



Xtreme Media Solutions Africa Limited v Jays Pyrotechnicslimited (Commercial Appeal E145 of 2023) [2025] KEHC 6859 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E145 OF 2023**

RC RUTTO, J

MAY 16, 2025

BETWEEN

XTREME MEDIA SOLUTIONS AFRICA LIMITED APPELLANT

AND

JAYS PYROTECHNICSLIMITED RESPONDENT

(A partial appeal from the judgment and decree of the Principal Magistrate's Court at Nairobi (C.K. Cheptoo, PM) delivered on 6th June 2023 in MCCC No. E1226 of 2021)

JUDGMENT

1. This is an appeal against the judgement of delivered on 6/6/2023 in Nairobi MCCC No. E1226 of 2023.
2. The respondent filed a plaint dated 8th September 2021, seeking the following reliefs;
 - a. Payment of Kshs.4,379,046.58 being the outstanding contractual balance that the Appellant owed the Respondent.
 - b. Cost of the suit
 - c. Interest from the date of filing suit until payment in full
 - d. Any other relief deemed fit by the Honorable Court.
3. The appellant entered appearance and filed its statement of defence dated 6th October 2021. It denied the claim praying that the suit be dismissed.
4. The trial Court delivered judgment dated 6/6/2023, unfortunately the Record of Appeal does not contain the complete judgment or decree from the trial Court.



5. While I am unable to establish the final award by the trial court, from the partial judgment in the Record of Appeal the trial Court found that the appellant was not in breach of contract as non-payment was due to a dispute on the amount owed. It further found that the respondent's claim of an outstanding balance of Kshs.2,276,176.00 was not disputed. Accordingly, it entered judgment in that sum together with costs and interest.
6. Dissatisfied with those findings, the appellant filed its memorandum of appeal dated 4th July 2023 raising four grounds of appeal summarized as follows: the award on special damages of Kshs.2,276,176.00 was not specifically pleaded and proved; the final orders were inconsistent with the substantive findings of the judgment to the extent that there was no breach of contract but the trial magistrate went ahead to award special damages; the amount in special damages was wrongly found to be undisputed; the learned magistrate erred in finding that the email of 10th June 2020 amounted to an admission of the sums owed; and the appellant's submissions were not considered.
7. The appellant prayed that the appeal be allowed by reviewing and varying the award on special damages. It further prayed for costs in this appeal and of the suit.
8. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 3rd October 2024. The respondent filed its written submissions dated 8th November 2024.
9. The appellant submitted that while the learned magistrate correctly found that the interest sum charged by the respondent was wrong and ought to be disregarded, the court proceeded to award special damages of Kshs. 2,276,176.00 which was not backed by any evidence. It maintained that there was no admission of indebtedness and for that reason, the trial magistrate was in error.
10. It was their submission that they had challenged some of the invoices and figures embedded in the statement of accounts furnished by the respondent thus the same was disputable. They further contended that the amount in special damages was not pleaded and proved thus they urged this court to allow the appeal.
11. The Respondent, at the outset, pointed to the incompleteness of the record of appeal and urged the court to rely on the court record in the trial court file.
12. The respondent submitted that the appellant and the respondent were in a contractual relationship whereby it supplied goods, documented in pro-forma invoices, purchase orders and statements of account, to the appellant. That the appellant paid for a portion of the goods, but it owed a balance of Kshs.2,276,176.00 giving rise to the suit at trial.
13. It was the respondent's submission that the trial court correctly found that the appellant was indebted to it on the strength of the documents it adduced at trial; a fact that was also admitted by the appellant's witness. That the sum awarded was specifically pleaded and proved. For those reasons, it prayed that the appeal be dismissed with costs.
14. As rightly pointed out by the respondent the Record of Appeal as filed by the appellant lacks several pages. Pages 2,4 and 6 of the trial Court's judgement as well as pages 2,4,6,8,10 and 12 of the proceedings are missing.
15. Under Order 42 Rule 13(4) of the Civil Procedure Rules certain documents must be contained in the Record of Appeal for the same to be considered complete. These are, the memorandum of appeal, the pleadings, proceedings and the Judgment, Order or Decree appealed from.



16. The consequence of an incomplete record of appeal was settled by the Supreme Court in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* (2015) eKLR the learned judges observed that:-

“Without a record of appeal a court cannot determine the appeal before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by the law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

17. In the instant case with the incomplete judgement and proceedings the Court is not able to carry out the role expected of it on a first appeal, that is to review and re-evaluate the evidence as contained in the Record of Appeal. As held in *Mursal-v-Manese* (2022) eKLR:

“A first Appellate Court is mandated to re-evaluate the evidence presented before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first Appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER* [1968] E.A. 123 AND IN *PETERS -VS- SUNDAY POST LTD* [1958] E.A. page 424.”

18. The proceedings of the trial Court are so critical in a first appeal. Consequently, where they are incomplete, as in the instant case, the Court is unable to review, re-evaluate and consider the merits of the appeal. The Appeal is incompetent and therefore must fail.

19. For the above reasons I find that the Appeal herein is incompetent and I therefore strike it out for lack of a complete Record of Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Sam Court Assistant

