



**Setpoint East Africa Limited & another v Zhongmei Engineering Group Limited  
(Civil Appeal E004 of 2023) [2024] KEHC 8447 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8447 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E004 OF 2023  
WA OKWANY, J  
JULY 4, 2024**

**BETWEEN**

**SETPOINT EAST AFRICA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**DEMO CONTRACTORS AND SERVICES LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ZHONGMEI ENGINEERING GROUP LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment in the Chief Magistrate's Court at Nyamira,  
Civil Case No. 100 of 2017 by Hon. M.C. Nyigei, delivered on 11th January 2023)*

**JUDGMENT**

1. The Appellants herein were the Plaintiffs before the trial court where they had sued the Respondent seeking the following reliefs: -
  - i. General damages for breach of contract
  - ii. Kshs 2,000/= being transportation costs per tonne x 36 tonnes totalling to Kshs 72,000/= per day.
  - iii. An order for the release of the 1<sup>st</sup> Appellant's company vehicle registration No KBZ 054W.
  - iv. Costs of the suit.
2. The 1<sup>st</sup> Appellant's case was that sometime in November 2016, it entered into a road construction contract with the Respondent for the sole purpose of carrying out concrete works, in particular, the making of culverts on Chebilat, Ikonge- Chabera Road. Pursuant to the service contract, the 1<sup>st</sup> Plaintiff company also engaged the service of the 2<sup>nd</sup> Plaintiff company for the purpose of transporting ballast materials to the said road construction site. The Appellants averred that the 2<sup>nd</sup> Appellant was on or about 30<sup>th</sup> May 2017, delivering ballast to the site when suddenly and without any requisite notice,



the Respondent's agents impounded its Motor Vehicle Registration No KBZ 054W thereby denying the 2<sup>nd</sup> Appellant the user of the said motor vehicle and occasioning him loss of business and damage.

3. Default judgment was entered in favour of the Appellants. The said judgment was however set aside after which the Respondent filed a Statement of Defence wherein it denied the contents of the Plaint and faulted the 1<sup>st</sup> Appellant for failing to honour its part of the contract and for engaging the 2<sup>nd</sup> Appellant in a sub-contract without notifying them (Respondent).
4. The trial court delivered its judgement on 11<sup>th</sup> January 2023 in which it dismissed the Appellants' case on the basis that it was not proved to the required standards.
5. Aggrieved by the decision by the trial court, the Appellants instituted this appeal in which they raised the following grounds of appeal: -
  1. The Learned Magistrate drew an erroneous conclusion and/or made an erroneous finding by not analysing and synthesizing the evidence and documents tendered by the Appellants in support of the case/claim in the lower court.
  2. The finding that the Appellants ran away and vacated the contract site was an erroneous inference on the part of the Learned Magistrate granted the abundance of evidence as late as 12<sup>th</sup> July 2017, where the Appellants were still on site long after 30<sup>th</sup> May 2017 when the Respondent ceased instructions and the supply of materials to the Appellants as per the agreed terms of engagement.
  3. The Learned Trial Magistrate erred in law and fact by not finding that the Appellants claim/suit in the lower court was apt and borne of frustration of contract by the Respondent to the detriment of the Appellant.
  4. The Learned Magistrate failed to appreciate the effect of documents filed by the Respondent pertinent to the Kenya Revenue Authority Withholding Tax Returns as the Respondent presented erroneous and fabricated tax returns and loaded the same on the Appellants in breach of the fundamental nature of the contract amounting to breach and frustration of the contract by the Respondent.
  5. The Learned Magistrate failed to find inaccuracies and exaggerations in the tax returns of the Respondent and also failed to appreciate that the Respondent did frustrate the contract to circumvent the Appellant's rights in the subcontract with regard to statutory deductions that were incorrectly/inaccurately presented by the Respondent.
  6. The Defendant's/Respondent's documents were admitted on superficial, casual and improper scrutiny by the Learned Magistrate leading to an erroneous finding on payment and thus ignored the contractual parameters binding the Appellant and the Respondent.
  7. The Learned Magistrate erred in law and fact that the complaint filed at the police station by the Respondent did not parse entail and was not equivalent to desertion from the site or breach of contract by the Appellants or their agents.
  8. The Learned Trial Magistrate was in error to deny the Appellants the entitlement for workers for 3 months, rent for 3 months and compensation for idling/non-use of equipment on site for three months awaiting instructions and materials from the Respondent as envisaged in the contract.
  9. The Learned Magistrate failed to appreciate the reasonable and contractually germane parameters of mobilization of equipment and personnel to the site and or premature



demobilization and thus arrived at erroneous finding instead of the finding that the Respondent had frustrated the contract.

10. The Learned Magistrate's finding pertaining to termination of the contract was an error as termination was not in issue as what was in issue was frustration of the contract and of breach of contract through erroneous and fabricated tax returns purported by the Respondent and also through withholding supply of materials and site instructions to the Appellant.
11. The Learned Magistrate erred in law and fact by introducing a clause in the agreement that was not a term of the contract between the Appellants and the Respondent.
6. The Appellants seek orders that the appeal be allowed and that the judgment of the trial court be set aside and or reviewed. They also pray for the costs of the appeal and the case before the trial court.
7. The Appeal was canvassed by way of written submissions which I have considered.

### **The 1<sup>st</sup> Appellant's Submissions**

8. The 1<sup>st</sup> Appellant submitted that the trial magistrate did not give reasons for the finding that it had downed its tools when the evidence on record showed that its vehicle had been impounded. It was submitted that the trial court misapprehended the facts of the case by finding that the contract between the parties had been frustrated as this was not an issue raised by the Appellants in the pleadings.
9. It was submitted that the trial court erred in finding that the Respondent had not terminated the contract by any oral or written means yet their conduct of impounding the subject motor vehicle and subsequent failure to engage them in a friendly negotiation amounted to terminating the contract.
10. It was submitted that the Respondent did not tender any evidence to show that their contract contained a requirement for the production of original receipts. According to the Appellant, the absence of such a requirement meant that the balance of probability tilted in favour of the Appellants. Reference was made to the decision in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co. KG (UK Production)* (2010) UKSC14, (45) where it was held that:-

“a binding contract depends upon not the parties' subjective state of mind, but on 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 required as essential for the formation of legally binding relations.”

11. It was submitted that the Appellants were not indolent and that the trial court erred in failing to address the prayers for general damages for loss of materials and special damages of Kshs 951, 224/=. The Appellant argued that the trial court's judgment was unsatisfactory. The Appellant cited Order 21, Rule 4 and 5 of the *Civil Procedure Rules* which requires the court to state its decision on each issue and the case of *Chandaria v Njeri* (1982) eKLR where the Court of Appeal explained the importance of addressing every issue raised in a suit.

### **The 2<sup>nd</sup> Appellant's Submissions**

12. The 2<sup>nd</sup> Appellant wrote a letter dated 19<sup>th</sup> March 2024, addressed to this Court, in which it denied any association with the present Appeal and indicated that they were neither aware of the Appeal nor did they wish to participate in it.



### **The Respondent's Submissions**

13. The Respondent cited the Appellant's non-compliance of the Court's directions for the filing of a complete Record of Appeal and urged the Court to strike out the Appeal on grounds of an incomplete record.
14. It was submitted that there were glaring contradictions in the Memorandum of Appeal and the Appellant's submissions with respect to the issue of termination of contract. It was the Respondent's case that compensation for termination of contract was not one of the issues before the trial court.
15. It was submitted that the Appeal and its grounds were not coherent and that the Court should not be dragged into an exercise of crafting the appropriate grounds of appeal on behalf of the Appellant. The Respondent urged this Court to disallow the appeal for lack of merit.

### **The Duty of the Court**

16. The duty of a first appellate court was discussed in *Kenya Ports Authority v Kustbon (Kenya) Limited* 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

### **Analysis and Determination**

17. I have considered the trial record, the grounds of appeal and the rival submissions of the parties together with the authorities that they cited. The main issues for determination are as follows:-
  - i. Whether the Appeal is incompetent for lack of a proper Record of Appeal and; depending on the finding on this issue,
  - ii. Whether the Appeal is merited.

### **Whether the Record of Appeal is incomplete and ought to be struck out.**

18. Order 42 Rule 13(4) of the *Civil Procedure Rules* stipulates as follows on the contents of the Record of Appeal: -
  - (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record and that such of them as are not in the possession of either party have been served on that party that is to say: -
    - (a) the memorandum of appeal;
    - (b) the pleadings;
    - (c) the notes of the trial magistrate made at the hearing;
    - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
    - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;



- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

Provided that-

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

19. The Supreme Court pronounced itself on the importance of a complete Record of Appeal in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*, Civil Application No 20 of 2014 (2014) eKLR wherein it referred to its earlier decision in *Law Society of Kenya v Centre for Human Rights and Democracy & others*, Supreme Court Petition No 14 of 2013, as follows: -

- (16) For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the *Supreme Court Rules, 2012* which provides that:-

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;
- (b) a record of appeal; and
- (c) the prescribed fee.

(17) .....

- (36) The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

(37) .....

- (38) The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

- (39) If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.” (Emphasis added)

20. In the instant case, I note that the 1<sup>st</sup> Appellant filed its Record of Appeal on 15<sup>th</sup> September 2023. When the appeal came up for hearing on 9<sup>th</sup> October 2023, the Respondent’s counsel informed the court that the Record of Appeal was incomplete and incorrect as it did not contain certain vital documents. This court then granted the 1<sup>st</sup> Appellant leave to make the necessary corrections but at the subsequent hearing, the 1<sup>st</sup> Appellant had not amended the Record. The failure to correct the Record notwithstanding, this Court once again granted the 1<sup>st</sup> Appellant a further opportunity to file its amended Record of Appeal after which the said Record was filed on 16<sup>th</sup> November 2023.



21. A perusal of the amended Record of Appeal reveals that the documents listed by the Respondent at paragraph 5 of their submissions are indeed, still missing. The question that arises is whether the provisions of Article 159 (2) (d) of the Constitution can rescue of the Appellant’s appeal in this regard.
22. In Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR, the Court of Appeal observed that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.” (emphasis added).

23. I have considered the manner in which the 1<sup>st</sup> Appellant moved the Court through an incomplete Record of Appeal and the subsequent concessions made by the Respondent and the leave granted to the 1<sup>st</sup> Appellant by this Court to correct the anomaly in the Record. It is clear that the 1<sup>st</sup> Appellant was not keen in complying with the orders of this court in as far as filing a complete Record of Appeal is concerned. It is therefore my finding that the provisions of Article 159 of the Constitution cannot cure the 1<sup>st</sup> Appellant’s failure in this case. I note that the said Article aims at curing procedural improprieties, not issues of substantive nature such as an incomplete Record of Appeal as in the present case. 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.
24. I award the Respondent the costs of the appeal.
25. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**W. A. OKWANY**

**JUDGE**

