



Pine Mesa Works Limited v Kenya Power and Lighting Co Ltd (Civil Appeal E1179 of 2024) [2025] KEHC 13494 (KLR) (Civ) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13494 (KLR)

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

CIVIL

CIVIL APPEAL E1179 OF 2024

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

PINE MESA WORKS LIMITED APPELLANT

AND

KENYA POWER AND LIGHTING CO LTD RESPONDENT

(Being an appeal from the judgment and decree of the Hon. B. M. Cheloti (PM) in Nairobi Chief Magistrates Court Civil Suit No. E703 of 2021 delivered on 4th October 2024)

JUDGMENT

Background:

1. Pine Mesa Works Limited, the Appellant herein, instituted Nairobi [Milimani] Chief Magistrates Court Civil Suit No. E703 of 2021 [hereinafter referred to as ‘the suit’] against Kenya Power & Lighting Co. Ltd, the Respondent herein, seeking to recover Kshs. 4,678,780/58 for breach of contract. The Appellant pleaded that it was contracted by the Respondent in diverse dates between 2017 and 2018 to carry out labour and transport construction services which involved the construction and maintenance of powerlines and other projects in various stations across the country.
2. It was its case that upon completion, the Respondent inspected and approved the works it had carried out. Accordingly, it presented to the Respondent invoices totalling Kshs. 4,678,780.58/- for payment. However, in breach of the agreement, the Respondent failed, neglected or refused to make payment.
3. The Respondent challenged the suit. It claimed that it was premature for failure by the Appellant to exhaust the laid down procedures. Separately, it was its case that it had not contracted the Appellant between as alleged to carry out the alleged works at Namanga and Loitoktok depots and if at all such works were done, then it was without its proper authority and procedures. It was its case that if it



invoiced the Appellant, the invoices would be of no import since it did not authorize it to do any works within the alleged locations. The Respondent pleaded that the Appellant's claim was fraudulent and a ploy through forgery and false depositions to facilitate unjust enrichment.

4. Upon taking and considering the evidence, the trial Court found that the Appellant's CR12 No. CPR/2014/185150 which was a Certificate issued by the Registrar of Companies had been doctored. It observed that its rightful CR12 was CR12 No. PVT/2016/031553. The Court then found that the Respondent had established sufficient vitiating factors as to warrant invalidation of the contract. Accordingly, it rendered the contract null and void and dismissed the Appellant's suit.
5. Aggrieved by the decision, the Appellant preferred the instant appeal subject of this judgment.

The Appeal:

6. Through a Memorandum of Appeal dated 14th October 2024, the Appellant urged this Court to set aside the trial Court's judgment on the following grounds: -
 1. That the learned Magistrate erred in law and in fact in finding that the Respondent had established the existence of fraud with contracts awarded to the Appellant whilst the evidence on record do not support such a finding.
 2. That the learned Magistrate erred in law and in fact in inferring fraud from the facts and finding that the Respondent had discharged the evidential burden whereas the superior courts have held that fraudulent conduct must be distinctly alleged and strictly proved to a high standard of proof approaching but below proof beyond reasonable doubt.
 3. That the learned Magistrate erred in law and in fact in failing to distinguish between prequalification exercise and the binding contracts constituted from time to time by the Respondent sourcing for services from the Plaintiff and failed to have regard that the same were not tainted by any fraudulent and or practices resulting in a miscarriage of justice.
 4. That the learned Magistrate erred in law and in fact in failing to have regard to the fact that there was full performance of the contracts in issue which were for labour and transport services and that in law if a person acquires rights under a voidable contract, they cannot afterwards be put in a worse position by its being set aside.
 5. That the learned Magistrate erred in law and in fact in failing to correctly analyse the evidence which showed the Respondent's conduct of ratification.
 6. That the learned Magistrate erred in law and in fact in allowing the Respondent to unjustly enrich itself at the expense of the Appellant and in allowing the Respondent to benefit from its own wrongdoing resulting in miscarriage of justice.
 7. The learned trial magistrate applied the wrong principles and/or considered erroneous, irrelevant and/or extraneous factor in determining the issues before her and she erred by failing to consider the issues and/or points of law and or submissions raised by the Appellant.

The Submissions:

7. In its submissions dated 24th March 2025, the Appellant stated that the claimed falsification of its CR12 Certificate was explained by the fact that the ownership of the Appellant changed hands from the initial shareholder/directors who participated in the tender from one Videlis Kipchumba Rotich to one Wairimu Mumbi Karugu in 2019. It was its case that the Respondent was duly notified of the change of ownership and subsequently, the Appellant was prequalified by the Respondent in the 2019



tenders and offered labour and construction services at Loitoktok FBBU for an initial period of two years that was later extended by six months to May 2022.

8. It was its position that the trial Court's reliance on the internal audit report produced in evidence was hearsay evidence since it originated from the Registrar of Companies who was not called as a witness. The Appellant faulted the trial Court for making an inference and reaching conclusions. The Appellant submitted that the learned trial Magistrate ignored the Respondent's own witness in cross-examination who confirmed that they had waived some conditions. It was its case that the Respondent was duly informed when the ownership of the Appellant changed hands and raised no objection. The trial Court was faulted for failing to distinguish between the process of prequalification and the actual binding contracts which arose once the Respondent issued a Letter of Award. The Appellant submitted that no evidence was placed before the Court that any of the letters of award it had been procured was as a result of fraud or were in any way tainted with illegality.
9. On the issue of legality of the contract, the Appellant submitted that the trial Court's finding was erroneous since it ignored Section 41(2), (3) and 66 of the Public Procurement and Disposal Act. It asserted that the Respondent did not place any evidence, in the nature of letter of termination, repudiation or cancellation, before the Court avoiding the legal relation created by the contract, but simply refused to pay for the services rendered. The Appellant further submitted that the Respondent had unjustly enriched itself at its expense. It claimed that it made payment of the first 14 invoices and refused to pay the outstanding 12 invoices, the subject of the instant suit.
10. In asserting that rights had accrued, the Appellant referred to the decision in *Diamond Hasham Lalji -vs- Cargill Kenya Limited & 3 others* [2017] eKLR where it was observed: -

... When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made.
11. The Appellant was emphatic that the contract was only voidable but rights, unconditionally acquired had not been divested or discharged.

The Respondent's case:

12. Kenya Power & Lighting Co. Ltd challenged the appeal through written submissions dated 8th May 2025. It was its case that upon conclusion of the prequalification exercise, it received complaints relating to the transparency of the said exercise and consequently, it conducted an independent audit investigation where it emerged that several contractors were ineligible for prequalification. It submitted that the Appellant was found to have falsified and submitted a fake CR-12 Certificate that differed glaringly from the one in the repository of the Business Registration Service and, pursuant to Clause 3.38.2 of the tender document as read alongside section 66 of the Public Procurement and Disposal Act, it nullified the contract on account of fraud. To fortify its case, the Respondent referred to the letter from the Registrar of Companies dated 13th March 2018 which confirmed the fraud.



13. On the question whether the trial Court erred in voiding the contract, the Respondent maintained that the Appellant was the author of its own misfortune. The very existence of fraud vitiated and rendered the whole contract null and void. The Respondent called to its aid the decision in *Kibathi t/a Osoro Chege Kibathi & Co Advocates -vs- Musti Investments Ltd* [2024] KECA 270 (KLR) where it was observed that: -

... Our reading of the decisions in *Kenya Pipeline Co. Ltd v. Glencore Energy (UK) Ltd* (supra), *Lazarus Estates Ltd v. Beasley* (supra), among other decisions on fraud and illegalities, leaves no doubt that the law seeks to deny a perpetrator of fraud or an illegality from benefitting from his fraud or illegal conduct.

14. The Respondent submitted that the whole contract was formulated indirect contravention of Article 227 of *the Constitution* and Sections 62, 66 and 89 of the Public Procurement and Disposal Act and to do otherwise would be to sanction illegal conduct and disregard public policy underlying the doctrine of illegality.

15. In the end, the Respondent urged this Court to dismiss the appeal and award costs.

Analysis:

16. Having intently considered the grounds of appeal, the parties' rival submissions and the decisions referred to therein, the issues that arise for determination are as follows: -

- i. Whether the incidence of fraud was established.
- ii. In the event issue (i) above is answered in the negative, whether the suit was proved.

17. This being a first appellate Court, its duty is to re-assess and re-analyse the evidence afresh, with a view to arriving at its own independent findings. In *Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, it was observed that: -

... This being a first appeal, we are reminded of our primary role as a first appellate Court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons Judgment - Nairobi (Milimani) High Court Civil Appeal No. E1138 of 2024 Page 5 of 7 either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* [2000] EA 212.

18. In discharging the said duty, this Court will now deal with the issues in seriatim.

Whether the incidence of fraud was established:

19. Duncan Kiragu testified as PW1. It was his evidence that he is a former Director and the sole Shareholder of the Appellant company. He claimed to have transferred his company but remained as its Manager. It was his evidence that the Appellant was contracted by the Respondent to undertake power installation services and that the Appellant executed the services on various dates from November 2017. He stated that the Appellant then served invoices upon the Respondent for settlement, but the Respondent failed to make the necessary payments amounting to Kshs. 4,678,780/- thereby instituting the suit. He also testified that it was not true that the Appellant was fraudulent since it had neither been investigated nor prosecuted over such allegations. In cross-examination, PW1 referred to his statement and stated that the Appellant was contracted to undertake the works on behalf of the Respondent and even signed a contract to that end. He denied that the Appellant ever forged the CR12 Certificate. In



re-examination, PW1 stated that he was not the owner of the Appellant at the time of the contract. It was his case that the contracts were signed but the Appellant was not given any copy. He claimed further that the Appellant proceeded to carry out the works as agreed and submitted the invoices for payment. He clarified that the letter of award originated from the Respondent and affirmed that the Appellant was neither investigated nor prosecuted for fraud and that in 2019, the Respondent awarded the Appellant another tender.

20. Magu Daniel Ngairi testified as PW2. He stated that he was the Chief Executive Officer of Power Transmission Line Contractors Association, which association was registered under the [Societies Act](#). It was his evidence that he previously dealt with the Respondent as a Contractor and despite the work done, they did not receive payment. On cross-examination, it was his evidence that the Appellant was a service contractor and a member of the Power Transmission Line Contractors Association and affirmed that total amount owed to the Appellant was Kshs. 3 million.
21. On its part, the Respondent called one Argwings Kodhek as DW1. It was his evidence that he had worked for the Respondent for 30 years and was part of the investigation team that found that the Appellant had provided a fake CR12 Certificate. He stated that the Registrar of Companies informed them that the CR12 was fake. Joseph Akello, the Respondent's 2nd witness [DW2] produced as DExh.4 the CR12 Certificate which was submitted by the Appellant that eventually led to the award of the tender.
22. It is common ground, from both the oral and documentary evidence by the parties that the Appellant executed some works for the Respondent. The Respondent's Letters of Award authored variously by Gideon Githu and Bernard Mukoma, Branch Business Head, Namanga and Loitoktok produced as PExh. 3, PExh.10, PExh.17, PExh.24, PExh.31, PExh.38, PExh.45 and PExh.52 respectively speak conclusively to that fact. A further confirmation of the existence of a contract was the admission by the disputants that out 26 invoices presented to the Respondent, only 14 were paid. The outstanding 12 invoices are the cause of action herein. As it were, the Respondent declined to meet its end of the bargain on claim of fraud contending that the Appellant had during the tendering process submitted a fake CR12 Certificate.
23. But what is fraud? The Black's Law Dictionary, 9th Edition defines 'fraud' at Page 731 as: -

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.
24. In the Black's Law Dictionary, 10th Edition 'Civil Fraud' is defined as follows: -

.... an intentional fraud which carries only a monetary, non-criminal penalty. That "fraud" is a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. That fraud is usually a tort but, in some cases, (especially when the conduct is wilful) it may be a crime...
25. Courts have also dealt with the subject of fraud and clearly set the parameters for proof. It is still a settled principle in law that for a party to successfully claim fraud, such must specifically set out in the pleadings the incidence of fraud. In *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) observed thus: -

.... It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done



fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

26. In *Abdulkadir Shariff Abdirahim & another vs Awo Shariff Mohammed t/a A. S. Mohammed Investments* [2014] eKLR the Court of Appeal of East Africa spoke to the standard of proof of fraud in the following terms: -

... allegations of fraud must be strictly proved; the standard of proof may not be so heavy as to require proof beyond reasonable doubt; what is required is something more than a mere balance of probabilities.
27. Therefore, a party alleging fraud has a duty to not only specifically plead the particulars thereof, but to also tender evidence in proof which goes beyond the mere balance of probabilities. In this matter, the Respondent contended that the Appellant submitted false documents during the tendering process and was irregularly and fraudulent pre-qualified such that all subsequent tenders awarded to it were illegal and void. On its part, the Appellant denied the allegation of fraud and contended that it lawfully took part in the entire tendering process and was correctly pre-qualified, and, having undertaken the various works, it was entitled to payment.
28. In order to settle this issue, this Court will, in the first instance, look at the tendering process that led to the execution of the works that yielded the suit. From the record, the Respondent advertised for Tender No. KPI/9AA-2/OT/58/PJT/16-17 for pre-qualification of Labour and Transport Contractors. That was on 12th April 2017. The Appellant applied to be pre-qualified as one of the contractors. It was among over 1000 other contractors who expressed interest in the bid and among over 500 successful bidders. Among the documents which the Appellant supplied was its Certificate of Incorporation No. CPR/2014/185150 indicating that the Appellant was incorporated on 15th February 2014. At the end of the tendering process, several complaints were variously raised on the sanctity of the prequalified companies that led to the Respondent carrying out an elaborate audit which was undertaken by among others, DW1.
29. The Respondent through its Audit team carried out searches at the Companies Registry vide a letter dated 15th February 2018 where it requested for the various details on the prequalified firms. Through a letter dated 13th March 2018, the Registrar of Companies tendered the details. In respect to the Appellant, the search revealed that the Appellant was registered on 23rd November 2016 under Company No. PVT/2016/031553. A copy of the Certificate of Incorporation thereto was also obtained and produced in evidence. It was on the basis of that revelation that the Respondent contended that the Appellant misrepresented itself and supplied false documents so as to beat the procurement process leading to false prequalification.
30. In response to the above, the Appellant contended that it was registered in 2014, but subsequently underwent change of directorship.
31. This Court has intently perused the Tender No. KPI/9AA-2/OT/58/PJT/16-17 for pre-qualification of Labour and Transport Contractors issued by the Respondent. One of the requirements on the bidders was to supply ‘... Audited Financial Statements for the last three years from the date of the tender document...’. Therefore, if the tender was floated in April 2017, then it meant that the Appellant was to supply its financial statements for the years 2014, 2015 and 2016. As the Appellant was incorporated in 2016, then it did not qualify to take part in the tendering process. That is where the alleged falsification of documents came in to so as to beat the process. The Appellant did not give an explanation on the two registrations over the same company. It only laid premium on the change of directorship. Whereas a change of directorship is legally permissible, that in itself did not resolve



the quagmire of the two registrations over the same company. Even if the Appellant's response was to be true, which is not, still a change of directorship does not result into issuance of a new Certificate of Incorporation bearing a different number from the original one. To this Court, in supplying the Certificate of Incorporation No. CPR/2014/185150 indicating that the Appellant was incorporated on 15th February 2014, the Appellant clearly intended to, and indeed, misled the Respondent. It presented itself as a qualified entity which was not. Therefore, having made a false entry into the race, it matters not how many tenders were awarded to the Appellant. The Appellant was a non-starter and cannot hide under the rubric that the Respondent has already paid some of its vouchers.

32. On a careful consideration of this issue, this Court is satisfied that the Appellant knowingly misrepresented the truth about its registration history in order to induce the Respondent in prequalifying it. That was a fraudulent conduct. As such, this Court is further satisfied that the Respondent attained the legal threshold in proving fraud beyond the balance of probabilities. In that case, the legal burden of proof shifted to the Appellant to disprove the allegation of fraud and having failed to do so, the suit was sufficiently resisted. This Court finds that the incidence of fraud was properly proved in the suit and the Learned trial Magistrate did not err in her findings.
33. Having found the first issue in the affirmative, the second issue becomes moot and this Court comes to the end of this discussion in this appeal.

Disposition:

34. As the appeal is unsuccessful, the following orders do hereby issue: -
- (a) The appeal is hereby dismissed.
 - (b) The Appellant shall bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Njoroge, Learned Counsel for the Appellant.

Miss Owano, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

