



**SGS Kenya Limited v Fontana Enterprises Limited (Civil Appeal
587 of 2019) [2025] KEHC 8107 (KLR) (Civ) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 587 OF 2019

WM MUSYOKA, J

JUNE 10, 2025

BETWEEN

SGS KENYA LIMITED APPELLANT

AND

FONTANA ENTERPRISES LIMITED RESPONDENT

(Appeal from the judgement and decree of Hon. GA Mmasi, Senior Principal Magistrate, SPM, in Milimani CMCCC No. 6159 of 2016, of 16th September 2019)

JUDGMENT

1. The suit, at the primary court, was by the respondent against the appellant. It was a negligence claim, with respect to goods that had allegedly been inspected, by the appellant, for the respondent, and subsequently cleared to be fit and authentic, and meeting the requisite standards and specifications, only to turn out not to be so. The respondent sought a declaration that the appellant had been negligent and had issued a false certificate of confirmation; special damages of Kshs. 4,879,467.00; interests on the special damages; general damages; and costs.
2. The appellant responded to the suit, by denying liability, but conceding that it was an agent for Kenya Bureau of Standards, whose mandate was confined and limited to the point of destination or entry, but not the country of origin, of the goods the subject of importation. The appellant, nevertheless, blamed the respondent for omissions to ensure that the aluminium sulphate, the subject of the verification, met the standards of Kenya Bureau of Standards, and its own specifications.
3. The matter was canvassed by way of viva voce evidence. Both sides presented a witness each. Judgement was delivered on 16th September 2019. The court found in favour of the respondent, on the basis that the appellant offered services globally, and did provide the same in India, for the purpose of the goods the subject of the suit, and availed, to the respondent, the appropriate certification, to facilitate



importation of the sub-standard goods. It was concluded that that certification misled the respondent to import sub-standard goods.

4. The appellant was aggrieved; hence he filed the memorandum of appeal herein, on 16th October 2019, dated 15th October 2019. The grounds, in the memorandum of appeal, revolve around whether there was a contract between the parties; whether the appellant issued a certificate of conformity for the consignment belonging to the respondent; holding that the appellant issued certification on the basis of a non-existent contract; holding the appellant to be negligent where no duty of care was owed; evidence tendered and submissions made by the appellant being ignored; and whether the respondent sued the agent instead of the principal.
5. Directions were given, on 20th December 2023, for canvassing of the appeal by way of written submissions. I see on record submissions filed by the appellant, dated 4th April 2024, and by the respondent, dated 16th May 2024.
6. In its written submissions, the appellant withdraws the ground that the respondent sued the agent rather than the principal. It reduces the other grounds into two, whether the appellant was liable for negligence and whether damage was proven. It is submitted that there was no contract between it and the respondent, upon which negligence could be attributed for the special damages claimed. It is further submitted that the loss was not proved.
7. On its part, the respondent argues all the grounds in the memorandum of appeal and submits in support of the decision of the trial court.
8. I believe that there are only two issues for determination, based on the grounds of appeal in the memorandum of appeal, being whether there was a contractual relationship between the appellant and the respondent, and whether the appellant acted negligently, and in the process exposed the respondent to loss and damage.
9. On the first issue, what I can gauge from the record, is that the appellant had been contracted by Kenya Bureau of Standards, together with two other entities, to offer pre-export verification of conformity to standards services. The appellant was the sole entity appointed to provide services globally, and covered, among other areas, the Indian sub-continent.
10. The respondent won a bid with Nairobi Water Company, in 2008, for supply and delivery of aluminium sulphate. Local purchase orders, LPOs, were issued in early 2009. It would appear that there were shipments from China, that had been inspected by the appellant, which went through successfully. The shipment in dispute was from India. There is documentation that the shipment was handled by the appellant. There is also documentary evidence pointing to a contractual arrangement between the appellant and the respondent. The appellant acknowledged the same through the documents it relied on at the trial. The defence statement equally conceded that inspection was done by the appellant, through its offices in India. It was not disputed that Kenya Bureau of Standards had contracted Societe Generale de Surveillance, SGS, globally, whenever stationed.
11. From a review of the material placed on record by both sides, there was adequate proof of a contractual relationship between the parties hereto, and the trial court did not err in finding that there was a contract.
12. The other issue argued by the appellant is on damages. There are two elements to the damages. The respondent claimed and was awarded general damages based on negligence. The argument was that the certification was done negligently, with the consequence that sub-standard goods were cleared for exportation, but when they arrived at the port of entry they were rejected. That exposed them



to destruction, with a resultant loss to the respondent. There was a duty of care. The appellant was under a duty to act with diligence, to ensure that the goods or consignment met the standards of Kenya Bureau of Standards and the specifications of the respondent. The clearance of goods that did not meet that standard and the specifications, led to the goods being rejected at the port of entry, which meant that the duty of care was breached. Any loss occasioned, would attract general damages, for the tort of negligence, and special damages, for the actual damage or loss.

13. The appellant does not appear to have an issue with the general damages. His submissions are on the special damages, with respect to loss of earnings, bank loan charges, letter of credit charges, SGS inspection charges and the performance bond expense.
14. The local purchase order from the Nairobi Water & Sewerage Company was for Kshs. 5,190,000.00. The respondent ordered aluminium sulphate at a cost of Kshs. 1,980,000.00 or USD 24,750, which was denied entry at the port for not meeting the standards of Kenya Bureau of Standards. The respondent expected to earn Kshs. 3,210,000.00, which was proved. The bank guarantee of Kshs. 1,200,000.00, by Equity Bank, was conditional on the performance of the local purchase order, and the failure to supply the goods meant that Nairobi Water & Sewerage Company was paid the moneys the subject of the performance bond.
15. For the SGS inspection fees, of Kshs. 23,000.00, only three receipts were produced, for Kshs. 464.00, Kshs. 2,200.00 and Kshs. 3,480.00; totalling to Kshs. 6,144.00. The respondent did not produce a receipt to confirm payment of the bank loan, charges of Kshs. 150,000.00 and the fact that it was contained in the contract, was not proof of payment. The receipt of Kshs. 5,000.00, for the import declaration form fees, was not proved, as the receipt produced related to a different shipment, from China. There was also no receipt produced with respect to the Kshs. 80,000.00, for the letters of credit charges. In view of the omission, to prove those expenses, the total special damages should have been Kshs. 4,507,771.00, and not Kshs. 4,879,467.00.
16. In the end, the appeal only partially, succeeds, to the extent indicated in paragraph 15 hereabove. The appeal is allowed in those terms. Each party shall bear their own costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 10TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Kenneth Wilson, instructed by Muriu Muigai & Company Advocates LLP, Advocates for the appellant.

Ms. Waliula, instructed by Murangasia & Associates, Advocates for the respondent.

