Next Group Solutions v Innovius Limited (Civil Appeal E1223 of 2024)
[2026] KEHC 678 (KLR) (Civ) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 678 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1223 OF 2024

AC MRIMA, J

JANUARY 29, 2026

BETWEEN

NEXT GROUP SOLUTIONS ..... APPELLANT

AND

INNOVIUS LIMITED ..... RESPONDENT

(Being an appeal from the judgment and Decree of Hon. B. Cheloti (PM) in Milimani Chief Magistrates Court Case No. 6638 of 2019 delivered on 27{{^th}} September 2024)

JUDGMENT

Background:

1. The appeal herein arises from a contractual dispute concerning renovation works on a property situated in Meru. Innovius Limited, the Respondent herein, entered into a contract dated 3rd February 2018 with Next Group Solutions, the Appellant herein. The Appellant undertook to design and execute rehabilitation works on the Respondent's property, Title No. MERU/23980/31. The initial contract sum was agreed at Kshs. 11,000,000/=.

2. The Respondent contended that the contract sum was later revised downwards to Kshs. 10,830,723.12 and that it paid a total of Kshs. 9,625,000 to facilitate the works. It pleaded that the Appellant failed to complete the works by the agreed date of 1st October 2018 and subsequently abandoned the site. Consequently, it sought a refund of the monies paid which exceeded the value of the work actually done.

3. The Appellant's case was that the contract sum remained capped at Kshs. 11,000,000 and was never revised downwards. The Appellant averred that the Respondent failed to complete payments, thereby breaching the contract and frustrating the completion of the works. It further pleaded that

the Respondent requested variations and additional works that exceeded the original budget, which it refused to pay for. In the course of the proceedings, the trial Court ordered a valuation by a Government Quantity Surveyor (hereinafter referred to as 'QS') to ascertain the value of works done. The Ministry of Public Works appointed QS Michael Chege, who valued the completed works at Kshs. 7,524,530.50. Conversely, the Appellant relied on a valuation by QS Samora Machel, who valued the works at Kshs. 12,796,770.50.

4. Upon hearing the case, the trial Court found in favour of the Respondent and ordered the Appellant to refund Kshs. 2,100,469.50, being the difference between the amount paid (Kshs. 9,625,000) and the value of completed works assessed by the Government Valuer (Kshs. 7,524,530).

5. Aggrieved, the Appellant preferred the instant appeal.

The Appeal:

6. The Appellant premised its case on 23 grounds contained in the Memorandum of Appeal dated 22nd October 2024, set out as hereunder;

    1. That the learned Magistrate erred in fact and in law by asserting territorial jurisdiction over a contract relating to renovation of a house situated in Meru. The house is built on Title Number Meru/23980/31. The Milimani Magistrates court, located far from Meru lacked the requisite jurisdiction to determine matters related to any contracts executed and/or performed in Meru.

    2. That the learned Magistrate erred in fact and in law by holding that the Defendant could not raise the issue of jurisdiction during submissions. Jurisdiction is a fundamental legal issue and can be raised at any stage of proceedings, including during submissions.

    3. That the learned Magistrate erred in fact and in law by awarding the Plaintiff Kshs. 2,100,470 despite the Plaintiff having prayed for Kshs. 8,789,983 and/or specific performance in the Plaint. The award did not align with the reliefs sought, thus constituting a misdirection.

    4. That the learned Magistrate erred in fact and in law by relying on the valuation report dated 7th November 2022, which capped the works at Kshs. 7,524,530.50. QS Chege, who prepared the report, was impeached during cross-examination, rendering his report unreliable.

    5. That the learned Magistrate erred in fact and in law by ignoring the valuation report dated 20th February 2020 by QS Samora Machel, which valued the works done at Kshs. 12,796,770.50. This report, which was unimpeached, should have been considered as the only reliable report as it provided a more accurate reflection of the work done.

    6. That the learned Magistrate erred in fact and in law by failing to consider the contract sum was capped at a total cost of Kshs. 11,000,000. This was a fundamental term of the agreement, and the court overlooked it in favor of unsubstantiated oral testimony that the same was Kshs. 9,625,000 as averred by the Plaintiff.

    7. That the learned Magistrate erred in fact and in law by holding that the contract sum was reduced to Kshs. 9,625,000 without evidence of a subsequent contract to amend the original agreement. The reliance on oral testimony to amend a written contract constitutes a misdirection, as contracts cannot be rewritten through informal means.

    8. That the learned Magistrate erred in fact and in law by effectively rewriting the contract between the parties by reducing the contract sum from Kshs. 11,000,000 to Kshs. 9,625,000 without any supporting evidence of such an amendment.

9. That the learned Magistrate erred in fact and in law by failing to assess the evidence of the Defendant's witness, John Muriithi Mutwiri, who made critical admissions during cross-examination. Mutwiri admitted that the contract sum was Kshs. 11,000,000 and further conceded that he had not completed payments under the contract.

10. That the learned Magistrate erred in fact and in law by failing to find that the Plaintiff had not completed full payment of the contract sum of Kshs. 11,000,000 and therefore the Plaintiff was in breach of the contract.

11. That the learned Magistrate erred in fact and in law by not granting specific performance, which would have required both parties to fulfil their contractual obligations. The Plaintiff should have been ordered to complete payment, and the Defendant to complete the works.

12. That the learned Magistrate erred in fact and in law by failing to find that the Plaintiff breached the contract and frustrated its completion by non-payment, which should have rendered the Plaintiff ineligible for any orders or reliefs sought.

13. That the learned Magistrate erred in fact and in law by failing to find that QS Michael Chege's decision to conduct the site visit in the presence of the Plaintiff only, without including the Defendant, constituted an injustice. This action undermined the neutrality required for an impartial valuation and should have disqualified the valuation report by QS Chege dated 7th November, 2022, rendering it unreliable.

14. That the learned Magistrate erred in fact and in law by relying on the report of QS Chege dated 7th November, 2022, who did not visit the site in the presence of both parties, thereby rendering his valuation flawed and unverified.

15. That the learned Magistrate erred in fact and in law by failing to highlight the undervaluation of the mechanical and electrical works, which were not properly estimated by QS Chege in his report dated 7th November, 2022.

16. That the learned Magistrate erred in fact and in law by not adequately addressing the irregularities and undervaluation in QS Chege's report, which had been impeached during cross-examination.

17. That the learned Magistrate erred in fact and in law by not considering that QS Chege's report was prepared without the input of mechanical and electrical engineers, leading to a gross undervaluation of the works.

18. That the learned Magistrate erred in fact and in law by failing to note that QS Chege included items in his valuation report that were not part of the contract, yet the report did not reflect this deviation from the agreed terms.

19. That the learned Magistrate erred in fact and in law by failing to provide sufficient reasons for relying on QS Chege's report, despite the noted biases and discrepancies in his valuation.

20. That the learned Magistrate erred in fact and in law by ignoring and not considering the testimony of DW3, Emma Mugambi, who confirmed that the Plaintiff had refused to complete payment of Kshs. 11,000,000, a key factor in the dispute.

21. That the learned Magistrate erred in fact and in law by failing to recognize that the Plaintiff received additional value beyond the contract scope, as detailed in the progress report and valuation report by QS Samora Machel, increasing expenses for the Defendant.

22. That the learned Magistrate erred in fact by holding at paragraph 24 of the judgment that the Defendant never disputed the contract sum of Kshs. 9,625,000, while earlier in paragraph 17 acknowledging that the contract sum was Kshs. 11,000,000. This inconsistency suggests a failure to properly analyze the evidence.

23. That the learned Magistrate erred in fact and in law by not fully relying on the valuation report of QS Samora Machel dated 20th February 2020, which was not impeached, nor did the court provide any reasoning for disregarding this report.

The Submissions

7. The Appellant filed written submissions dated 12th June 2025. It centred its case on the challenge to the jurisdiction of the trial Court and the propriety of the valuation process. On the issue regarding jurisdiction, it was its case that the trial Court lacked territorial jurisdiction because the subject property was located in Meru. It was submitted that jurisdiction is a question of law derived from *the Constitution* and statute and cannot be conferred by pleadings or waiver. To that end, it relied on the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR for the proposition that a Court cannot arrogate itself jurisdiction exceeding that conferred by law.

8. As regards the contract, the Appellant submitted that the trial Court erred by reducing the contract sum from the written Kshs. 11,000,000 to Kshs. 9,625,000 without a written variation. It drew support from the case of Centurion Engineers & Builders Limited v Kenya Bureau of Standards [2023] KECA 1289, to cement the position that it is not the business of Courts to rewrite contracts but to interpret them. The Appellant maintained that the Respondent was in breach for failing to pay the full contract sum.

9. The Appellant vehemently attacked the reliance on QS Michael Chege's report. It argued that QS Chege conducted the site visit in the presence of the Respondent but excluded the Appellant. Further to the foregoing, the Appellant submitted that the trial Court erred in ignoring the report by QS Samora Machel, who visited the site with a full team of experts (mechanical, electrical, and structural engineers). It was its case that his report was unchallenged and methodically sound, valuing the works at Kshs. 12,796,770.

10. Finally, the Appellant argued that the trial Court failed to consider evidence of contract variations requested by the Respondent, which resulted in costs exceeding the budget. The Appellant pointed to progress reports admitted by the Respondent's witness confirming these variations.

The Respondent's case:

11. The Respondent opposed the appeal through written submissions dated 30th May 2025. From the outset, it was its position that the trial Court had proper jurisdiction since the contract was executed in Nairobi, payments were made in Nairobi, and both parties operate from Nairobi. On the question of breach of contract, the Respondent maintained that the Appellant failed to complete the works and abandoned the site thus being in breach. It argued that the Appellant failed to perform its obligations despite receiving Kshs. 9,625,000.

12. The Respondent relied on the valuation by the Ministry of Public Works, QS Chege, arguing it was prepared pursuant to a Court order and by consent of the parties. They asserted that the Appellant failed to provide credible evidence to contradict these valuations or justify the payments received.

13. In conclusion, it was its case that no variation was authorized or documented via a formal addendum as required. It referred the court to the case of Kenya Breweries Ltd v Kiambu General Transport Agency Ltd, to assert the position that variations must meet the requirements of a valid agreement. It, therefore, prayed that the appeal be dismissed with costs.

Analysis:

14. Upon considering the pleadings, the grounds of appeal and the parties' rival submissions, the issues that emerge for determination are as follows: -

    i. Whether the trial Court had territorial jurisdiction to hear and determine the suit.

    ii. Whether the trial Court erred in relying on the valuation report of QS Michael Chege.

    iii. Whether the trial Court erred in its finding regarding the contract sum and the alleged variations.

    iv. Whether the Respondent was entitled to the refund awarded by the trial Court.

15. A consideration of the above issues now follows, but first the role of this Court. As a first appellate Court, the role was set out in the case of Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, as follows: -

> " ... An appeal from a High Court is by way of rehearing and the Court of Appeal is a first appellate court. It is not sufficient to merely scrutinize the evidence and say whether the trial Judge was right or wrong. An appellate court is not bound to accept the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

16. Next is a look at the issues.

(a) Whether the trial Court had territorial jurisdiction to hear and determine the suit:

17. A challenge on jurisdiction of a Court is one that goes to the root of the legality of the proceedings. It is a pure question of law that deprive parties of the claim to consent to a Court's jurisdiction. Equally important is the fact that a contest on jurisdiction can be raised at any stage even on appeal and through any means, be it pleadings or even submissions.

18. In Petition No. 20 of (E023) 2022, Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries Commission & 17 Others the learned Judges of the Supreme Court observed as follows;

> " .... It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, viva voce during arguments or by the Court suo motu because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a court by either *the Constitution* or statute. A court cannot expand its jurisdiction through judicial craft or innovation"

19. And, in Kenya Ports Authority v Modern Holding [EA] Limited [2017] eKLR the Court of Appeal stated as hereunder: -

> " .... We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises.

It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard."

20. Therefore, the trial Court fell into error by failing to consider the jurisdictional contest on account of having been raised by the Appellant in the written submissions. Similarly, the Respondent's contention that the Appellant's admitted jurisdiction in its statement of defence was erroneous. As regards the merits of the issue, the Appellant challenged the jurisdiction of the trial Court on the basis that the suit property is located in Meru. The Appellant's witness, Emma Mugambi, in her statement, expressed confusion as to why the suit was filed in Nairobi instead of Meru, testifying that all witnesses unequivocally stated that the property is located in Meru.

21. It is notable, however, that the dispute before the trial Court was grounded on a breach of contract. Specifically, a contract for services (renovation works). It was not a dispute over the title or ownership of the land itself. Section 15 of the *Civil Procedure Act* allows suits to be instituted where the Defendant resides, carries on business, or where the cause of action arose, wholly or in part.

22. The record indicates that the contract was executed in Nairobi, payments were effected in Nairobi, and that both parties are based in Nairobi. Explanation No. 3 of Section 15 of the Civil Procedure was applicable to the circumstances of the suit. The suit could be properly instituted both in Meru or in Nairobi.

23. Consequently, the trial Court at Nairobi in Milimani had the requisite jurisdiction to determine the dispute. This ground of appeal, therefore, fails.

(b) Whether the trial Court erred in relying on the valuation report of QS Michael Chege:

24. This is the central issue in the appeal. According to the record, on 1st September 2022 and 6th December 2022, the trial Court ordered a valuation to be conducted. For context, the orders of 1st September 2022 were as hereunder;

    1. That a Government Quantity Surveyor do visit the property being Meru/23980/31 and do a report which will be shared to the two Advocates and be filed in court by the Plaintiff's counsel.

    2. That the parties do equally share the costs.

    3. That the Quantity Surveyor to confirm the works done, costs of the works done and the pending works.

25. And, the orders made on 6th December were as follows: -

    1. That an additional report to deal with the cost of pending works be done by a Quantity Surveyor from the Ministry of Public Works.

    2. That the Accounting Officer to avail another Quantity Surveyor different from Quantity Surveyor Njoroge to do the report.

    3. ...

26. There is every reason why a Court-ordered exercise is paramount. That is the only way there can be order in rendering in Courts. Pursuant to the above orders, a letter dated 26th September 2022 from the Ministry of Trasport Infrastructure Housing, Urban Development nominated QS Michael Chege. He then proceeded to conduct the site visit in the presence of the Respondent while excluding the Appellant. The Appellant's dissatisfaction with this process is evident from the testimony of QS

Samora Machel and the Appellant's correspondence. QS Chege, during cross-examination, admitted that he did not visit the site in the presence of mechanical, structural and electrical engineers, leading to what he conceded was an estimation of those works. Specifically, QS Chege valued the engineering services at Kshs. 800,000, whereas QS Samora Machel, who visited the site with the requisite experts, valued the same works at Kshs. 3,900,000. The massive variance of Kshs. 3,100,000 highlights the danger of estimating technical works without expert input. Additionally, QS Njogu, another Government valuer involved in the matter, testified that the failure to visit the site with the requisite experts led to misleading estimations.

27. In this Court's view, the exclusion of the Appellant from the site visit by QS Chege, despite protests vide letters dated 17th October 2022 and 24th October 2022, denied the Appellant the opportunity to clarify the discrepancies on site. Therefore, the trial Court erred in relying on a report that was the product of a procedurally-flawed process. The resulting valuation report by QS Chege, which capped the works at Kshs. 7,524,530.50, could not be deemed safe to rely upon when the Appellant was denied the chance to participate. Equally important is the Appellant's own valuer, QS Samora Machel, evidence which assessed the works at significantly higher value, Kshs. 12,796,770.50. The stark disparity between the two reports underscores the prejudice suffered by the Appellant due to their exclusion from the Government valuation exercise.

28. This Court finds and holds that expert appointed by the Court or pursuant to a Court order acts as an arm of the Court. They must exhibit neutrality and afford both parties a fair opportunity to participate in the verification exercise. Conducting a valuation site visit in the presence of only one party, especially in a contentious construction dispute where measurements, quantity and quality of work are in issue, amounts to a breach of the rules of natural justice. Iin this instance, it denied the Appellant the opportunity to point out specific works done or explain discrepancies on site. This Court, hence, finds the report by QS Michael Chege to be of low and questionable probative value.

(c) Whether the trial Court erred in its finding regarding the contract sum and the alleged variations:

29. The trial Court proceeded on the premise that the contract sum was Kshs. 9,625,000., or at least that the Appellant was liable to refund the difference between this amount and the valuation. To resolve this issue, this Court will look at what Courts have said about contract variations. In Kenya Breweries Limited v Kiambu General Transport Agency Limited [2000] KECA 417 (KLR) the Court of Appeal stated thus: -

..... A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement...

30. Recently, in the case of Moniks Agencies Limited v Kenya Airports Authority (Civil Appeal E280 of 2022) [2025] KECA 471 (KLR) (7 March 2025) (Judgment) the learned Judges of the Court of Appeal discussed how Courts ought to deal with contract variations and whom the onus of proof lay whenever a dispute occurs. The learned Judges observed;

> " ...Furthermore, factual evidence regarding the background of the dispute, both before and during the engagement, is valuable in determining the objectives and intentions of the parties involved. The ultimate intentions and terms of the contract are usually assessed from

the perspective of a reasonable person who has access to the relevant factual background information available to the parties."

31. In the above case, the learned Judges reiterated the legal implication of failing to prove contract variation by observing thus;

> " .... In wrapping up our determination of the question as to whether the appellant performed additional work, we observe that at no point during the performance of the contracts did the appellant raise any issue regarding the alleged expanded scope of work. We, therefore, find no reason for agreeing with the learned Judge and the appellant that the appellant had established that it had delivered services to the respondent, which were outside the two contracts."

32. With the foregoing guidance, I now turn to the issue at hand.

33. The contract document clearly stipulated a sum not exceeding Kshs. 11,000,000. The contract sum was corroborated by the evidence of Emma Mugambi. She testified that the contract sum Kshs. 11,000,000 and that the Respondent had refused to complete the payment, leaving a balance of Kshs.1,375,000. The Respondent's own witness, John Mutwiri, admitted during cross-examination that the contract was for Kshs. 11,000,000 and that there was no amendment adjusting the price downwards. He further admitted that he was yet to complete payment, having only paid Kshs. 9,625,000.

34. This Court has also taken the liberty to interrogate the progress report dated 10th May 2018. Under the head Deviation from Planning and Corrective Actions, it detailed variations such as a change from wall-to-wall carpet to tiling among other extra items like soak pit and the slab at the pool house. The circumstances of the dispute herein are on all fours with the pronouncement of Court of Appeal in Moniks Agencies Limited v Kenya Airports Authority (supra). There was communication in the form of a progress report between the parties on the expanded scope of work and importantly, evidentiary material demonstrating the same. The admissions by the Respondent's witness fortify the Appellant's claim that variations were requested and executed, increasing the cost.

35. Therefore, by capping the value of works based on a flawed valuation report and ignoring the admissions regarding the contract sum and variations, the trial Court, with utmost respect, misdirected itself.

(d) Whether the Respondent was entitled to the refund awarded by the trial Court:

36. Since this Court has found that QS Chege's valuation report was procured through a process that violated the Appellant's right to a fair hearing and participation, and given the admissions by the Respondent's witness regarding the contract sum and variations, the foundation of this award collapses.

37. Without a reliable, independent valuation conducted in the presence of both parties, the finding that the Respondent overpaid cannot stand.

Disposition:

38. Deriving from the above conclusion, this Court finds that the exclusion of the Appellant from the Court-ordered valuation exercise was a fatal irregularity. It rendered the resulting report biased and unreliable. The trial Court should not have based its judgment on such a report, particularly when a competing professional report by QS Samora Machel existed and was not impeached. The failure to

observe the principles of natural justice in the evidence-gathering process vitiates the Court's findings on the quantum of work done.

39. In the premises, the appeal is merited and the following final orders hereby issue: -

(a) The Judgment and Decree of the Chief Magistrate's Court in Milimani CMCC No. 6638 of 2019 delivered on 27th September 2024 be and is hereby set aside and is substituted with an order dismissing the suit with costs.

(b) Any sums deposited as security shall be refunded to the depositor.

(c) The Appellant shall also have the costs of this appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY,2026.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Kiptoo, Learned Counsel for the Appellant.

Mr Abdi, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

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