



**Catholic University of Eastern Africa v Benard Mahiuha t/a Adaptive Science (Civil Appeal E1067 of 2023) [2025] KEHC 9011 (KLR) (Appeals) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9011 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL E1067 OF 2023**

**TW OUYA, J**

**JUNE 26, 2025**

**BETWEEN**

**CATHOLIC UNIVERSITY OF EASTERN AFRICA ..... APPELLANT**

**AND**

**BENARD MAHIUHA T/A ADAPTIVE SCIENCE ..... RESPONDENT**

*(Being an Appeal against the Judgment and decree of Hon. BECKY CHELOTI PRINCIPAL MAGISTRATE delivered on 29th September 2023 in Milimani Commercial Chief Magistrates' Court on Commercial Suit No. E755 of 2022)*

**JUDGMENT**

1. Through a memorandum of appeal dated 13<sup>th</sup> October 2023 and filed before the Court on 4<sup>th</sup> June 2024, the Appellant is challenging the decision of the trial Court Hon. Becky Cheloti delivered on the 29<sup>th</sup> of September 2023 awarding the Respondent a sum of Kshs. 5,881,881 together with interests and costs upon finding the Appellant in breach of the contract dated 31<sup>st</sup> October 2017 and Addendum thereto dated 23<sup>rd</sup> November 2017.
2. The Appeal is anchored on grounds that:
  - i. The trial Court erred in law and fact in failing to find and hold that the Respondent had not proved his claim on a balance of probabilities that it entered into contracts with the duly authorized officers of the Appellant.
  - ii. The trial Court erred in law and in fact by misconstruing the law on contracts and contractual obligations of the parties as the Respondent never performed its part of the contract.



- iii. The trial Court erred in law and fact when she failed to hold that there was no contract in place between the Appellant and the Respondent capable of enforcement.
  - iv. The trial Court erred in law by failing to find that the failure to produce in court any evidence of professional qualification by the Respondent to prove he was qualified to engage in specialized construction activities.
  - v. The trial Court erred in law by allowing the claim despite the lack of evidence on record to warrant a contractual relationship between the parties.
  - vi. The trial Court erred in law by failing to consider the applicable legal principles on contract and evidence and thus arrived at wrong findings.
  - vii. The trial Court erred in failing to hold that the Appellant lacked capacity to enter into an oral contract due to the undisputed fact that contractual relationships must be in writing, sanctioned and approved by its relevant authorities.
  - viii. The trial Court erred in failing to hold that the Respondent could not commence the purported construction without having the necessary approvals from Nairobi city council and National construction authority.
  - ix. The trial Court erred in law and in fact she flouted the principle of judicial precedent and acted on wrong principles of law.
  - x. The trial Court erred in law and fact in allowing this claim.
3. A brief history of the dispute between the parties herein is that the Appellant procured the Respondent's services to construct laboratories at its Lang'ata Campus consequent to which the Appellant and the Respondent executed two agreements, that is, the main agreement dated 31<sup>st</sup> October 2017 and an addendum thereto dated 23<sup>rd</sup> November 2017.
  4. The agreement dated 31<sup>st</sup> October 2017 provided for the construction and installation of laboratory fittings for health services and also set out the mode of payment under Clause 5 thereunder. Under Phase 1 of the said agreement, it was expressed that the Appellant would deliver a 20 percent commitment fee of Kshs.3,214,383 and same was paid by the Appellant to the Respondent on 1<sup>st</sup> November, 2017.
  5. The second agreement is an addendum dated 23<sup>rd</sup> November 2017 for the construction of additional rooms next to the anatomy lab at a cost of kshs.4,120,625. It was mutually agreed by the parties herein that the terms of payment for the construction of the additional rooms next to the anatomy lab as provided in the addendum agreement dated 23<sup>rd</sup> November 2017 remained the same as the ones in the main contract.
  6. The Respondent proceeded to the next phase of the construction after payment of the commitment fee was made. The Respondent raised an invoice dated 25<sup>th</sup> November 2017 of kshs.6,881,881 where the Appellant only paid kshs.1,000,000 on 4<sup>th</sup> December 2017 leaving a balance of kshs.5,881,881.
  7. The Appellant urged the Respondent to continue with construction despite delays in settling the previous bill in full and represented that the same would be done in due course which the respondent did. The Respondent, however, was not able to complete the project due to lack of funding. When the Appellant demanded payment for work done the Respondent averred that there was no contractual agreement between the parties.



8. The trial Court determined that the Defendant, now Appellant, was in breach of the contractual obligation owed to the Plaintiff, now Respondent for failure to deliver payment as contracted and for failure to issue completion documents as per the terms of the governing agreement.
9. The appellant prays that the appeal be allowed and the judgment of the trial Court delivered on 29<sup>th</sup> September 2023 be set aside. The appeal was dispensed by way of written submissions.
10. The appellant filed written submissions dated 10<sup>th</sup> June 2024 through its counsel and relied upon several authorities in support of his case. The gist of the Appellant's submissions is that trial Court exercised its discretion improperly.
11. The respondent filed written submissions dated 11<sup>th</sup> June 2024 through its counsel maintaining the position that it was the appellant's duty as the procuring entity to get approvals and that the trial magistrate rightly entered judgement in favor of the respondent being the balance of the unpaid invoice.
12. Having carefully considered the grounds of appeal, the parties rival written submissions together with all the authorities cited, I find that the issues arising for my determination to be: whether a valid contract was ever executed between the parties and whether the judgement entered in favour of the Respondent by the trial Court on 29<sup>th</sup> September 2023 was merited.
13. This being a first appeal, the Court is guided by the dictum in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR where the Court declared as hereunder:

“Indeed, an appellate court is not bound to accept the factual findings of a trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See *Mwangi vs Wambugu* [1984] KLR 453.”
14. The law relating to the exercise of the Court's discretion to set aside an ex- Court elaborated on its role when invited, as in the subject appeal, to interfere with the exercise of discretionary powers the trial court ex-parte judgment is beyond peradventure. In *Mbogo vs. Shah* [1968] EA page 93 the Court held as follows:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
15. It is trite the Courts will not re-write contracts for the parties. In the case of *Kenya Commercial Finance Company Ltd vs Ngeny & Another* [2002] 1KLR, the Court proclaimed as follows:

“The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.”



16. In the case of Eldo City Limited v Corn Products Kenya Ltd & Another (2013) eKLR the Court cited with approval Lord Denning in Storer v Manchester City Council (1974) as follows:

“In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

17. The Court finds and holds that by rendering part-payment to the Respondent, the Appellant clearly demonstrated the intention to be bound by the terms of the aforesaid contract. Having rendered payments to the Respondent under the agreements dated 31<sup>st</sup> October 2017 and 23<sup>rd</sup> November 2017, the Appellant is estopped from denying the existence of the same contractual relationship.

18. The Appellant did not submit that the Contract executed with the Respondent was harsh, unconscionable or oppressive. However, the Appellant contended and submitted that the Respondent lacked capacity to execute the aforementioned contracts as the Respondent was not registered with the National Construction Authority (NCA). The Court finds the Appellant's position to be a non-starter on grounds that it was not an express term of either the agreement dated 31<sup>st</sup> October 2017 or the one dated 23<sup>rd</sup> November 2017 that the Respondent be registered with the NCA as a pre-condition for entering into contract with the Appellant. In the premises, no issue of misrepresentation was raised as to the registration status of the Respondent with the NCA.

19. Upon careful evaluation of the totality of the evidence placed before the trial court, this Court is satisfied that sufficient material was presented by the Respondent attesting to the existence of a valid contract between the parties herein, as contained in the agreement dated 31<sup>st</sup> October 2017 and Addendum thereto dated 23<sup>rd</sup> November 2017.

20. This Court finds the amount granted by the trial court in the judgment dated 29<sup>th</sup> September 2023 to be the exact outstanding balance claimed by the Respondent. In this event, the decision of the trial Court dated 29<sup>th</sup> September 2023 is hereby upheld.

21. This court proceeds to make the following Final Orders:

I. The instant Appeal is found unmerited and same is hereby dismissed entirely.

II. The Appellant shall bear the costs of the appeal and at the trial Court.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>th</sup> JUNE, 2025.**

**Hon. T. W. Ouya**

**JUDGE**

**FOR APPELLANT.....NO APPEARANCE**

**FOR RESPONDENT.....OTIENO**

**COURT ASSISTANT.....BRIAN**

