



**Aswa Developers and Contractors Limited v Mbugua t/a Munleo Hardware & Metal Fabricators  
& another (Civil Appeal 38 of 2018) [2023] KEHC 2807 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2807 (KLR)

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

**CIVIL**

**CIVIL APPEAL 38 OF 2018**

**PM MULWA, J**

**MARCH 31, 2023**

**BETWEEN**

**ASWA DEVELOPERS AND CONTRACTORS LIMITED ..... APPELLANT**

**AND**

**LEONARD MUNYUA MBUGUA T/A MUNLEO HARDWARE & METAL  
FABRICATORS ..... 1<sup>ST</sup> RESPONDENT**

**G NORTH & SONS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment and decree of Honourable P. Muboli (Mr.) (Senior Resident Magistrate) delivered on 24th January, 2018 in MILIMANI CMCC No. 4108 of 2014)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent in the present instance instituted a suit before the Chief Magistrate's Court by way of the plaint dated 16<sup>th</sup> July, 2014 and amended on 21<sup>st</sup> January, 2016 and sought for the sum of Kshs.1,293,476/ plus interest on the said sum at 25% p.a. from 20<sup>th</sup> March, 2014 until payment in full, and costs of the suit and interest thereon.
2. The 1<sup>st</sup> respondent pleaded in the amended plaint that the appellant and the 2<sup>nd</sup> respondent were at all material times his customers by virtue of a contract entered into between the latter parties to carry out excavation works at Del Monte in Thika, where the 2<sup>nd</sup> respondent was installing a drip irrigation system in its capacity as the principal contractor while the 1<sup>st</sup> respondent was a contractor of the appellant.
3. The 1<sup>st</sup> respondent further pleaded in the amended plaint that on various dates between 10<sup>th</sup> January, 2014 and 6<sup>th</sup> February, 2014 upon the request of the appellant, the 1<sup>st</sup> respondent dug trenches on hard rocks and soft soil for the appellant and the 2<sup>nd</sup> respondent at the rates of Kshs.1,900/ per metre and



- Kshs.168/ per metre, respectively; thereby digging a total of 772 metres and 1095 metres on hard rock and soft soil, respectively.
4. It is pleaded in the amended plaint that subsequently on 20<sup>th</sup> March, 2014 the plaintiff raised Invoice No. 1068 for payment of the sum of Kshs.1,293,467/ and which sum was not paid by the appellant and the 2<sup>nd</sup> respondent, hence the suit.
  5. Upon service of summons, the appellant and the 2<sup>nd</sup> respondent entered appearance and filed their statements of defence separately to deny the 1<sup>st</sup> respondent's claim.
  6. At the hearing of the suit, the 1<sup>st</sup> respondent testified whereas the appellant and the 2<sup>nd</sup> respondent each called one (1) witness.
  7. Upon close of submissions, the trial court delivered judgment in favour of the 1<sup>st</sup> respondent and against the appellant by awarding him the sum of Kshs.1,293,476/ prayed in the plaint. The trial court however dismissed the 1<sup>st</sup> respondent's suit against the 2<sup>nd</sup> respondent, with costs.
  8. Being aggrieved by the above decision, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 29<sup>th</sup> January, 2018 the appellant put in the following grounds:
    - i. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the evidence tendered by the 1<sup>st</sup> defendant in its case, and in particular during cross-examination, at which the plaintiff expressly admitted to having been contracted by the 1<sup>st</sup> defendant.
    - ii. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the evidence tendered by the 1<sup>st</sup> defendant and in particular during cross-examination which alluded to a separate contract between the plaintiff and the 1<sup>st</sup> defendant.
    - iii. THAT the learned trial magistrate erred in law and in fact by failing to take into consideration the correspondence between the 1<sup>st</sup> defendant and the plaintiff alluding to the entering into a contract for the provision of services by the plaintiff to the 1<sup>st</sup> defendant.
    - iv. THAT the learned trial magistrate erred in law and in fact in failing to distinguish the fact that there were two separate and distinct contracts between the parties, and thereby alluding to the contract between the plaintiff and the 1<sup>st</sup> defendant as being the one applicable to the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant.
    - v. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the totality of the evidence tendered and hence arriving at a decision that is not supported by the evidence of the parties.
  9. This court issued directions to the parties to file written submissions on the appeal.
  10. By way of its submissions dated 12<sup>th</sup> August, 2022 the appellant argues that the trial court ought to have found that the 2<sup>d</sup> respondent had been contracted by the 1<sup>st</sup> respondent and hence the latter ought to have sought the settlement of his invoice from the former, rather than from the appellant.
  11. The appellant further argues that the trial court ought to have appreciated the existence of two (2) separate and distinct contracts in the matter: that is, the contract dated 4<sup>th</sup> July, 2013 entered into between the appellant and the 2<sup>nd</sup> respondent for excavation services; and the contract entered into between the respondents herein between the months of 10<sup>th</sup> January, 2014 and 6<sup>th</sup> February, 2014.



12. It is therefore the submission by the appellant that it was not privy to the second contract and was therefore not obligated to perform any obligations arising therefrom, relying on the case of Aineah Liluyani Njirah v Agha Khan Health Services [2013] eKLR where the Court of Appeal rendered the following decision:

“Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See *Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd* [1915] AC 847, 853; MLR Blackwell Publishers, *Modern Law Review* 1997, page 238. The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.”

13. In view of the foregoing, the appellant is of the view that it is the 2<sup>nd</sup> respondent who ought to have been held liable to satisfy the decree in the suit.

14. In reply, the 1<sup>st</sup> respondent on his part contends that the trial court arrived at a correct finding since he had tendered uncontroverted evidence to support his claims made against the appellant, and hence the decision by the trial court ought to be upheld. The 1<sup>st</sup> respondent has borrowed from the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR where the Court of Appeal held thus:

“Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.”

15. On its part, the 2<sup>nd</sup> respondent echoed the sentiments by the 1<sup>st</sup> respondent by submitting that while it is not in dispute that there existed a contract between the appellant and the 2<sup>nd</sup> respondent at all material times, the latter’s obligations to the former were fully settled.

16. The 2<sup>nd</sup> respondent further submits that the abovementioned contract made provision for sub-contracting, on the agreement that the sub-contractor would be liable to fulfil its obligations to the third party and hence there existed a contract between the appellant and the 1<sup>st</sup> respondent and for which the former was liable to pay the agreed consideration to the latter.

17. In view of the foregoing, the respondents urge that the appeal be dismissed with costs.

18. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the evidence placed before the trial court. It is clear that the appeal lies principally against the trial court’s decision to enter a finding of liability as against the appellant. I will therefore deal with the grounds of appeal contemporaneously.

19. The 1<sup>st</sup> respondent in his capacity as PW1 adopted his signed witness statement as evidence and also produced his list and bundle of documents as exhibits before the trial court.

20. The 1<sup>st</sup> respondent then testified that upon undertaking the work and raising the invoice with the 2<sup>nd</sup> respondent, he was directed to take the matter up with the appellant but that he was never paid for the services rendered.



21. In cross-examination, the 1<sup>st</sup> respondent testified that the contract was between the appellant and the 2<sup>nd</sup> respondent but that it is the appellant who asked him to dig the trenches. However, later during cross-examination by counsel for the appellant, the 1<sup>st</sup> respondent stated that it is the 2<sup>nd</sup> respondent who instructed him to perform his services and that he only forwarded the invoice to the appellant upon the instructions by the 2<sup>nd</sup> respondent's representative.
22. It was the evidence by the 1<sup>st</sup> respondent that he had only sued the 2<sup>nd</sup> respondent, who then enjoined the appellant in the suit as a co-defendant.
23. In re-examination, the 1<sup>st</sup> respondent stated that the 2<sup>nd</sup> respondent had not mentioned that it would not be paying his consideration but instead asked him to follow up on his payment with the appellant.
24. Elijah who was DW1 testified on behalf of the 2<sup>nd</sup> respondent by adopting his signed witness statement as evidence and gave evidence that no contract existed between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and that he had no knowledge that the appellant had delegated duties to the 1<sup>st</sup> respondent.
25. In cross-examination, the witness gave evidence that the contract between the appellant and the 2<sup>nd</sup> respondent permitted the former to sub-contract the works and that on the part of the 2<sup>nd</sup> respondent, it has cleared all debts owing to the appellant and therefore does not owe any other parties monies in respect to the material works done. This evidence was echoed during re-examination.
26. Douglas Mathenge who was DW2 adopted his executed witness statement as evidence and stated on behalf of the appellant that no contract existed between the appellant and the 1<sup>st</sup> respondent and hence the former does not owe the latter any monies.
27. During cross-examination, it was the evidence by the witness that the appellant was not involved in any agreement with the 1<sup>st</sup> respondent but merely did a reference to him on the rates to be paid for the works done.
28. In re-examination, the witness testified that the appellant did not receive an invoice from the 1<sup>st</sup> respondent or contract him to perform any duties, though the 1<sup>st</sup> respondent is known to the appellant.
29. In arriving at his decision, the learned trial magistrate reasoned that there was no evidence to show the existence of a contract between the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
30. The learned trial magistrate further reasoned that evidence was tendered to show that there existed an implied contractual arrangement between the appellant and the 1<sup>st</sup> respondent.
31. For those reasons, the learned trial magistrate found the appellant liable to pay the sum of Kshs.1,293,476/ sought in the plaint. However, the learned trial magistrate declined to award interest on the said sum at 25% p.a. from 20<sup>th</sup> March, 2014 until payment in full but directed that interest be assessed at court rates, while dismissing the case against the 2<sup>nd</sup> respondent.
32. From my re-examination of the pleadings and evidence which was tendered before the trial court, it is not in dispute that a contract existed between the appellant and the 2<sup>nd</sup> respondent at all material times and vide the agreement dated 4<sup>th</sup> July, 2013 wherein it was agreed that the appellant would carry out excavation works at Del Monte in Thika on behalf of the 2<sup>nd</sup> respondent and at a consideration.
33. From my further re-examination of the pleadings and evidence, it was not clearly ascertained whether the services of the 1<sup>st</sup> respondent were sought for by the appellant or by the 2<sup>nd</sup> respondent, since the 1<sup>st</sup> respondent by way of his testimony gave separate accounts that his services had been rendered at the request of the appellant as well as the 2<sup>nd</sup> respondent.



34. Suffice it to say that, it is apparent from the evidence tendered that both the appellant and the 2<sup>nd</sup> respondent had knowledge of the services being rendered by the 1<sup>st</sup> respondent at all times and this is seen through the correspondences exchanged between the appellant and the 1<sup>st</sup> respondent on the one hand; and those exchanged between the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand and pertaining to the project, thus creating an implied contractual relationship between the parties herein.
35. In my view therefore, the exception to the rule on privity of contract would become applicable here, borrowing from the following decision rendered by the Court of Appeal and referenced in the submissions by the 1<sup>st</sup> respondent, namely the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR thus:
- “Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.”
36. Furthermore, upon my consideration of the evidence tendered, I observed that the 1<sup>st</sup> respondent issued the invoice for the sum of Kshs.1,293,476/ to the 2<sup>nd</sup> respondent. I further observed that though the invoice was not specifically addressed to the appellant, its representative by way of email correspondence instructed the 1<sup>st</sup> respondent to amend the rates on the soft soil to the sum of Kshs.168.4 and further requested for the invoice rates to be made.
37. Going by the evidence, there is nothing to indicate that the sums sought in the invoice were disputed either by the appellant or the 2<sup>nd</sup> respondent.
38. In view of all the foregoing circumstances and with all due respect, I find that the learned trial magistrate misdirected himself in arriving at the decision he did, and I am therefore inclined to interfere with his finding. In my view, both the appellant and the 2<sup>nd</sup> respondent ought to be found jointly and severally liable to pay the sums sought in the claim.
39. Final orders:
- i). The appeal partially succeeds.
  - ii). The judgment delivered by the trial court on 24<sup>th</sup> January, 2018 in Milimani CMCC No. 4108 Of 2014 is hereby set aside and is substituted with a finding in favour of the 1<sup>st</sup> respondent and against the appellant and the 2<sup>nd</sup> respondent jointly and severally, thus awarding him the sum of Kshs.1,293,476/ plus costs of the suit and interest on the abovementioned sum at court rates from the date of filing suit until payment in full.
  - iii). Parties to bear their own costs of the appeal.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 31<sup>ST</sup> DAY OF MARCH, 2023**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

Aden – Court Assistant



No appearance for Appellant  
No appearance for Respondent

