, signed delivery notes and the local purchase orders. The said invoices were not disputed. They were also audited by Kenya Revenue Authority and the Plaintiff’s auditors.
9. The defendant did not testify in spite of being given time to testify, the defendant failed to testify. The Plaintiff’s evidence is as such un rebutted. In the case of the *Charterhouse Bank Limited (under Statutory Management Vs. 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. The plaintiff filed submissions on 5/4/2023. They relies on Sections 3(1) of the *sale of goods Act*, the Decision in *Isaac Mugweru Kirabi T/A Isamu Refri-electrical s =vs= Net Plan East Africa ltd* (2018) eKLR, *Consolata Anyango Ouma versus South Nyanza Sugar Co. Ltd., Kenya Breweries =vs= Natex Distributors* (2004) eKLR and *standard Chartered Bank Ltd =vs= Intercom Services Ltd & Others* (2004) eKLR.
11. Regarding failure by the defence to call witnesses, the plaintiff relied on the decision of Christine Otieno Caleb =vs= Attorney General (2014) eKLR *Notex Knitwear Ltd =vs= Gopitex Knitwear Mills ltd =vs= Trust bank Ltd =vs= Paramount Commercial Bank & 2 Others Karuru Munyororo versus Joseph Ndumua Murage and another No. 95 of 1988, Janet Kaphiphe Ouma and another =vs= Marie Stpopes International (Kenya) Kisumu HCCC 68 of 2007 and Inter chemise EA Ltd. =vs= Nakuru Verstiary Center Ltd. Nairobi HCCC 165 of 2000 and Finally DT Dobie & Co. ( K ) ltd =vs= Wanyonyi Wafula Chebuka.*

## Analysis

12. The plaintiff's claim is liquidated. In *DAVID BAGINE vs MARTIN BUNDI* [1997] eKLR, the Court of Appeal stated as doth: -

"It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

"...special damages in additon to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

13. The burden of proof was on the plaintiff by dint of Section 107, 108 and 109 of the *Evidence Act*. The same provide as follows: -

" 107. Burden of proof,

- (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. Incidence of burden,

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. Proof of particular fact

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.

14. On the other hand, the LPO were issued by the Defendant. They knew whether or not cheques for payment cleared. They had a bank account wherein the cheques were to clear. They tendered no evidence. It is only them who knew. Whether a debt has been cleared. Section 112 of the Evidence Act binds them, it states:-

“ 112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

15. Mere denial of a debt does not suffice in the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

“ The main object of this rule and r. 14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

16. The evidence being un rebutted and it is cogent evidence, I belief the same. In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR, the court, C. Kariuki, stated as follows: -

“ 51. The appellant chose not to call any witness despite it having filed a defence. In *Shaneebal Limited vs County Government Of Machakos* [2018] eKLR, ODUNGA J while quoting with approval various court decisions held as



follows (in relation to failure to tender evidence in support of averments in a defence:

“.....According to Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff’s evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:

Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth....”

17. I have gone through the invoices. I am satisfied that the Plaintiff has proved their case. I therefore allow the same with costs.

#### **Determination**

18. The upshot is that I make the following orders: -
- a. I enter judgment for the plaintiff against the defendant for a sum of Ksh 68,122,200/=.
  - b. Costs of Ksh. 800,000/=
  - c. Interest on (a) 14% from the date of filing till payment in full.
  - d. Stay for 30 days.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3<sup>RD</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Mr. Achoka for the plaintiff

No appearance for the Defendant

Court Assistant - Brian

