REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E373 OF 2025

-between-

KENYA POWER AND LIGHTING COMPANY .....APPELLANT

-versus-

NJAMBA DEVELOPERS LIMITED .....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Riany (PM) in Milimani Chief Magistrates Court Commercial Case No. E8184/2021 delivered on 18th December 2024)

JUDGMENT

Background:

1. This dispute originates from Tender No. KP2/6G/PT/01/14-15, issued by the Appellant, *Kenya Power & Lighting Company Ltd.* The Respondent, *Njamba Developers Limited*, participated in it seeking pre-qualification for works involving road/pavement opening, cutting, ducting and reinstatement.

2. Before the trial Court in *Milimani Chief Magistrates Court Commercial Case No. E8184 of 2021* [hereinafter referred to as ***'the suit'***], the Respondent pleaded that on 19th May 2014, it entered into a contract with the Appellant to execute some works. It claimed that it carried out various emergency and planned works in Industrial Area, Donholm Estate and Komarock Estate, for which it raised nine invoices totalling Kshs. 8,273,018.39. The Respondent pleaded that the Appellant failed to honour the payments despite the works being completed to satisfaction.

3. The Appellant denied liability. It contended that there was no valid contract capable of enforcement and that the Respondent

had failed to strictly prove the performance of the works or the validity of the debt.

4. Upon hearing the suit, the learned trial Magistrate entered judgment in favour of Respondent for the sum of Kshs. 8,273,018.39, together with costs and interest. Aggrieved by the trial Court's decision, the Appellant preferred this appeal.

The Appeal:

5. Through a Memorandum of Appeal dated 27th January 2025, the Appellant premised its appeal on the following grounds: -

    1. *The Learned Trial Court erred in law and fact and misdirected itself by finding that the Respondent has proven his case on a balance of probability despite clear evidence to the Contrary which it failed to appreciate namely:*

        a. *The non-existence of a valid contract between the parties capable of enforcement; and*

        b. *The lack of irrefutable proof for the claim totalling to KES 8,273,018.39.*

    2. *As a result of the foregoing, the Learned Trial Court erred in law and fact and misdirected itself by entering Judgment in favour of the Respondent for payment of KES 8,273,018.39 plus costs and interest, while failing to give reasons informing the said decision.*

    3. *The Learned Trial Court erred in law and fact and misdirected itself by considering irrelevant considerations and extraneous factors in determining the suit.*

    4. *The Learned Trial Court erred in law and fact by exercising and applying discretion not anchored in law or backed by judicial reasoning.*

    5. *The Learned Trial Court erred in law and fact and misdirected itself by failing to consider the issues and/or points of law and/or facts and submissions presented by the Appellant.*

The Submissions:

6. In its written submissions dated 27th May 2025, the Appellant crystallized the issues into two main limbs: *The validity of the contract and the sufficiency of proof*. On the validity of the contract, the Appellant submitted that the document relied upon by the Respondent was invalid. It argued that the contract was signed by a Supply Chain Manager (Procurement) and not the Accounting Officer (Managing Director), contrary to Regulation 7 of the *Public Procurement and Disposal Regulations, 2006* (now repealed but applicable at the time) and Sections 2, 7, and 27 of the *Public Procurement and Disposal Act, 2005*. The Appellant contended that a public entity can only be bound by contracts executed in strict compliance with the statute. To that end, it relied on the decision in *Republic -vs- Mangiti & 22 others* [2022] KEHC 12688 and *Royal Media Services -vs- IEBC* [2019] eKLR to buttress the argument that Courts should not enforce illegal contracts or those procured in disregard of the law.

7. On issue regarding proof of claim, the Appellant submitted that the Respondent failed to prove special damages to the required standard. It cited the decision in the case of *Jackson Mwabili -vs- Peterson Mateli* [2020] eKLR, to front the legal position that special damages must be strictly proved. The Appellant pointed out discrepancies including the fact that Job Cards were incomplete, unsigned or blank. Further, it highlighted discrepancies in invoice No. 408 which had measurement discrepancies between the allocation (Part A) and the alleged completion (Part B), Invoice No. 566 which was dated 16th February 2016, outside the contract period which ended on 31st January 2016.

8. The Appellant cited irregular Bills of Quantities (BQs), internal documents that the Respondent inexplicably possessed and were unapproved.

9. Finally, the Appellant argued that the trial Court was influenced by extraneous factors, such as the number of Advocates handling the file and the substitution of witnesses, rather than the legal merits of the case. It prayed that the appeal be allowed and the suit be dismissed with costs as well as the costs of the appeal.

The Respondent's case:

10. *Njamba Developers Limited* opposed the appeal through written submissions dated 8th October 2025. It was its case that although it completed the assigned works in areas such as Industrial Area, Donholm and Komarock, the Appellant unilaterally failed to pay invoices totalling to Kshs. 8,273,018.39.

11. It argued that the *Public Procurement and Asset Disposal Act, 2015* was inapplicable to the dispute because the contract was signed in 2014 and expired in January 2016, prior to the Act's commencement date of 7th January 2016. To support the position that the law does not operate retrospectively, it referred to the decision in *Kenya Revenue Authority -vs- Orb Energy Private Ltd* (Income Tax Appeal E110 et al. of 2023 (Consolidated)) [2025] KEHC 82 (KLR) where it was held that retrospective applicability of legislation is frowned at unless the legislature expressly so states in the legislation itself.

12. Regarding the validity of the contract, the Respondent invoked the *Turquand rule*. It argued that as an outsider dealing with a limited liability company, they were entitled to assume that the Appellant had complied with all internal procedures and that the signing officer had the requisite capacity. It cited the case of *Wafula (Derivatively on behalf of Trans-Nzoia Investment Company) -vs- Walubengo & 6 Others* (Environment and Land Case 74 of 2019) [2025] KEELC 4668 (KLR), where the Court, citing the classic case of *Royal British Bank -vs- Turquand*, held that a person dealing with a company in good faith is entitled to assume the company has complied with its internal formalities. The Respondent emphasized that the Appellant failed to produce any internal policy or board resolution to disprove the Supply Chain Manager's capacity to sign.

13. Further to the foregoing, the Respondent contested any attempt by the Appellant to rely on statutory limitations reserved for public bodies. It argued that the Appellant is a limited liability company under the Companies Act and not a Public Authority or a State Office, meaning it was not strictly subject to the *Public Authorities Limitation Act*. In support of the foregoing

classification, it relied on the case of *Ongachi -vs- Kenya Power & Lighting Co Ltd* (Cause E024 of 2023) [2023] KEELRC 2582 (KLR), where it was observed that KPLC is not the Government or a local authority and therefore cannot invoke the protections of the *Public Authorities Limitation Act*.

14. On matters of evidence, the Respondent defended the admissibility of their invoices despite Appellant holding the originals. It submitted that since the original documents were handed over to the Appellant, who then refused to produce them, secondary evidence was admissible. It buttressed its argument with the decision in *Kaigi General Contractors Limited -vs- National Irrigation Authority* (Civil Case E009 of 2021) [2024] KEHC 6341 (KLR), where it was held that when original documents are in the adverse party's possession and they refuse to produce them, the other party is at liberty to produce secondary evidence under *Section 66(b)* of the *Evidence Act*. The Respondent pointed out that the Appellant's witness, *DW1*, admitted that trial pits dug by KPLC engineers revealed no inconsistencies in the work done, effectively corroborating the Respondent's claim.

15. Finally, the Respondent described that the Appellant's defence as consisting of mere denials, which are insufficient in law to challenge a claim. It argued that it failed to offer a substantive answer to the allegations, such as proving payment or demonstrating that the work was not done.

Analysis:

16. Having reproduced and appreciated the parties' respective cases, the issues that emerge for determination are as follows: -

    i. Whether there was a contractual relationship.

    ii. Whether the Respondent proved its claim for Kshs. 8,273,018.39.

17. A look at the above issues now follows, but first the role of this Court. As a first appellate Court, this Court is enjoined to re-evaluate the evidence tendered before the trial Court and arrive at its own independent conclusion, bearing in mind that it did

not see or hear the witnesses. In ***Selle -vs- Associated Motor Boat Company Ltd*** [1968] E.A. 123*,* the foregoing role was discussed 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.*

18. Similarly, in ***Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates*** [2013] eKLR, the Court set out the role of the first appellate Court in the following terms: -

> *….. 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 either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2 EA 212.*

19. With the above guidance, this Court shall now address the above identified issues.

[a] <u>Whether there was a contractual relationship:</u>

20. The Appellant impugned the validity of the contract on the statutory ground that it was not signed by the Accounting Officer, the Managing Director, as required by the *Public Procurement and Disposal Act, 2005* [hereinafter referred to as '***the PPD Act'***]. However, the evidentiary record shows that the contract was executed by *Ms. Anne Gatukui*, the Appellant's Supply Chain Manager. During cross-examination, the Appellant's witness, *Patrick Thuo Maguta*, who testified as DW1 admitted he was neither the Supply Chain Manager nor the Managing Director and could not speak to the specific authorization of *Ms. Gatukui*. Crucially, he admitted that he had not provided a sample of a proper contract to demonstrate what a valid one should look like.

21. The resolution of this issue resides in *Sections 33* and *34* of the *Companies Act*. The said provisions stipulate thus: -

> *33. The validity of an act or omission of a company may not be called into question on the ground of lack of capacity because of a provision in the constitution of the company.*
>
> *34. Power of directors to bind company*
>
> *(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is free of any is limitation contained in the company's constitution.*
>
> *(2) For purposes of subsection (1) -*
>
> *(a) a person deals with a company if the person is a party to a transaction or other act to which the company is a party; and*
>
> *(b) a person dealing with a company—*
>
> *(i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorise others to do so;*
>
> *(ii) is presumed to have acted in good faith unless the contrary is proved; and*
>
> *(iii) is not to be regarded as having acted in bad faith only because the person knew that a particular act is beyond the powers of the directors under the constitution of the company.*

22. The above provision is at the heart of the *Turquand rule*. In ***Ethics & Anti-Corruption Commission -vs- Vulcan Lab Equipment Ltd & another*** [2020] KECA 598 (KLR), the Court of Appeal discussed its utility as follows: -

> *…. Whereas I see the practical necessity and the patent utility of the rule, for to hold otherwise would be to unduly clog the commercial interaction between companies and third parties, and unduly burden the latter with the duty to make inconvenient, lengthy and probably unsuccessful inquiries or investigations into internal procedures of companies, I cannot accept that such third parties are in any way absolved from*

the duty to be satisfied that the rather obvious relevant statutory requirements have been met.

23. While public bodies must strictly adhere to procurement laws, the *Turquand rule* protects innocent third parties from internal irregularities of a company. The Appellant, being a limited liability company, *albeit* with state shareholding, held out *Ms. Gatukui* as having authority. Further, her signature was not challenged as a forgery during trial. In the premise, it would be unconscionable for a state corporation to procure services, consume them and then retreat behind internal signatory mandates to avoid payment.

24. For the purposes of this claim, this Court finds and hold that a valid contractual relationship existed between the parties.

[b] Whether the Respondent proved its claim for Kshs. 8,273,018.39:

25. This issue forms the substratum of the appeal. A claim for Kshs. 8,273,018.39 based on unpaid invoices is a claim for special damages. To succeed in such damages, the threshold is that a party must specifically claim and strictly prove. In ***Hann -vs- Singh*** (1985) KLR 716 the Court of Appeal held inter alia that: -

> *…. Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof depend on the circumstances and the nature of the acts themselves*

26. In ***Imanyara & 2 others -vs- Attorney General*** (Civil Appeal 98 of 2014) [2016] KECA 557 (KLR) (19 May 2016) the Court of Appeal referred to its own decision in *Bangue Indosuez -vs- DJ Lowe and Company Ltd* [2006] 2KLR 208 where a claim in special damages was elaborated as hereunder: -

> *…. It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.*

27. Having analysed the evidentiary material as presented by the witnesses, the Respondent's claim mainly hinged on some Job Cards. A standard KPLC Job Card has *Part A* (Allocation) and *Part B* (Completion/Satisfaction).

28. The Appellant contended that Job Card No. 4033, which covered the substantial invoices (475, 561, 562, 563, 564, 565), lacked a signature on Part B and without its certification, there was no documentary proof that it accepted the works. On its part, the Respondent, through *Stephen Kamau Mbatia* and *Wycliffe Stanley Omung'ala* who testified as PW1 and PW 2 respectively, stated that Part B was not filled because they were planned works that took longer to complete, unlike emergency jobs. It was their further testimony that the Appellant's officer responsible, *Mr. Andrew Lusaba*, was transferred to Mlolongo before he could sign. However, the Appellant took the contrary position.

29. While the Court empathizes with administrative hurdles, a Court of law must be slow in substituting the written contents of a document, like in this case, with oral evidence unless that only happens within the ambit of *Part VI* of the *Evidence Act.*

30. The Respondent essentially asks the Court to treat an incomplete document as complete based on oral statements regarding Mr. Lusaba's transfer. This falls short of the standard of strict proof under Part VI of the Evidence Act more so given that there was no evidence of the alleged transfer and further, just like how this Court has found in the first issue above, any other officer of the Appellant could have signed the document had the work been satisfactorily undertaken. Again, a critical examination of the specific invoices reveals some profound inconsistencies that weaken the Respondent's credibility. For instance, whereas Invoice 410 shows that the work was allegedly completed on 31st May 2014, the Job Card thereto shows that the work was allocated on 4th June 2014. Logically, one cannot complete work before it is assigned. The Respondent's witness, PW1, attempted to explain this away as an error by the Appellant staff, but document 410 and Job Card Serial No. 4025 stand as primary record. A Court cannot rely on a document that asserts a chronological impossibility.

31. There was also Invoice 566 dated 16th February 2016. Whereas the contract explicitly expired on 31st January 2016, PW1 admitted that whereas the contract expired as stated, the invoice had been split from earlier works. Without a written extension of the contract, any claim based on works and invoices raised post-expiry of the contract is contractually unenforceable. Further, the Respondent presented a spirited argument that the Appellant's engineers, *Grace Karuiru* and *Eng. Ondari* conducted repeat supervision by digging trial pits to verify the works and found no issues. The Respondent argued that it was an admission of liability.

32. Whereas there may be some oral evidence by DW1 on the trial pits, that evidence is secondary to the primary documents. While an adverse inference against the Appellant can be made for withholding the trial pit reports, such an inference would only have aided the Respondent if their own primary evidence was consistent. Further, there must have been a reason as to why the reports were not released and according to the Appellant, it is all about non-completion of the works. Adverse inference cannot cure the fatal defect in Invoices 410 or 566. Whereas it might be argued that some works were undertaken, the lack of any written certification or confirmation by the Appellant that the works were truly undertaken and completed as required defeats the entire transaction.

33. As regards the alleged splitting of invoices, *Munyoki Muthangya,* who testified as *PW3* stated that larger invoices were split into smaller ones (e.g., Invoice 566 split from 428) at the request of the Appellant's officials due to cash flow deficits. While the Appellant did not approve of such an arrangement in its evidence, the splitting itself is problematic in two ways. First, it paints a picture of a chaotic payment system at the Appellant's offices, a position which is unlikely to be supported within the procurement law, and, second, it also suggests that the documents before the Court (the split invoices) may not reflect the original contemporaneous records. This arrangement muddies the evidentiary waters, making strict proof impossible.

34. In conclusion, therefore, and with tremendous respect to the trial Court, the Court failed to appreciate that in a claim for

special damages, oral testimony (PW1, PW2, PW3) could not have overridden the glaring defects in documentary evidence namely, irreconcilable dates, missing signatures and post-contract documents. The Court of Appeal in ***National Social Security Fund Board of Trustees -vs- Sifa International Limited*** [2016] KECA 550 (KLR) observed thus;

> *…. It has been stated time without number that special damages must not only be pleaded; they must be specifically or strictly proved. This Court in the case of William Kiplangat Maritim & Another v Benson Omwenga, Civil Appeal No. 180 of 1993 (Nairobi) cited with approval its decision in* ***Coast Bus Service Ltd v Murunga Danyi & 2 Others****, Civil Appeal No. 192 of 1992 (UR) and stated as follows: -*
>
> > ***…. We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and, in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars****… (emphasis added)*
>
> ***So, does the record reflect this requisite proof that led the Judge to award the amount to the respondent? With tremendous respect to the Judge, the answer is no. There was no proof.***

35. The suit was, hence, not proved. The Respondent's case was lacking in certainty and the evidence presented created doubt rather than proof. By allowing oral assertions to override the patent defects on the face of the documents, the trial Court, respectfully, effectively abandoned the standard of strict proof in special damages claims, an error which goes to the root of the impugned judgment. To that end, the Appellant has a valid concern.

Disposition:

36. Deriving from the foregoing, the appeal is merited and the following final orders hereby issue: -

[a] The appeal is hereby allowed.

[b] The Judgment and Decree of the suit, *Milimani Chief Magistrates Commercial Case No. E8184 of 2021*, delivered on 18th December 2024 is hereby set aside and the suit is hereby dismissed with costs.

[c] The Appellant shall also have the costs of this appeal.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **20th** day of **February, 2026.**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for the Appellant.

Mr. Nga`ng'a, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.