National Water Conservation & Pipeline Corporation v Assembled Enterprises Limited (Civil Appeal E775 of 2021) [2025] KEHC 9487 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E775 OF 2021

JN NJAGI, J

JUNE 26, 2025

BETWEEN

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... APPELLANT

AND

ASSEMBLED ENTERPRISES LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. O. Mbeja, Principal Magistrate, in Nairobi Chief Magistrate's Court Civil Suit No. 8721 of 2019 delivered on 29/10/2021)

JUDGMENT

1. The Respondent herein brought suit against the Appellant at the lower court wherein they were seeking judgment in the sum of Kshs. 5,147,500/- being a pending bill payable to the Respondent for work done for the Appellant which sum the Appellant had refused to pay. The Appellant denied the claim. After a full trial, the trial magistrate found the amount proved to be Ksh. 2,168,040/= and entered judgment for the said sum with interest and costs of the suit. The appellant was aggrieved by the judgment and lodged the instant appeal which is based on the grounds that:

    1. That the Learned Magistrate erred in fact and in law by holding that the Appellant is liable to pay the Respondent a sum of Kshs. 2,168,040/- which was not pleaded or prayed for and which was not supported by evidence.

    2. That the Learned Magistrate erred in law and facts in assessing damages by way of a computation of the judgment sum.

    3. That the Learned Magistrate erred in law and facts by rewriting the contract between the parties.

4. That the Learned Magistrate erred in law and facts by taking into consideration irrelevant facts and failing to take into account relevant facts.

5. That the Learned Magistrate erred in law and facts in arriving at the conclusion that the Respondent was contracted by the Appellant.

2. The appellant sought to have the appeal allowed with costs and the judgment and decree of the trial court be set aside and substituted with an order dismissing the Respondent's suit.

Pleadings

3. The respondent pleaded in its plaint dated 15th February 2012 that it had been contracted by the Appellant to offer it transport services in the years 2007 and 2008. That the respondent issued the appellant with several invoices totaling to Ksh.5,500,000/= and sought for payment. The appellant informed the respondent that its offices had been gutted down by a fire and a Pending Bills Committee had been set up to look into the claim. That on the 16th June 2011, the appellant communicated to the respondent that the committee had assessed their bill at Ksh. 5,147,500/= but requested the respondent to present the necessary documents in support of the claim for analysis and payment. That the respondent presented the documents but the appellant did not pay which prompted the filing of the case in court.

4. The appellant on their part denied the claim vide a statement of defence dated 19th March 2012 in which it stated that the Pending Bills Committee did not assess the respondent`s claim at Ksh.5,149,500/= as alleged and neither did it acknowledge the debt but rather requested the respondent for further particulars of the debt. That the respondent failed to provide further particulars as requested.

The Evidence

5. The respondent called one witness in the case, Patrick Kamau Gachanja, PW1 who was the Managing Director of the plaintiff/respondent Company. The witness relied on his witness statement filed in court on the 22nd February 2012 and his further evidence adduced in court on 21st January 2021. It was the evidence of the witness that their company provided the appellant with transport services through motor vehicles registration Nos. KAK 336L and KAA 387B. That the procedure was that after a lorry for the appellant`s work was identified, a work ticket would be issued for the lorry. That the work ticket would be signed by an officer of the appellant. That upon completion of the assignment they would be given a requisition form which would be used to invoice the appellant. Payment would then be processed. To support the claim, the witness produced several invoices that were backed by daily work tickets, transport requisition forms and LPOs. He said that some invoices were partly paid and others were not paid. They wrote a letter to the appellant making a demand of Ksh.5,286,700/=. The appellant after due consideration assessed the claim at Ksh.5,147,500/= vide a letter of the Managing Director of the appellant dated 16/6/2011. He stated that the managing director of the appellant admitted the claim in the said letter but requested for documentation, a request that was provided by the respondent. That even after providing the supporting documents as requested in the letter, the claim was not paid.

6. The witness further testified that there was an audit by KPMG which confirmed that they were owed.

7. On cross examination by counsel for the appellant, the witness stated that the Local Service Order communicated the money payable. He admitted that some work tickets had less days than indicated in the transport requisition forms and invoices. His explanation as to why the transport requisition

forms did not indicate the approximate amount was that he might have misplaced some of the work tickets hence the reason some had less days that was indicated in the transport requisition forms and invoices. He pointed out a number of them, for example page 41 which indicated 18 days instead of the 31 days invoiced, page 45 indicated 15 days instead of 31 days, page 49 indicated 16 days instead of the 29 days while page 53 indicated 15 days.

8. The witness admitted that there was change of daily charge rate from Ksh. 11,500/= to Ksh.15,500/ = in some of the documents. He said that he did not have any document indicating the change of rate to the stated figure.

9. On re-examination, he stated that he issued invoices on the same day and that all the information on all invoices tallied with the requisition forms and the work sheets. That some work tickets were missing some dates attributing to error when photocopying. He further told the court that he availed all the necessary documents on request. That the appellant wrote a letter, Exhibit 14, confirming that they had received the documents.

10. The appellant called one witness Musa Kilubi Osieko, DW1 who works with the appellant Company as a transport manager. The witness adopted his statement dated 3rd May, 2018 as his evidence-in-chief. He said that the amount claimed by the Respondent was not payable. That the transport requisition forms are internal documents which should have approval by the head of department and have the corporation stamp. He said that the transport requisition forms presented by the respondent were not approved by the head of department and the signature by the managing director were missing.

11. He explained that works could only be done upon receipt of an LPO and that it was not possible to carry out work and obtain the LPO later. He further told the court that most of the defendant's documents were burnt in an accidental fire in 2009.

12. On cross-examination, the witness said that he was the transport manager between 2006 and 2011. That the Transport Requisition forms were signed by the managing director and only had a provision for the transport and the managing director to sign. He confirmed that he knew the Plaintiff's director Mr. Gachanja. That the managing director signed the letter dated 16th June, 2011 addressed to the Plaintiff based on an audit report that confirmed that there was money owed to the Plaintiff but there were no documents.

13. He stated that the managing director got the figures from the audit but there was no documentation. That the letters drawn by the plaintiff and addressed to the managing director dated 18th July, 2011 and 24th October, 2011 were supported by transport requisitions forms and work tickets.

14. On re-examination, he told the court that he was not aware if any further analysis was done and that there was a request to the Plaintiff to provide necessary documents. He maintained that the signature on the transport requisition forms marked at page 30 and 46 on the Plaintiff's documents was not his.

15. The appeal was canvassed by way of written submissions.

Appellants' Submissions.

16. The Appellant filed submissions dated 14th October, 2024 through the firm of E. K. Mutua & Company Advocates. Counsel identified two issues for determination: whether the learned trial magistrate erred in holding that the Respondent rendered transport services to the Appellant and whether the learned trial magistrate applied the correct principles in assessing the special damages of Kshs. 2,168,040/- awarded to the Respondent.

17. On the first issue the appellant submitted that the Respondent did not offer the services which they were claiming from the appellant. That the documents relied on by the respondent being work tickets, transport requisition forms, invoices and local service orders had glaring contradictions which indicated that the claim was based on falsehoods. That the number of days worked in some of the invoices produced were more than the number of days shown in the corresponding work tickets produced. That the evidence showed that some LSOs were issued after work was done. That some work tickets and LSOs were not produced in support of the claim. That some invoiced did not disclose any particular LSO that each related to.

18. It was submitted that the total sum in all the 11 invoices tendered amounted to Ksh.530,790,601/= as opposed to the amount claimed of Ksh.5,147,500/. That the Respondent's evidence in support of its claim for work done was wanting and it was highly improbable that one would do work before an LPO was issued. The appellant relied on the case of Stairs Enterprises v Managing Director National Water Conservation & Pipeline Corporation (2018) eKLR where the court held as follows:

> " Another anomaly is in respect to the LPO number 699363 which was dated 1st February, 2007 and for which the plaintiff raised an invoice for that work of that LPO one year earlier that the date of the LPO. The LPO was dated 1st February, 2007 and the Plaintiff's invoice was dated 14th April, 2006.
>
> The Plaintiff's claim is supported by LSOs, LPOs and contract but there is no supporting document to prove that the plaintiff made proposals for the work awarded to it... accordingly, the plaintiff's claim is hereby dismissed with costs to the defendant."

19. The Appellant further submitted that the trial court erred in relying on the Rule in the Turquand's case to explain the inconsistencies when the Respondent had failed to discharge its burden of proof.

20. It was submitted that it is trite law that special damages ought to be specifically pleaded and proved. Reliance was placed on the case of Okulu Gondi v South Nyanza Sugar Co. Ltd (2018) eKLR where the High Court cited the Court of Appeal case of Richard Okuku Oloo v South Nyanza Sugar Co. Ltd (2013) eKLR where the court stated that:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.
>
> In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi *CA No. 192 of 1992* (ur) appears in the Jivanji case:
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> > " It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another

v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:

> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.
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> The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

21. In the end, the appellant submitted that in light of the glaring inconsistencies and contradictions in the Respondent's evidence, the respondent had failed to prove with a degree of certainty and particularity that it had provided services to the appellant as to warrant the sum of Ksh.2,168,040/= awarded by the trial court. Therefore, that the award should be set aside.

Respondent's Submissions

22. The Respondent filed its submissions dated 4th November, 2024 through the firm of Murithi Kimathi & Karera Advocates. It was submitted that there was no issue as to whether there was a contractual relationship between the parties but the trial court erred in not awarding the Respondent the full claimed amount of Kshs. 5,147,500/= when the same had been admitted by the appellant in the letter dated 16th June, 2011.

23. It was submitted that even though there were some minor discrepancies, there was no doubt that the Respondent was owed the stated sum and the same was supported by invoices, transport requisition forms and work tickets. Additionally, that an audit from KPMG appearing on page 56 of the Record of Appeal also confirmed that the respondent was owed the stated sum.

24. It was submitted that the denial of the Respondent` documents by the Appellant is an escapist move. On this they relied on the case of Midroc Water Drilling Co. Ltd vs National Water Conservation and Pipeline Corporation (2020) eKLR where the court held as follows;

> "In my considered opinion, the Defendant having failed to produce any documents cannot tear into the Plaintiff's documents to fill in the gap they are unable to deal with, however, inadmissible the Plaintiff's documents may be. In fact, even if the Plaintiff produced the originals, the Defendant would not rebut them. As submitted by the Plaintiff all the evidence led by the Defendant on lacking documents is based on the documents by the Plaintiff."

25. The respondent urged the court to award the respondent the sum that was claimed in the plaint together with general damages.

Analysis and determination

26. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. These principles were stated in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123 as follows:

> " .....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

27. Similarly, In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that: -

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

28. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the respective advocates for the parties. The Appellant contends that the Respondent did not offer the services which he is claiming payment for. According to them, the work tickets, transport requisition forms, invoices, local service orders and letters from the appellant had some glaring contradictions and as such the trial court ought not to have concluded that the special damages had been proved with a degree of certainty and particularity. The Respondent on the other hand asserts that in fact, the trial court erred in not awarding it the fully claimed amount of Kshs. 5,147,500/- as the same was proved satisfactorily. The issues that arises for determination are therefore:

(1) Whether the trial court erred in awarding the sum of Ksh. 2,168,040/= in special damages.

(2) Whether the respondent should be awarded the amount claimed in the plaint.

29. The claim by the respondent was one of special damages. It is trite law that special damages must be pleaded and strictly proved. In the Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR the court, Justice Luka Kimaru, as he was then, stated as follows; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh,

Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

30. On the other hand, a party who says he does not owe must show that he never owed or has paid. It is not enough to make a general denial. In Muguga General Stores v Pepco Distributors Limited (1988-1992) 2 KAR 89 the Court said: -

> " First of all, a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money, either there was no contract or it was not carried out or it could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

31. There was no doubt from the evidence adduced before the trial court that the Appellant owed the Respondent money for work done. This is confirmed by the Managing Director`s letter dated 16th June 2011 in which the MD was informing the Respondent that the Pending Bills Committee had considered their claim and found the amount owing as Ksh.5,147,500/=. Additionally, the appellant commissioned an audit with KPMG which came up with a figure of Ksh.4,269,986/=. The issue then was the amount of money owing to the respondent and not whether there was money owing.

32. The Respondent in this matter produced a number of documents including work tickets, transport requisition forms, invoices, local service orders and Letters from the appellant to support its claim. The witness for the appellant who testified in the case, DW1, took issue with the documents that were relied on by the respondent in support of the claim. He pointed out various contradictions in the documents that led him to conclude that the claim was suspect. He said that it was not possible for the LPOs to be issued after work was done. That the requisition forms were not signed by the relevant officers of the appellant.

33. The witness for the respondent PW1 on the other had testified that the work tickets were signed by officers of the appellant. That the requisition forms were being issued after completion of work.

34. The trial court considered the issue of lack of approval of requisition forms by head of department as well as lack of stamp on them and the LSOs being issued after work was done. The court held that the general rule is that a party dealing with a company need not inquire into the internal processes of the company but may assume that its requirements have been complied with. The court cited the case of KTK Advocates v Nyambene Coffee Estates Ltd & 2 0thers (2018) eKLR where Tuiyot J. (as he then was) held that:

> " However, in the absence of such special circumstances there is no reason to depart from the general rule that a person dealing with a corporation, acting in good faith and without knowledge or notice of any irregularity, need not inquire about the formality of the internal procedures of the corporation but is entitled to assume that there has been compliance with the Articles and bylaws. It is assumed that a person who is conducting the affairs of the Company in a manner which appears consonant with the Articles of the Corporation is acting with authority. The old rule in the decision of Royal British Bank vs. Turquand 119 EA 886 has been affirmed by the Court of Appeal in the case of *East African Safari Air*

Limited vs. Anthony Ambaka Kegode & another CA No. 42 of 2007 which was an appeal from East African Safari Air Limited (supra). The Rule is as follows:-

> "While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called "the indoor management" and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained."

35. I have considered the issue of documents relied on by the respondent. The respondent`s witness PW1 gave evidence that the work tickets, the requisition forms and the LSOs were signed by the officers of the appellant. I have noted that the documents are indeed indicated to have been signed by the said officers. However, the appellant did not call any of these officers to deny that they issued and signed the documents. DW1 who testified in the case was a transport officer with the appellant and he never said that he was a signatory to any of the documents. Besides that, the documents were presented before a Pending Bills Committee and a firm of auditors who never raised any issue on the genuineness of the documents. The auditor only noted that the LSOs were issued after work was done. If therefore the LPOs were being issued after work was done, it was the officers of the appellant who issued and signed them who were expected to explain why they issued the documents. In view of the fact that the said officers were not called to testify in the case, there was no reason to doubt the genuineness of the documents when the auditors who examined the documents did not raise any issue on their genuineness.

36. On the other hand, the witness for the respondent, PW1 admitted that the work tickets produced in court did not correspond with the number of days worked as indicated in the invoices and requisition forms. The invoices and requisition forms indicated more number of days worked than was indicated in the work tickets availed to the court. The witness also admitted that the daily charge rate per lorry was Ksh.11,500/= but in almost all of the claims the rate was indicated as Ksh.15,500/=, which was an overcharge of Ksh.4,000/=. The witness admitted that he did not have a letter increasing the rate from Ksh.11,500/= to Ksh.15,500/=.

37. Just to give an example is invoice No. 1059 for the month of May 2008. The invoice and requisition form showed that the respondent`s motor vehicle No. KAA 387B had worked for a total of 31 days yet the attached work ticket indicated that the vehicle had worked for 16 days, meaning that there was an overcharge for 15 days. The daily charge for the claim was indicated in the invoice as 15,500/= instead of Ksh.11,500/=, meaning that there was an overcharge of Ksh.4,000/= per day. In that invoice alone, the respondent had claimed the full 31 days multiplied by 15,500 thereby bringing the claim to Ksh. 480,000/=. Had they claimed the actual number of days worked as shown in the work ticket of 16 days at the rate of 11,500/= the claim would have come to Ksh.184,000/= (excluding VAT). This scenario was replicated in almost all of the 11 invoices produced by the respondent. It is then clear that the respondent`s claim was exaggerated.

38. I have perused the judgment of the trial court. The magistrate considered the actual number of days worked in a month as per the work tickets availed to the court and multiplied that with the daily charge rate of Ksh.11,500/=, which led him to the figure awarded of Ksh.2,168,040/=. I find no fault in the figure awarded.

39. The respondent submitted that the trial court should have awarded the full sum claimed of Ksh.5,147,500/=. It is to be noted that the respondent did not file a counter-appeal in the matter. There would have been no basis of awarding them the full amount even if the court had found evidence supporting that figure.

40. That notwithstanding, there was no evidence that the appellant admitted the claim. The auditors vide their report dated 8/2/2011 found the sum owing as Ksh. 4,269,986/= subject to the respondent providing documents in support of the amount claimed. This does not amount to admission of the claim as the report was qualified on the respondent providing documents in support of the stated figure.

41. The Managing Director`s letter dated 16th June 2011 was also qualified on the respondent providing documents in support of the proposed figure of Ksh.5,147,500/=. That again was not an admission of the claim.

42. In the final end, the appellant has not shown that the trial court erred in the award of Ksh.2,168,040/= to the respondent. I therefore do not find any merit in the appeal and the same is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH JUNE 2025

J.N. NJAGI

JUDGE

In the presence of:

Mr. Kalii holding brief for Mr. Eric Mutua, SC, for Appellant

Mr. Murithi Kimathi for Respondent

Court Assistant -