



REPUBLIC OF KENYA



Kenya Power and Lighting Company Limited v Mungai (Civil Appeal E083 of 2024) [2025] KEHC 5535 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E083 OF 2024
RM MWONGO, J
APRIL 30, 2025**

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

PHILIP MUGUI MUNGAI RESPONDENT

*(Appeal arising from the decision of Hon. D. Endoo in Embu
SCCCOMM No. 104 of 2024 delivered on 09th September 2024)*

JUDGMENT

The Appeal

1. By a memorandum of appeal dated 22nd September 2024, the appellant seeks the following orders:
 1. This appeal be allowed with costs;
 2. The judgement delivered by Hon. D. Endoo on 9th September 2024 and all consequential orders be set aside;
 3. The judgement delivered on 9th September 2024 be substituted with a judgment dismissing the respondent's suit; and
 4. In the alternative to prayer (c) above, and with no prejudice to the same, this court do make such orders as it may deem appropriate.
2. The appeal is premised on the grounds that:
 1. That the Learned Magistrate erred in law and fact by failing to consider the facts and circumstances of the suit while determining the suit;



2. That the Learned Magistrate erred in law and fact by failing to consider the appellant's evidence and submissions while determining this suit;
 3. That the Learned Magistrate erred in law and fact by failing to distinguish that the dispute in this suit relates to public procurement, which dispute is subject to and strictly applicable to the provisions of the *Public Procurement and Asset Disposal Act* of 2015;
 4. That the Learned Magistrate erred in law and fact by finding that there was a valid contract between the appellant and the respondent, despite the fact that the facts of the suit and the evidence on record showed that the essential elements of a valid contract were not in existence;
 5. That the Learned Magistrate erred in law and fact by blatantly disregarding the provisions of *the Constitution* of Kenya 2010 and the *Public Procurement and Asset Disposal Act* 2015, while determining the dispute in this suit;
 6. That the Learned Magistrate erred in law and fact by relying on a misrepresentation and a misapprehension of the provisions of the *Public Procurement and Asset Disposal Act* 2015, to arrive at a faulty and erroneous decision;
 7. That the Learned Magistrate erred in law and fact by finding that there was a valid contract between the appellant and the respondent, while completely ignoring the provisions of section 135 of the *Public Procurement and Asset Disposal Act* 2015, which provides for creation of procurement contracts and highlights in mandatory terms the salient features of a procurement contract;
 8. That the Learned Magistrate erred in law and fact by failing to distinguish that the dispute in this suit stemmed from procurement proceedings between the appellant and the respondent, and that the subject tender document in the said proceedings is the primary evaluation guide with respect to compliance and non-compliance with tender requirements by the respondent;
 9. That the Learned Magistrate erred in law and fact by finding that the respondent was entitled to the reliefs sought, while completely ignoring the provisions of section 72 of the *Public Procurement and Asset Disposal Act* 2015;
 10. That the Learned Magistrate erred in law and fact by finding that the respondent had discharged the requisite burden of proof, to warrant granting of any of the reliefs sought; and
 11. That the Learned Magistrate erred in law and fact by considering extraneous matters in the determination of the suit herein.
3. It is noted that the claim was filed in the Small Claims Court before the Adjudicator, not a Magistrate, a significant distinction.

Background

4. The respondent, through his company viz, Mungai Electroventures Ltd, filed a statement of claim dated 10th July 2024 through which he claimed a total of Kshs.419,797.45/=. The respondent's company is a pre-qualified contractor with the appellant. He claimed that the amount was for work done through 2 different contracts he entered into with the appellant for Kshs.89,000 and Kshs.330,797.45 in January and May 2018 respectively. According to the respondent, the work was done to the satisfaction of the appellant who was supposed to settle the amount by 30th August 2018. The appellant failed to pay the amount, which the respondent claimed had earned interest at the rate



of 20% per annum over a period of 6 years. Together with interest, the total amount claimed was Kshs.923,554.39/=. He also claimed compensation and costs of the claim.

5. The appellant filed a response to the claim in which it denied the respondent's averments in the statement of claim. It stated that there was no contractual relationship between the parties and that, in any event, the respondent's company is seeking compensation by false pretences with the aid of forged documents.

The Hearing

6. At the hearing, CW1 was the respondent herein, who adopted his witness statement whose contents were the same as those in the statement of claim. he stated that he has been working with the appellant since the year 1997. On cross-examination, he stated that he was give 4 contracts, but was only paid for 2 of them. The 2 contracts for which he was paid were not produced as evidence. The award letter he was given did not have the appellant's letterhead neither was it signed by the project engineer or the Managing Director of the appellant. The respondent did not write an acceptance letter to the tender award.
7. He insisted that there is a contract between him and the appellant and the work done was inspected and approved by the appellant, as evidenced by the bill of quantities. He stated that he did the work and it was inspected by one Mr. Abuto, an engineer based in Embu, who was assigned that role by the project engineer. He billed for the work which he said had been completed and approved by Mr. Abuto, even though a certificate of completion was not issued,
8. It was his evidence that whatever irregularities were discovered leading to cancellation of the subject tender in May were not his fault. In any event, the letter of award for the tender came to him after the work had been done. He stated that he was charged with a criminal offence in connection with this issue but he was acquitted. His documents were never stamped by the procurement officer in Nyeri but they were signed by the county manager because the amount involved was less than Kshs.5,000,000/=. He was seeking interest because he had borrowed the principal amount which has been accruing interest.
9. RW1 was Argwings Kodhek, a senior auditor at the appellant's company, who sought that the suit be dismissed. He denied knowledge of Mr. Abuto and why the said person signed the documents held by the respondent. it was his job to investigate activities and he noticed that when called upon, the respondent presented tender documents including those of an employee of the appellant. The company noted irregularities in the tender documentation, which prompted its cancellation.
10. The respondent faced criminal charges arising from the irregularities found. He did not know whether the respondent was pre-qualified but he knew that the equipment and poles needed for the work he did were released from the appellant's store in Embu, which is supervised by the appellant's officers. In his testimony, he could not tell whether money was paid for the tenders or whether some staff members were unlawfully terminated. After the tender was cancelled, no work was to be awarded after that, otherwise, it would be held as illegal.

Written submissions

11. The appeal was canvassed by way of written submissions.
12. The appellant submitted that the dispute before the Small Claims Court relates to public procurement which is governed by the Public Procurement and Assets Disposal Act, 2015 (hereinafter referred to as 'PPADA') which was enacted in accordance with the provisions of Article 225 of *the Constitution*. It relied on section 72 of the PPADA and stated that the respondent's obligations to the appellant



were subject to that law and the regulations thereof. It relied on the case of *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* [2019] KEHC 8239 (KLR).

13. It submitted that the relationship between the appellant and the respondent was not contractual and it did not meet the requirements set under section 135 of the PPADA. That no valid contract was produced as evidence, thus the work done by the respondent outside a valid contract amounts to a nullity. Further reliance was placed on the cases of *Shabwali Secondary School v Vwinah* [2024] KEHC 6206 (KLR), *Sam-Tech Diagnostics Company Limited v County Government of Tharaka Nithi* [2022] KEHC 11543 (KLR) and *County Government of Kiambu v Bradonlink Contractors Ltd & another* [2023] KEHC 2338 (KLR).
14. It urged the court not to enforce an illegality since there were no contracts against which the payment claimed should be made in line with section 135 of the PPADA. It relied on the cases of *Heptulla v Noormohamed* [1984] KECA 42 (KLR), *Multi-Line Motors (K) Ltd v Migori County Government* [2019] KEHC 9823 (KLR), *Patel v Singh* [1987] eKLR, *Kenya Airways Limited v Satwant Singh Flora* [2013] KECA 545 (KLR) and *Mapis Investment (K) Limited v Kenya Railways Corporation* [2006] KECA 344 (KLR).
15. The respondent submitted that he was pre-qualified for the appellant's work which means that he would be exempted from the lengthy tender requirements. The letter dated 02nd May 2018 was signed by one Benard Ochieng Abuto who is an employee of the appellant but was not called to verify that he signed the documents. It is not known whether the said Mr. Abuto was disciplined for the alleged impropriety on his part according to RW1 whose testimony was on an audit he conducted. The findings of the audit were not communicated to the respondent and there was no evidence to show otherwise.
16. He urged the court to imply the existence of a contract and he relied on the cases of *Ali Abdi Mohamed v Kenya Shell & Company Limited* [2017] KECA 590 (KLR), *Timoney and King v King* 1920 AD 133 at 141, *Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed T/A A. S. Mohammed Investments* [2014] eKLR, *Steadman v Steadman* (1976) AC 536, 540 and *Rose and Frank Co. v J R Crompton & Bros Ltd* (1923) 2 KB at 293. He referred to the Bill of Quantities/ inspection report signed by the appellant and stated that there was a valid contract between him and the appellant.
17. He submitted that the appellant bore the burden of proving his case according to section 112 of the *Evidence Act* but this was not done. He relied on the cases of *Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No. 68 of 2007* and *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others* [2012] KEHC 5590 (KLR), *Trust Bank Limited V Paramount Universal Bank Limited & 2 Others* [2009] eKLR and *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000*.

Issue for Determination

18. The issue for determination are
 - i. Whether there was a contract between the parties.
 - ii. Whether or not the appeal has merit.



Analysis and Determination

19. The appellate Court can only make its decision based on the record of the trial court as was held in the case of *Okeno vs. Republic* (1972) EA 32 wherein the court held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

20. The respondent produced a letter of award for supply to Mecca Road signed by Benard Abuto, a technician, allegedly at the appellant company. The letter contained terms including the total amount of Kshs.3330,797.43/= being the work of installing street lights. The letter instructed the respondent to write an acceptance letter by 07th July 2018. No acceptance letter was written and the respondent testified as much. He also stated in his evidence that the award letter was written by the appellant and signed by Bernard Abuto who described himself in the document as a technician.
21. CW1 said that Bernard Abuto is an engineer in Embu, to whom the appellant’s project manager delegated the duty of overseeing the project at Mecca road. When asked whether Bernard Abuto is an employee of the appellant, RW1 could not confirm this, neither did the said Bernard testify. On the basis of the award letter printed on 02nd May 2018, the respondent proceeded to pay VAT on the amount and invoiced the appellant. Through evidence, it was established that the respondent was indeed charged with a criminal offence in Embu CM Criminal Case No.701 of 2018 where he was acquitted.
22. Section 135 of the PPADA gives the prerequisites for creation of procurement contracts. It states:
- “(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.
- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.



- (5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.
- (6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—
- (a) Contract Agreement Form;
 - (b) Tender Form;
 - (c) price schedule or bills of quantities submitted by the tenderer;
 - (d) Schedule of Requirements;
 - (e) Technical Specifications;
 - (f) General Conditions of Contract;
 - (g) Special Conditions of Contract;
 - (h) Notification of Award.
- (7) A person who contravenes the provisions of this section commits an offence.”
23. Pursuant to the PPDA, the tender document exhibited by the Appellant for the tender under which the respondent applied provides as follows at paragraph 3.37:
- “3.37.1 At the same time as KPLC notifies the successful Tenderer that its Tender has been accepted, KPLC will send the Tenderer the Contract Agreement provided in the Tender Document together with any other necessary documents incorporating all agreements between the Parties.
- 3.37.2 Within fourteen (14) days of the date of notification of award, the successful Tenderer shall only sign the Contract Form and all the documents specified in that Form and return them to KPLC within that period of fourteen (14) days.
- 3.37.3 KPLC shall sign and date the Contract in the period between not earlier than fourteen (14) days from the date of notification of contract award. Further, KPLC shall not sign the contract until and unless the authentic performance security is received in accordance with paragraph 3.36.
- 3.37.4 Failure of the successful Tenderer to sign the Contract, the award shall be annulled and its tender security forfeited in which event KPLC shall notify the next lowest evaluated Tenderer that its Tender has been accepted.”
24. Under common law, a contract is created where there is an offer, acceptance, consideration and most importantly, the parties must have the legal capacity and intention to enter into a contract. It may be written or unwritten. In fact, a contract may even be implied where no words were used at all as was stated in the Court of Appeal case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* (supra).
25. However, for purposes of this case, a contract ought to have been in writing in line with the requirements under section 135 of the PPADA and Paragraph 3.37 of the tender document. Both parties testified that the respondent’s company was prequalified to work for the appellant. The



tendering process would therefore to be well within the respondent's knowledge since he stated that this was not the first contract he was awarded by the appellant.

26. According to aforesaid provision of the PPADA and the evidence adduced, the respondent ought to have sent an acceptance letter to the award within the stipulated time frame. The award itself should have been signed by the accounting officer as provided under the PPADA and paragraph 3.37 of the tender document but this was not the case. RW1 testified that the tender was cancelled in May 2018 when his audit of the same revealed irregularities. One of the irregularities was that the tender documents provided by the respondent included some details of the appellant's employee. The findings of RW1's investigation and audit were not communicated to the respondent who was already in the process of doing the work he was allegedly assigned through the now cancelled tender.
27. From a perusal of the documentary evidence adduced, the alleged contract is only signed by one party whose identity is in question and was not supported through evidence. The respondent allegedly delivered on the assignment and Benard Abuto, the same unidentified person who signed the letter of award as a technician, signed the bill of quantities as supervisor in acknowledgment of the work done. In fact, Benard Abuto only prepared the bill of quantities that ought to have been checked by one Stephen Mbau Ngugi and approved by the project manager.
28. Where a contract ought to have been specifically drawn as provided by the PPADA, the parties herein are bound to the terms set out in the statute. In essence, parties have to expressly agree on the terms and the court will only interpret the terms as agreed and specified in a contract. The Court cannot re-draw a contract to suit circumstances. The court cannot even imply a contract where there was no indication of an intention to have one in the first place. Halsbury's Laws of England 4th Edition (Reissue), at paragraph 778 provides as follows:

“In addition to the terms which the parties have expressly adopted, there may be other terms imported into the contract, these latter being generally known as 'implied' terms, ... As a general rule, the Courts will enforce not only the terms expressly agreed between the parties, but also those which are to be logically implied from those express terms including from any recitals... The question of whether a term is to be logically implied from the express terms of the agreement is a matter of construing the intention of the parties”.
29. In this case, the parties did not agree on specific terms for the work done. The appellant's alleged offer through an award letter was not accepted by the respondent. Nevertheless, he went ahead to do the work. The offer, as stated earlier, was not signed by the accounting officer of the appellant as required by law or as prescribed by the tender document. It would be presumptuous in the circumstances to say that there existed a contract between the parties. In *Lamb v Evans* [1893] 1 Ch 218, Bowen LJ stated:

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile”.

(see also the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited* (supra))
30. Even if a contract was to be implied out of the fact that the respondent remitted VAT to the Kenya Revenue Authority, that alone is not enough because there is no proof of previous contracts of a similar sort between them. It cannot even be said that the respondent had previously been paid for 2 other



contracts prior to this one as there was no evidence in support thereof. Even though an Adjudicator in the Small Claims Court is not bound to follow the strict rules of evidence under section 32 of the Act, the burden of proof still lies on a claimant to prove his case on a balance of probabilities.

Conclusions and Disposition

31. It is central to the exercise of an Adjudicator's function that it must be undergirded by the principles of natural Justice. This is what is provided for in Section 17 of the SCC Act. The rules of natural Justice are focused on both procedural and substantive impartiality, fairness, reasonableness, equity and equality. A fair and equitable process necessarily implies that a person who alleges something must prove it on a balance of probabilities, and if he fails to do so, can only achieve a commensurate outcome.
32. Here, the trial magistrate found without supporting evidence that there was indeed a contract between the parties and she went on to award the sum of Kshs.423,937.62/=. From the foregoing however, the amount was wrongly awarded since there was no basis for the finding, there being no valid contract between the parties.
33. Accordingly, the appeal is hereby allowed with costs to the appellant. Prayers 1, 2 and 3 of the Memorandum of appeal are allowed as prayed.
34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Kimathi – holding brief for Okwaro for Respondent
2. Mr. Muchai for Appellant
3. Francis Munyao - Court Assistant

