Malia & Lucas Company Limited v County Government of Trans-Nzoia (Civil Appeal 99 of 2019) [2023] KECA 1143 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1143 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 99 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

SEPTEMBER 22, 2023

BETWEEN

MALIA & LUCAS COMPANY LIMITED ..... APPELLANT

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kitale (Chemitei J), dated 3rd April 2019 IN Kitale High Court Civil Case No. 1 OF 2017)

JUDGMENT

1. Malia & Lucas Company Limited (the appellant herein), has filed this appeal against the judgment of Chemitei J dated 3rd April 2019.

2. The appeal arises from Kitale High Court Civil Case No.1 of 2017 in which the appellant had sued the respondent claiming a sum of Kshs 32,906,960.00 together with interest thereon, being payments for various road works allegedly undertaken by the appellant within the County Government of Trans-Nzoia.

3. The matter was heard by Chemitei, J who in a judgment delivered on 3rd April 2019, dismissed the entire suit with costs to the respondent. The appellant was aggrieved by the aforesaid judgment thus provoking the instant appeal vide a Notice of Appeal dated 4th April 2019 and a Memorandum of Appeal dated 30th May 2019 raising a whooping 16 grounds of appeal which we shall advert to in the course of our determination of this appeal. The grounds were:

    i. The learned Judge erred in law and in fact in failing to completely appreciate the case by the appellant against the respondent herein, take into account relevant factors surrounding its case and misapprehended the evidence on record, the consequence of which was a decision which does not resolve the dispute herein and also lacks any basis in law and fact.

ii. The learned Judge erred in law and fact by failing to properly and exhaustively analyze the pleadings filed by the parties herein, frame the issues for trial and determination and evaluate the evidence on record hence arriving at wrong inferences and conclusions.

iii. The learned Judge erred in law and in fact by failing to appreciate the mandate, scope, limitations, findings and recommendations the Special Audit Report of the Auditor General dated June 2015 hence arriving at an erroneous decision.

iv. The leaned Judge erred in law and in fact in failing to find that findings the Auditor General in his Special Audit Report of June 2015 did not in any way query specifically the award of any contract of the appellant herein and none of its works were listed by the auditor general amongst the doubtful claims of Kshs 118, 969,181.00 in the said report, hence arriving at an erroneous decision.

v. The learned Judge erred in law and in fact in making the assumption that the appellant was paid a sum of Kshs 1,748, 920/- in respect to the contract dated 28th April 2014 to maintain the road between Kiptoo-Chepsari, yet the respondent failed to specifically respond to such a claim, give particulars and adduce evidence of such payment hence arriving at an erroneous decision.

vi. The learned Judge erred in law and in fact in finding that none of the contracts adduced as evidence by the appellant were never signed by the respondent or its representative, contrary to the evidence that the Head of Procurement and County Supply Chain Management. Mr. Joseph Tevulo Mundi also known as J.T Muindi appended his signature on the contracts, hence arriving at an erroneous decision.

vii. The learned Judge erred in law and in fact in failing to find that the appellant by virtue of the provisions of Section 44 of the *Public Procurement and Disposal* Act (repealed but relevant to the appeal herein) cannot be privy to inter alia information relating to tender evaluation and processing minutes from the respondent's respective committee, hence arriving at an erroneous decision.

viii. The learned Judge erred in law and in fact in finding that tender awards were absent when the appellant had produced them as exhibits 11, 19, 27,36, 44, 52 and 60 of its evidence, hence arriving at an erroneous decision.

ix. The learned Judge erred in law and in fact in failing to find that Section 45 (1) of the *Public Procurement and Disposal of 2005* (repealed but relevant to the appeal herein) requires the respondent, not the appellant to keep records for each procurement for at least six years and which records were admitted by the respondent's witness during trial to be available but were never produced as evidence, hence unlawfully and unfairly punishing the appellant for lack of such documents.

x. The learned Judge erred in law and in fact in failing to find that the failure by the respondent as a procuring entity to supply both to the Honourable Court and Auditor General before the preparation of his report was deliberate, malicious and unlawful hence should not benefit from an illegality, the consequence of which was a decision that was unjust.

xi. The learned Judge erred in law and in fact in failing rightly interpret and apply the provisions of Section 3 of the *Law of Contract Act* cap 23 of the Laws of Kenya hence arriving at an erroneous decision.

xii. The learned Judge erred in law and in fact in finding that the principle of estoppel does not apply in this case, the consequence of which was a decision that was very unjust.

xiii. The learned Judge erred in law in failing to find and appreciate that the Special Audit Report of the Auditor General is subject the scrutiny, checks, balances and investigation of and by the County Assembly of Trans-Nzoia pursuant to the provisions of article 229 (7) of the *Constitution* of Kenya.

xiv. The learned Judge erred in law and fact in failing to consider the extensive findings of the Report of the Public Accounts and Investments Committee on Special Audit Report of the Auditor General on Road Works in Trans-Nzoia County for the Financial year 2013/2014 and the Report by the Ad-hoc Committee on Petition Against the P.L.A.C Committee hence arriving at an erroneous decision.

xv. The learned Judge erred in law and in fact in failing to consider the submissions by counsel for the appellant while making his decision.

xvi. The learned Judge erred in law and in fact in giving a decision which was generally contrary to the law and facts placed before him."

4. The brief facts giving rise to this appeal were as follows: Edna Kerubo who testified as PW1 is a Director of the appellant. She adopted her witness statement dated 12th January 2017. She testified that in the financial year 2013/2014, the respondent had advertised for various procurement opportunities in the public works sector. The appellant successfully applied for the grading, bush clearing, stump removal, ditch cleaning, gravel patching, culvert installation and rock blasting of 7 different roads.

5. It was her further evidence that the appellant had used a total of Kshs 32,906,960.00 in rendering the aforesaid services which monies were expended on the following roads:

"a) Muroki-Masengeli Kapretwa Coffee Factory Road-Kshs 6,058,440

b. St. Thomas Kapretwa Road-Kshs 2,064,400.00.

c. Kiptoo-Chepsari Road-Kshs 1,813,320.00.

d. Kapretwa Centre Bianji Road-Kshs 5,615,000.00.

e. Kapretwa Coffee Matisi Road- Kshs 4,392,000.00.

f. Matisi Nyayo Tea Zone Bwayo Road- Kshs 6,743,000.00.

g. Kapretwa Coffee Factory to Sukwa via Kibenei Bamba Fala- Kshs 6,220,800.00."

6. Pius Munialo on the other hand, the respondent's then Acting County Secretary testified on behalf of the respondent as DW1. It was evidence that the tender was fraudulently procured on 1st October, 2013, before the appellant was registered under the Youth Access to Government Procurement Opportunities on 10th March, 2014. It was his evidence that none of the appellant's directors were youth (below the age of 35 years) at the time of registration and further, that there was no valid procurement of the appellant as a contractor, nor was there valid tender evaluation and processing of the alleged contracts.

7. It was his further evidence that the appellant did not render any services or works and that if at all the same were rendered, the work was substandard and defective. Consequently, the respondent denied owing the appellant the aforesaid sums.

8. When the appeal came up before us for plenary hearing on 21st March 2023 Mr. Wanyama, learned counsel appeared for the appellant whereas Mr. Yego appeared for the respondent. Both parties relied on their written submissions dated 6th April 2022 and 23rd May 2022 respectively. In the appellant's written submissions, the 16 grounds of appeal were merged into 4 thematic areas.

9. It was submitted for the appellant that the trial court misapprehended the evidence thus arriving at a decision which lacked any basis in law and fact.

10. It was submitted that neither the provisions of the *Law of Contract Act*, the County Government's Act nor the *Public Procurement and Disposal Act* 2005(repealed but applicable in this matter), prescribed as to where a signature of a procuring entity should appear on a contract between the said entity and a contractor; that in the instant case, one Joseph Temulo who signed on all the agreements was the then respondent's head of procurement and supply chain and that the trial court erred in failing to appreciate the above.

11. The learned Judge was further faulted for failing to appreciate the recommendations of the Special Audit Report of the Auditor General dated June 2015 which found that the appellant did clearing and grading of the following roads:

    i. The road between Kiptoo and Chepshare

    ii. The road between Serenus centre and Skynest

    iii. The road between Muroki via Masengeli

    iv. The road between Kapretwa centre and Bianasi

    v. The road between Kapretwa Coffee Factory and Mat

    vi. The road between St. Thomas and Kapretwa

    vii. The road between Kapretwa office and Matisi and a recommendation had been made that the appellant be paid by the respondent.

12. Finally, the learned Judge was faulted for failing to analyze the issues raised in the appellant's submissions and hence, left so many unanswered questions which ought to have been answered conclusively in determining the dispute. We were urged to allow the appeal with costs.

13. On the other hand, it was submitted for the respondent that the purported letter of award entitled "letter of acceptance" was not signed by the authorized person representing the respondent's supply chain department; that a prequalification letter did not amount to a tender award and that Section 3(1) of the *Law of Contract Act* cap 23 of the Laws of Kenya makes it mandatory for all parties to sign an agreement and that there was no valid prequalification of the appellant to provide any services to the respondent in accordance with Section 31 of the *Public Procurement and Asset Disposal Act* of 2005.

14. It was submitted that in absence of any valid procurement process, the appellant cannot purport to have been contracted to offer services to the respondent and that due process was not followed in prequalifying the appellant or awarding it with any contract as there was no evidence of an award letter or contract signed to this effect.

15. As to whether the appellant had rendered services to the respondent and if so, the extent thereof, it was submitted that the appellant was relying on completion certificates to back up its claim that it did road works for the respondent, which completion certificates the appellant had failed to confirm their authenticity.

16. It was submitted that the completion certificates were unsigned and there was no seal affixed to them by the procuring entity. It was further contended that the said completion certificates were not accompanied by measurement sheets and inspection certificates raising questions as to how the quantities in the completion certificate were arrived at.

17. It was submitted that in the absence of road inspection certificates and genuine completion certificates, measurement sheets and road inspection certificates, it could not be proved that the appellant rendered any services to the respondent and that if at all any work was rendered by the appellant to the respondent, then such services were not adequately rendered.

18. Finally, and as to whether the appellant was entitled to any payment, it was submitted that Section 45 of the *Public Procurement & Asset Disposal Act* 2005 (repealed) restrained the respondent from making any payments for services that had not been adequately offered. Consequently, we were urged to dismiss the appellant's appeal with costs to the respondent.

19. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. This being a first appeal, our duty as stipulated under rule 31 of the *rules of this Court* is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own independent conclusion. This duty was reiterated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where this Court pronounced itself as follows:

> "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 v Kustron (Kenya) Limited* 2000 2EA 212."

20. Having carefully perused the record and the rival pleadings by the parties, we have framed the following 4 main issues for our determination:

    1. Whether the learned judge erred in law and in fact by completely failing to appreciate the evidence tendered by the appellant against the respondent thus arriving at a decision which lacks any basis in law and fact.

    2. Whether there was any valid contract between the appellant and the respondent?

    3. Whether the appellant rendered any services to the respondent.

    4. Whether the appellant is entitled to any payment.

21. Turning to the first issue, and as to whether the learned judge erred in law and fact by completely failing to appreciate the appellant's evidence, it is not in dispute that both the appellant and the respondent called one witness each in support of their respective case. The appellant called Edna Kerubo who was one of its directors whereas the respondent called Pius Munialo, its then Acting County Secretary.

22. The learned judge while considering the evidence stated, inter alia, as follows:

> " Both the plaintiff and the defendant relied on voluminous documents and called a single witness each to support its case. They adopted the statements already filed on record. Edna Kerubo testified on behalf of the plaintiff while Pius Munialo on behalf of the defendant.
>
> Without reproducing their evidence in court, it's clear that what is at stake and as righty captured by the submissions by both counsels for the plaintiff and the defendant is whether there was a contract between the plaintiff and the defendant."

The leaned judge further went on:

> " Whatever the two witnesses stated on oath, all that they based their evidence was the documentary evidence already on record. In fact, whatever documents produced by the defendant was already in custody of the plaintiff."

23. From the above excerpts, it is evident that the learned Judge may not have extensively reproduced the evidence that was relied upon by the parties. However, it is to be remembered that in evaluating the evidence there is no set format which the court ought to conform to. What matters in the analysis is the substance and not the length. This position was aptly stated by this Court in *John K. Malembi v Trufosa Cheredi Mudembei & 2 others* [2019] eKLR where it was stated thus:

> " There is no uniform method for evaluation of the evidence on record. What is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. With a tooth comb precision, we have analyzed the judgment of the trial court. We find that the judge distilled the legal and factual issues for consideration by the court. At paragraph 21 of the judgment, the judge properly captures the agreed issues for determination by the court and adds the jurisdictional question. Premised on the agreed issues, we find that the trial court, item by item appraised the evidence on record and identified the relevant law to be applied in the determination of each contested issue."

24. From the circumstances of this case and for reasons that shall become apparent in our determination of this appeal, we have no reasons whatsoever to fault the learned Judge on the basis that he failed to analyze the evidence that was before him.

25. The learned Judge was faulted for failing to frame the issues for trial and determination thereby arriving at wrong inferences and conclusions. We have carefully looked at the record and more specifically so, the judgment of the learned Judge where he inter alia rendered himself thus:

> " Without reproducing their evidence in court, it's clear that what is at stake and as rightly captured by the submissions by both counsels for the plaintiff and the defendant is whether there was a contract between the plaintiff and the defendant. Secondly, if there was such a contract was work performed or not? Whichever answer is arrived at, is the plaintiff entitled to the payments?" (Emphasis ours).

26. It is evident from the above passage and contrary to the appellant's contention that indeed the learned judge framed 3 issues for his determination as follows: whether there was a contract between the appellant and the respondent and if there was such a contract, was the work performed or not and whether in view of the foregoing the appellant was entitled to any payments. The contention by the appellant that the learned judge did not frame the issues for determination is therefore clearly without

any basis. In any event the appellant could not be heard to blame the learned judge when the parties themselves did not file a list of agreed issues. Consequently, this ground of appeal is without merit and the same must fail.

27. On the question as to whether there was any valid contract between the appellant and the respondent, the appellant's case was that vide a letter dated 1st October 2013, it was pre-qualified by the respondent for provision of building and civil works which offer it duly accepted on 7th October 2013. The respondent's stamp/ seal is however not affixed to the letter of offer.

28. It was the appellant's case that subsequently thereafter, the respondent advertised various procurement opportunities including those set aside for the youth within the public works sector and the appellant made applications to be granted some of the said opportunities which applications were all approved. These were for grading, bush clearing, stump removal, ditch clearing, gravel patching, culvert installation and rock blasting of 7 different roads. No evidence was however tendered to show that indeed the respondent had "advertised for various procurement opportunities" as contended by the appellant.

29. Further, we have looked at the various contract agreements between the appellant and the respondent all dated 28th April 2014 for road maintenance works of Muroki –Masengeli- Kapretwa Coffee Factory Road, St. Thomas- Kapretwa Factory in Saboti Ward, Kiptoo- Chepsari Kalamai Road, Kapretwa Centre Bianji Road in Saboti Ward, Kapretwa Coffee-Matisi Road in Saboti Ward, Matisi – Nyayotea zone via Bwayo Road in Saboti Ward and Kapretwa Coffee factory to Sukwo via Kibinei Bamba Fala Road in Saboti Ward. None of these contracts are signed/ executed by an authorized officer of the respondent and neither has the common seal/stamp of the respondent been affixed to them. It is instructive to note that vide the letters dated 8th April 2014, "awarding" the appellant the respective tenders, both parties were required to sign the contracts within 30 days of the letter but not earlier than 14 days of the letter.

30. Section 3 (1) of the *Law of Contract Act* cap 23 of the Laws of Kenya provides as follows:

> "No suit shall be brought hereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." (Emphasis supplied).

31. Juxtapositioning the above express mandatory provisions of the *Law of Contract Act* and the contracts dated 28th April 2014 where only one party (the appellant) has appended its signature/executed the contract, can it be said there was a valid contract between the parties capable of being enforced? We shall revert to this issue shortly. The preamble to the *Public Procurement and Disposal Act* No. 3 of 2005 (now repealed) and which was then in force provided as follows:

> "An Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters." (Emphasis ours).

32. Section 31 of the *Act* further provided for qualifications to be awarded contract. The same provided;

> "31. Qualifications to be awarded contract

(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria—

d. The procuring entity is not precluded from entering into the contract with the person under Section 33;

e. The person is not debarred from participating in procurement proceedings under Part IX."

Section 33 thereof further provided:

" 33. Limitation on contracts with employees, etc.

(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with—

(a)) An employee of the procuring entity or a member of a board or committee of the procuring entity." (Emphasis supplied).

33. Edna Kerubo a director of the appellant and who was the sole witness for the appellant stated as follows in cross examination:

"I am a director of the plaintiff company. I don't have CR12 showing directors of the company here. We are 3 directors. My husband Victor Odira Okul is one of the directors. He is a ward administrator Chepchoina ward. I am aware that he should not engage with the defendant. He was employed later. We replied in the defence. The Memorandum and Articles of Association are not in this bundle. The company was procured to do road work in April 2014. We got pre-qualified on 1/10/2013. I received the certificate on 10/3/2014. It's for youth, women and disabilities.

Before prequalifying and distribution have the certificate. I received it after 5 months of prequalification. I am aware of *Public Procurement and Disposal Act* provisions. There was a tender for road works in March/April 2014. I don't have information on tenders. I found people applying and I also did apply. I don't have the application for tender form. The defendant didn't issue us with letters I am not aware whether there was any tender opening or evaluation.

I was awarded for what I had applied but I don't know the process that took place. I was given letters in Saboti Constituency I produce the letter from the County Government. The contract was not signed by the County Government. Mr. Muhindi signed all the letters. He was head of procurement.....the 3rd contract the same procedure, no seal of the employer or the signature.It's the same for all the contracts." (Emphasis ours).

34. The evidence of this witness is quite telling. First of all, she admitted that none of the 7 contracts that were allegedly entered by the appellant and the respondent were signed/ executed by authorized officers of the respondent and neither was the seal of the respondent affixed to any of the contracts. Secondly, she admitted that she se did not have any information on any tenders and she was not aware whether there was any tender opening or evaluation, thirdly and more profound she admitted that her husband Victor Odira Okul who was one of the directors of the appellant was an employee of the respondent

and should not have participated in the tendering process. It is telling that the said Victor Okul was a signatory as a witness in all the 7 contracts.

35. By virtue of Victor Odira Okul being a an employee of the respondent, he was precluded from entering into a contract with the respondent by virtue of Section 33 (1) of the *Public Procurement and Disposal Act* No. 3 2005.

36. The Learned Judge while addressing the issue as to whether there was a valid contract between the appellant and the respondent stated inter alia as follows: -

> "As clearly discerned from the attached contracts, none of them has been signed by the defendant or its representative. Even in the absence of the tender advertisement, tender evaluation and processing minutes from the respective committee and a valid tender award, I find it respectfully, very difficult to believe that the attached contracts can be termed legally binding contracts. This court has been unable to understand why the contracts were not signed by the procuring entity namely the defendant. Even if they were signed on the same date without the tender process being followed, then it would have been prudent to have them signed and sealed." ".....I find the plaintiff's claim not sustainable for the simple reason that it did not comply with the procurement rules. There was no evidence that it tendered for the works. Even if it tendered there was no evidence that there was a valid contract between it and the defendant. The contracts produced does not stand the force of law." (Emphasis ours).

37. We fully associate ourselves with the sentiments expressed by the learned judge in the above passage. It is evident that the "contracts" between the appellant and the respondent were so fundamentally flawed to the extent that they were null and void abinitio. It is our considered view that indeed there was no valid contract between the appellant and the respondent and we so hold and find.

38. Turning to the issue as to whether the appellant rendered any services to the respondent, the appellant contended that it conducted various road maintenance works and sought to rely on various Local Service Orders and Completion Certificates issued by the respondent. The respondent on the other hand contended that the work was not fully done and that, the completion certificates did not bear any stamp of the respondent and that further no work measurements sheets were shown.

39. We have looked at the Local Service Orders dates 13th May 2013, 13th May 2014, 10th June 2014, and 3 other local service orders which are barely legible. None of this Local Service Orders bears the official seal/stamp of the respondent and they are signed by a person whose designation is indicated to be "CFO". Additionally none of the completion certificates relied upon by the appellant bears the official seal of the respondent and is not even clear who signed these documents since they simply indicate that they have been verified by "procurement, roads inspector and audit", a fact that was noted by the learned Judge when he stated thus:

> "There was also a document called "completion certificate" dated various dates and supposedly signed by the engineer and verified by procurement, roads inspector and audit departments." The Judge highlighted PW1's evidence in cross-examination in which she stated as follows:-

PW1 in cross examination stated as follows:

> "I wasn't given site insurance but I went with the surveyor from the county. There was supervision of the road but I don't recall the names. They didn't give us any documents. I got

certificate of completion I didn't know the people who signed the certificate of completion. I don't know who checked and signed. The report by the county assembly showed that Lucy Sitati wasn't an employee of the county government. The audit stated that the authors of reports be found personally responsible including the governor." (Emphasis ours).

40. From the circumstances of this case, it is clear that the Local Service Orders and the completion certificates that the appellant relied on to support its claim did not bear the official seal/stamp of the respondent and some of them were barely legible and even though some of them had been signed, it was not clear who had signed them. The appellant through its witness confirmed as much when the witness testified that:

> " she didn't know who signed the completion certificates, that she wasn't given site insurance and in some instances she could not even remember the names of the roads that were inspected."

41. As was rightly observed by the learned Judge, "Even though perhaps some work was done as evidenced by the voluminous exhibits including photographs produced by the plaintiff, the principle of estoppel doesn't apply in this case. As stated earlier the LSOs exhibited were not signed and or stamped by the defendant. As found by the Auditor General the same were suspect."

42. We fully agree with the learned Judge and say no more regarding this issue. Finally, as to whether the appellant was entitled to any payments and having found that there was no valid contract between the appellant and the respondent, there would be no basis upon which the appellant would be entitled to any payment and it is evident that the appellant's appeal must fall on all fours. Indeed, as was stated by Lord Mansfield in *Holman v Johnson* [17775] 1 Cowp 341 thus:

> " No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff..."

43. Before we pen off, we wish to point out that this may as well have been a calculated scheme between the directors of the appellant and rogue officials of the respondent. The appellant entered into a contract with the respondent knowing very well that one of its Directors (Victor Okul) was an employee of the respondent, contrary to the provisions of S.33(1) of the *Public Procurement and Disposal Act* (now repealed). As if that was not enough, the said Victor Okul went ahead and even witnessed all the contracts. The appellant through its witness was so casual as regards the way in which they were awarded the contract when its witness testified thus: "I found people applying and I did also apply". This reminds us of the recent infamous Kenya Medical Supplies (KEMSA) scandal where someone alleged to have been walking around the offices of KEMSA and happened to be awarded a contract! We condemn and detest this kind of conduct in the strongest terms possible.

44. Ultimately therefore, the appellant's appeal is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF SEPTEMBER, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR