Superfit Steelcon Limited v Dhruvi Builders Limited (Civil Appeal E454 of 2024) [2025] KEHC 15759 (KLR) (Civil) (3 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15759 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E454 OF 2024

WM MUSYOKA, J

NOVEMBER 3, 2025

BETWEEN

SUPERFIT STEELCON LIMITED ..... APPELLANT

AND

DHRUVI BUILDERS LIMITED ..... RESPONDENT

(Appeal from the judgement and decree, of Hon. Hosea Mwangi Ng'ang'a, Principal Magistrate, of 8th March 2024, in Milimani CMCCC No. 8737 of 2019)

JUDGMENT

1. The suit, at the primary court, was by the respondent, against the appellant. It sought recovery of Kshs. 2,259,621.00, being moneys due for work done or services rendered but not paid for.

2. The appellant resisted the claim. The engagement between the parties was conceded, for the appellant had subcontracted the respondent, who allegedly performed, by doing substandard works, which had defects, which cost the appellant Kshs. 5,753,941.50, to rectify, which the appellant counterclaimed, plus costs, interests and damages.

3. The respondent denied that the works were defective and of poor workmanship, arguing that it only provided labour, while the appellant supplied the materials and equipment used, which should have been of satisfactory standard. It denied responsibility for the extra costs of Kshs. 5,753,941.50, asserting that it did all the labour works as per design and supervision.

4. An oral hearing was conducted. Both sides presented a witness each. Judgement was delivered on 20th December 2024, in favour of the respondent.

5. The appellant was aggrieved, hence the appeal. The grounds being that the trial court misunderstood the terms of the contract; the respondent had failed to carry out supervision to ensure proper execution

of the works and workmanship; the trial court had attempted to re-write the contract between the parties; the respondent admitted or acknowledged that it did not rectify noted defects in the works; finding that there was breach of contract in withholding the sum of Kshs. 2,259,621.00, when the same was justifiably withheld; and the judgement was not supported by the law, pleadings evidence and submissions.

6. Directions were taken, on 2nd May 2025, for disposal of the appeal by way of written submissions. Both sides have complied.

7. The appellant submits that it presented reports and correspondence which indicated problems with the works, which needed to be addressed. The respondent addressed some of them, before abandoning the works altogether, and disregarded the rest of the defects, forcing the appellant to incur Kshs. 5,753,941.50, to rectify the same. It is further submitted that the contract was not a mere labour agreement. It is argued that the works were not completed, and noted defects were not rectified. Due to that there was justification for retention of the Kshs. 2,259,621.00, due to the respondent.

8. The respondent submits that the joint inspections were done, but the appellant did not pay, breaching the terms of the contract. It is submitted that the respondent was willing and committed to undertake general pending works, subject to the appellant funding the completion. It is further submitted that the appellant had conceded to completion of the works. It is submitted that the Kshs. 2,259,621.00 was to be paid before the rectification work was undertaken. On the counterclaim, it is submitted that the defects had something to do with lack of quality materials, which were to be provided by the appellant.

9. What I am called upon to determine is the nature and extent of the contractual arrangement between the appellant and the respondent, whether the respondent discharged what it had undertaken to do under that arraignment, and, if it did not, how that affected the appellant financially.

10. I note, from the list of documents filed by the respondent, that it did not attach the contract documents, for all it attached were invoices for work done, and emails asking for payment. The appellant too did not file any documents, to evidence the contract between it and the respondent. What was filed were reports on incomplete and defective works, and correspondence and demands around those issues.

11. Without any documents, on the contract entered into by the parties, for which the respondent claimed Kshs. 2,259,621.00, it would be extremely difficult to tell the exact nature of the engagement between them, by way of the terms and scope of the works. In view of that, one could only go by the documents generated after the dispute arose, and the testimonies recorded.

12. One thing is evident, even from the documents by the respondent, that there were defects that required attention. The email of PW1, Ramesh Sanghani, dated 2nd July 2019, talked about them, and appeared to concede to a retention of the outstanding account amount, pending completion of the defective liability works. The email was addressed to John Mbua, of the appellant, and it said:

> " We hereby request your directors Mr. Ashwin D. Madhaparia and Jitendra D. Madhaparia to realese the final account amount so as we can attent to pending defect liability works (retention works), pending retention amount payable after completion of defective liability works (retention work)."

13. Going by the contents of that email of 2nd July 2019, it would appear that there was justification for the retention sum of Kshs. 2,259,621.80, claimed by the respondent.

14. What came out of the testimonies?

15. PW1, Ramesh Sanghani, of the respondent, was not sure if he had signed any written contract with the appellant, but he talked of "a clause in the contract." He conceded that there were "cracks in the plaster and cracks on the concrete floor," which the appellant requested to be fixed, but the respondent "did not fix the defects because of non-payment." He asserted that the respondent was not liable for the defects, as it was only supplying labour, and that it was the appellant who was supposed to do the defects. He explained that the costs, arising from addressing the defects, were covered by the retention amount. The main contractor, the appellant, requested the sub-contractor, the respondent, to address the defects, but the respondent needed money to fix the defects, hence the request for funds.

16. DW1, Clement Mutuku, for the appellant, testified that the defects were supposed to be rectified as they arose, and not necessarily after completion, whereupon repair the appellant paid for them. He asserted that the respondent did not rectify the defects, forcing the appellant to incur the expense, in addressing them, hence the counterclaim.

17. To my understanding, the dispute was not so much as to whether there were defects, or whether the agreement between them was a labour contract, but about when the respondent was supposed to rectify the defects, and when the appellant was to release the funds due. Both sides conceded that there were defects, and that under the contract the respondent was to repair them. They also conceded that the retention clause was intended to cater for such defects, as they were anticipated. The dispute was on the point at which the appellant was to release the funds, whether before or after the defects were rectified. The respondent took the position that it should have been paid first, the moneys outstanding, less retention, for it to carry out the rectification; but the appellant asserted that whatever was due should have been paid after the rectification was done.

18. It would have been a fairly straightforward matter to resolve, had the parties filed the contract document, which was the basis of the engagement, if at all there was one. In the absence of that document, the trial court was left to determine the matter based on what was available.

19. It was common ground that there were defects in the works, which both parties conceded. It was equally common ground that it was the responsibility of the respondent to repair them. It was also common ground that the parties had between them a labour contract, where the respondent supplied the labour for the works. The contract had not been fully executed so long as there were pending repair works. The respondent was unwilling to execute the repairs, so as to wind up the works, and handover.

20. In the email of 1st July 2023, from John Mbau, to Ramesh Sanghani, the appellant had prepared a final account, dated 28th June 2019, which was accepted by the respondent, in its email of 2nd July 2019. The defects outstanding were to be sorted out, and settled through the retention amount.

21. As the final account was agreed upon, the respondent was entitled to the final account amount, less the retention amount, as it did not attend to the defects. The retention amount, according to the final account, dated 28th June 2019, was Kshs. 1,091,136.74, and the amount due, on the final account was Kshs. 1,168,485.06. That was the amount that the trial court should have awarded to the respondent.

22. What about the claim by the appellant?

23. The case by the appellant was that after the respondent abandoned the site, it engaged some other party to rectify the works, at a cost of Kshs. 5,753,941.50. I see on the record a document, dated 13th June 2019, titled "Claim for Defective Works against Dhruvi Builders Ltd." The claim totals Kshs.5,753,941.50. It would appear that that document was generated before the final accounts of 28th June 2019 were forwarded to the respondent, vide the email of 1st July 2017. Yet, the amount, of Kshs.

5,753,941.50, was not factored into that final account. According to the defence and counterclaim of the appellant, Kshs. 5,753,941.50 was what it spent to rectify the works.

24. How could that be, if the dispute, on the payment for the defective works arose after 2nd July 2019, while the figure of Kshs. 5,753,941.50 first came up on 13th June 2019? Was it on 13th June 2019, or after the dispute erupted after 2nd July 2019? Other than the document of 13th June 2019, and the subsequent ones, dated 3rd July 2019 and 8th August 2019, both titled, "Default Clause Notice," there was no material tabled, on when the rectification works were done, after the respondent abandoned the site. There was no evidence as to who did the works, and what was charged for that. In other words, there was no proof of how that cost was incurred, even if the works were done by the appellant itself. What I see, from the record, concerning the sum of Kshs. 5,753,941.50, is an estimate, and not an actual cost. I doubt that the appellant tabled evidence to justify entitlement to the sum claimed in the counterclaim. Its entitlement was the retention amount of Kshs. 1,091,136.74, for that was the contract amount for settling any defects in the works.

25. The trial court should have found in favour of the appellant to the tune of Kshs. 1,091,136.74, and for the respondent to the tune of Kshs. 1,168,485.06. The difference between the 2 amounts is Kshs. 77,348.32. when the principle of set-off is applied, the respondent would be entitled to that difference, of Kshs. 77,348.32, and that should have been the award that the trial court should have made in favour of the respondent.

26. Consequently, I do hereby allow the appeal herein. The judgment of the trial court is hereby set aside, and substituted with an award to the respondent of Kshs. 77,348.32, with costs. The judgement sum shall attract interest in the terms ordered by the trial court. Each party shall bear its own costs of the appeal. The original trial court records shall be returned to the trial court, while the instant file shall be closed. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA ON THIS 3 RD DAY OF NOVEMBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi

Advocates

Mr. Isindu, instructed by Burton Isindu & Company, Advocates for the appellant.

Ms. Shabana, instructed by Shabana Osman & Associates, Advocates for the respondent.