



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kenya Power and Lighting Company Limited v Centoil Limited (Civil Appeal E034 of 2024) [2025] KEHC 7822 (KLR) (4 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E034 OF 2024
RM MWONGO, J
JUNE 4, 2025**

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

CENTOIL LIMITED RESPONDENT

(Appeal arising from the decision of Hon. Mercy N. Nkirote in Embu SCCOMM No. E005 of 2024 delivered on 02nd April 2024)

JUDGMENT

The Appeal

1. By a memorandum of appeal dated 12th April 2024, the appellant seeks the following orders:
 1. That the Honourable Court do allow this appeal;
 2. That Honourable Court do set aside the judgement entered against the Appellant on the 02.04.2024 in Embu SCCOMM. No. E005 of 2024 (Centoil Limited v Kenya Power and Lighting Company);
 3. That in the alternative, the Appellant be granted leave to be allowed to defend the suit namely Embu SCCOMM. No. E005 of 2024 (Centoil Limited v Kenya Power and Lighting Company) on its merit;
 4. That upon the grant of prayer 3 above, leave be granted to the Appellant to file its list of witnesses and the witness statements within 14days from the date of this order;
 5. That costs of the Appeal be awarded to the Appellant
2. The appeal is premised on the grounds that:



1. That the Learned Trial Magistrate erred in law and in fact to consider that there was no contract between the Appellant and Respondent as stipulated in Section 68 of the Public Procurement and Disposal Act;
2. That the Learned Trial Magistrate erred in law and in fact to consider that there was a breach in a non-existent contract between the Appellant and Respondent;
3. That the Learned Trial Magistrate erred in law and in fact to consider that the Appellant was not accorded a right to a fair heard as enshrined under Article 50 of *the Constitution* of Kenya;
4. That the Learned Trial Magistrate erred in law and in fact to consider that the Respondent was statutory time-barred from instituting proceedings against the Appellant as stipulated in Section 4 of the *Limitation of Actions Act* as the subject matter allegedly emanated from purported contracts entered into in 2011 and 2012;
5. That the Learned Trial Magistrate erred in law and in fact in determining the suit in favour of the Respondent who did not discharge the burden of proof to the required standard; and
6. That the Learned Trial Magistrate erred in law and in fact by pronouncing its judgment outside the stipulated 60 days period contrary to section 34 of the *Small Claims Court Act*.

Brief Background

3. The respondent filed a claim against the appellant seeking judgment in the sum of Kshs.581,750.27/ = plus costs and interest. The appellant claimed that it was contracted by the respondent to offer labour and transportation services through a renewable contract in 2017. The appellant delivered its services for 2 of the respondent's projects under 2 different contracts, but the respondent refused to pay the total amount owed. In the process of following up on such payment, the respondent caused the appellant's director to be wrongfully arrested on criminal charges. In support of its case, the appellant produced letters of award for the said jobs among other documents.
4. In its response to the claim, the respondent denied owing the appellant any money and urged the court to dismiss the claim with costs.
5. The claim was canvassed by way of written submissions. The Adjudicator considered the submissions and considered the issue of whether a contract existed between the parties. She found that the elements of a contract existed, and that there was a valid binding contract between the parties. As to whether there was breach of the said contract, she referred to the cases of Jackline Njeri Kariuki v Moses Njung'e Njau [2021] KEHC 4818 (KLR), National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR) and Kirugi & Another v Kabiya & 3 others (1987) KLR 347. She found that the contract was breached. The Court held that the appellant had proved the claim and so judgment was entered in its favour.

Parties' Submissions on the appeal

6. The court directed that parties to file written submissions and they both complied.
7. The appellant, in its submissions, relied on sections 28 and 68 of the Public Procurement and Disposal Act (PPDA) on the validity of its contracts with the respondent. It relied on the case of EPCO Builders Ltd v County Government of Kilifi [2017] KEHC 6356 (KLR) and the provisions of Article 50 of *the Constitution* and section 38 of the *Small Claims Court Act*. It stated that it was served late and denied a chance to properly respond to the claim. Moreover, it decried the fact that its advocate, who was unavailable to file submissions, was not accommodated by the court.



8. Further reliance was placed on the cases of *Juma & another v Republic* [2003] KECA 183 (KLR), *South Nyanza Sugar Company Limited v Charles M. Nyantaha* [2022] KEHC 688 (KLR), *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another* [2016] KECA 804 (KLR) and *Divecon Limited v Samani* [1995-1998] 1 EA P.48 which was cited in the case of *Michael Maina Nderitu v Kenya Power and Lighting Co. Ltd & another* [2013] KEELRC 84 (KLR).
9. The respondent relied on the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR). It argued that the parties are bound by their contracts which cannot be re-written by the court. It urged that the claim was properly heard and that the appellant's advocate could have asked for help from her colleague at the point of filing submissions.
10. It was its submission that the claim before the Adjudicator was not time barred. It relied on section 4 of the *Limitation of Actions Act* and the case of *Banaba O. Oyugi v South Nyanza Sugar Co. Ltd* [2019] KEHC 8955 (KLR). That the modification of the duration of the contract was duly communicated while the contract was still existing. It relied on the cases of *Ali Abdi Mohamed v Kenya Shell & Company Limited* [2017] KECA 590 (KLR) and *Biosystems Consultants v Nyali Links Arcade* [2023] KEHC 21068 (KLR).

Issue for Determination

11. The issue for determination is whether the appeal has merit.

Analysis and Determination

12. It is worth reiterating that the appellate court makes its decision based on a complete and full review of the evidence in the record of the trial court. This was the holding in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, wherein the Court held:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

13. The respondent stated that it was awarded two jobs or assignments by the appellant, as follows:
 - a. The Siakago rotten poles replacement under Award Reference Number 1252XXXX1946 whose consideration was Kshs.346,740.24/-; and
 - b. The system reinforcement of Thiba Sub-location under Award Number 12520XXXX41835 whose consideration was Kshs.235,010.03/-.
14. It claimed that it submitted invoices to the appellant for payment of the amount. The nature of work was to provide transportation services while the appellant provided the materials and manpower for the projects. Part of the documents produced was a letter dated 02nd November 2011 for the first assignment, whose reference is marked as “letter of award”. The letter contains the price of the contract and a requirement that an acceptance of the award be provided by a specified date being no later than 17th November 2011. The respondent sent an acceptance of the award through a letter to the appellant dated 16th November 2011.



15. There is also a letter of award dated 10th September 2012 through which the respondent engaged the appellant for a second project. This letter also named the contract price for that second project. For this second letter, there was no acceptance of award.

16. Both letters of award are drawn on the appellant's letterhead and they are signed by the relevant official. For all intents, these letters comply with section 135 of the PPADA which gives the prerequisites for creation of procurement contracts. That provision is as follows:

- “(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.
- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.
- (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.
- (6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—
- (a) Contract Agreement Form;
 - (b) Tender Form;
 - (c) price schedule or bills of quantities submitted by the tenderer;
 - (d) Schedule of Requirements;
 - (e) Technical Specifications;
 - (f) General Conditions of Contract;
 - (g) Special Conditions of Contract;
 - (h) Notification of Award.
- (7) A person who contravenes the provisions of this section commits an offence.”



17. Under common law, a contract is created where there is an offer, acceptance, consideration and most importantly, the parties must have the legal capacity and intention to enter into a contract. It may be written or unwritten. In the case of the first letter of award dated 02nd November 2011, the elements of a contract clearly appear and were met. The letter itself is an offer which includes a timeline for an acceptance.
18. The acceptance was received from the respondent through its letter referencing the applicant's letter and accepting the terms therein. Both the letter of award and acceptance of award bring the parties to a "consensus ad idem" regarding the consideration which was the sum of Kshs.346,740.24/-. The intention created from the letter of award and its response is that the respondent would provide transportation services to the appellant for the named project to be undertaken. Both parties consciously intended to create legal obligations. A contract was formed.
19. The elements of a valid contract were discussed by the Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, as follows:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”
20. The second letter of award was sent to the respondent by the appellant. It was dated 10th September 2012. It is not known if the letter was accepted such that the obligation was created, as there is no such evidence. However, by the clear conduct of the parties through and following the letter of award dated 02nd November 2011, there is communication of similar terms and there is also the element of consideration. It was intended that the respondent would be provided transportation services while the appellant would provide the materials and expertise for the work to be done. It was not shown that the transportation services were not rendered, and in fact invoices for transportation were issued.

Conclusions and Disposition

21. The letters of award, as stated herein earlier, were drawn in compliance with section 135 of the PPDA. Both letters amount to valid and enforceable contracts in law.
22. In light of the foregoing, the appeal lacks merit and it is hereby dismissed with costs to the respondents.
23. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 4TH DAY OF JUNE, 2025.

.....

R. MWONGO

JUDGE

Delivered in the presence of:



1. Ms. Kihara for Appellant
2. Ms. Nyaga holding brief for Mukami for Respondent
3. Francis Munyao - Court Assistant

