



**Global Impex Machinery Ltd v Vlan Construction Limited (Commercial Case E193 of 2019) [2023] KEHC 19064 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 19064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E193 OF 2019  
DO CHEPKWONY, J  
MARCH 24, 2023**

**BETWEEN**

**GLOBAL IMPEX MACHINERY LTD ..... PLAINTIFF**

**AND**

**VLAN CONSTRUCTION LIMITED ..... DEFENDANT**

**RULING**

1. Before the court for determination is the Defendant/Respondent's Notice of Motion application dated 22<sup>nd</sup> April, 2021 filed under the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 50 Rule 6, Order 1 Rule 15, Order 9 Rule 9, Order 22 Rule 22, Order 45 and Order 51 Rule 1 of the *Civil Procedure Rules*.
2. The first two prayers in the Notice of Motion application have been spent and the court is left with prayers 3, 4 and 5 to determine on. Prayer No. (3) seeks an order for review of the ruling delivered by this court on 11<sup>th</sup> March, 2021 directing the Defendant to deposit a decretal sum herein in a joint account as security. Prayer No. (4) seeks leave to issue Third Party notice to Rama Homes Limited whereas prayer No. (5) seeks for costs of the application.
3. The Defendant/Applicant's case is elaborated in the grounds on face of the application and the affidavit of Singh Sondh sworn in support thereof, the Defendant's/Applicant's case is that the said ruling delivered on 11<sup>th</sup> March, 2021 was delivered in the absence of its counsel. In any event, the Defendant/Applicant has endeavoured to partly comply with the terms of the said ruling by filing a defence but was unable to raise the security amount of Ksh 27,714,503.02 owing to the downward trajectory in the economy and the financial sabotage by the intended Third Party.
4. According to the Defendant, it had entered into an agreement dated 14<sup>th</sup> February, 2018 with the intended Third Party for some construction works on Jumeirah, Deira and Marina at a total revised



- contract price of Ksh 321,000,000/=. Clause 3.0 thereof enjoins the Third Party to make adequate financial arrangements to ensure payments to the subcontractor or direct material suppliers within the period in the contract.
5. Nonetheless, sometimes on 19<sup>th</sup> September, 2019, the Third Party denied the Defendant entry and access to the construction sites. The Third Party also denied the Defendant the right to remove its construction equipment from the site as a result of which the Defendant sued the Third Party *vide* HCCOMM. No.E341 of 2019 – [Vlan Construction v Rama Homes Ltd.](#)
  6. The Defendant contents that it had completed a substantial part of the project and despite submitting invoices for payment to the intended Third Party, it failed to make the payments contrary to Clauses 2.0 and 3.0 of the Agreement. However, it is acknowledged that the intended Third Party paid the Defendant Ksh 240,887,080.00 leaving a balance of Ksh 90,612,920.00. It is the Defendant's case that it has been unable to pay the suppliers owing to balances which the intended Third Party has not paid to it and it believes that the Third Party should indemnify it from claims made by suppliers such as is in this suit.
  7. In opposing the application, the Plaintiff filed a Notice of Preliminary Objection dated 26<sup>th</sup> April, 2021, faulting the application for having offended the provisions of Order 45 Rule 6 of the [Civil Procedure Rules 2010](#), and a replying affidavit sworn by its Director, Jayantilal Premji Velji on 6<sup>th</sup> April, 2022. The Notice of Preliminary Objection application was dismissed *vide* a ruling dated 17<sup>th</sup> March, 2022.
  8. Nonetheless, the deponent avers that the instant application was filed after an inordinate delay and in contravention of the ruling made on 11<sup>th</sup> March, 2022. In any event, it is contended that the applicant has not established a ground for review given that the alleged breach was a fact within the Applicant's knowledge and is subject of HCCOMM. No. E341 of 2019.
  9. Similarly, it is also averred that the Applicant has not established a viable ground for leave to issue the Third Party Notices to be granted, for among other reasons that; the Third Party is not privy to the agreement for supply between the Plaintiff and the Defendant herein. Likewise, the Plaintiff is not a party to the agreement between the Defendant and the Third Party hence their misunderstanding cannot be stretched to the present suit. As such, the court has been asked to dismiss the application as being an attempt to deny the Plaintiff a chance to enjoy fruits of its Judgment.
  10. In the Supplementary Affidavit sworn on 13<sup>th</sup> June, 2022 by Mani Singh, the Defendant reiterated that it had established sufficient grounds for review and joinder of the intended Third Party. It is stated that in any event, depositing security would impair its right to fair hearing and access to justice when the inability to comply is as a result of willful failure by the intended Third Party to pay it for the works done. The deponent further reiterates that given that the materials supplied by the Plaintiff were for the benefit of the intended Third Party, then the intended Third Party is a necessary party in this suit and ought to come on board to explain its failure to pay the Plaintiff.
  11. The application was canvassed by way of written submissions pursuant to directions issued by the court on 17<sup>th</sup> March, 2022. Both parties complied and as the record reflects, the Defendant/Applicant's submissions are dated 13<sup>th</sup> June, 2022 whilst those of the Plaintiff/Respondent are dated 31<sup>st</sup> May, 2021. Counsel for the parties highlighted their respective submissions on 9<sup>th</sup> November, 2022. I have considered the said submissions tendered by the parties and since they reiterate the summary laid above, I do not wish to reproduce the same here but I shall highlight the same in the determination.



## Analysis and Determination

12. Having set out the perspective on the application at hand by each party respectively, I am of the view that the issues which stand out for determination are :-
  - a. Whether the Defendant has established a case for review of the ruling dated 11<sup>th</sup> March, 2021;
  - b. Whether the court should issue a Third Party Notice to the intended Third Party.
13. On the first issue on whether to review the ruling dated 11<sup>th</sup> March, 2021, I will reiterate that this court's power of review can only be exercised only within the scope and ambit of Order 45 Rule 1 of the *Civil Procedure Rules, 2010* and Section 80 of the *Civil Procedure Act*. Order 45 Rule 1(1)(b) is very explicit that a court can only review its orders if the following grounds exist: -
  - a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - b. There was a mistake or error apparent on the face of the record; or,
  - c. There were other sufficient reasons; and
  - d. The application must have been made without undue delay.
14. Section 80 of the *Civil Procedure Act* on the other hand provides as follows:-

“ Any person who considers himself aggrieved—

  - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
15. Whereas the power of review is granted by Section 80 (above), Order 45 sets out restrictive grounds for review hence limiting the court's jurisdiction thereof to:
  - a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
  - b. on account of some mistake or error apparent on the face of the record; or
  - c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
16. In this case, the Defendant/Applicant has not alluded to discovery of any new and or important evidence or any evidence of some mistake apparent on the face of the record, it avers that the requirements for deposit of security as directed by the court in the ruling of 11<sup>th</sup> March, 2021 is an impediment to its access to justice given that the failure to raise the sums as directed to be deposited as costs is attributable to the Third Party's wilful failure to pay the Defendant invoices for construction works done on the intended Third Party's projects.



17. It has further been argued that pursuant to Clause 3.0 of the Agreement dated 14<sup>th</sup> February, 2018, between the Defendant and the intended Third Party, the intended Third Party was to make adequate financial requirements and ensure the direct material suppliers were paid on time. That, the intended Third Party was under duty to pay the Plaintiff being a material supplier, hence the intended Third Party ought to indemnify the Defendant on claims made by the Plaintiff.
18. Therefore, the question compelling an answer is whether the allegation by the Defendant/Applicant amounts to “any other sufficient reason” under which an application for review can be granted as provided for under Order 45 of the *Civil Procedure Rules*. A brief background on the matter would however shine light on the forgoing.
19. The Plaintiff instituted this suit vide a plaint dated 24<sup>th</sup> June, 2019 seeking the payment of Ksh 27,714,503.02 from the Defendant. The Defendant entered appearance on 9<sup>th</sup> July, 2019 after which the Plaintiff successfully applied for summary Judgment for the said sum of Ksh 27,714,503.02. The summary Judgment was allowed vide a ruling dated 14<sup>th</sup> May, 2020 wherein the court had found the defence filed having raised no triable issues as against the Plaintiff’s case which was plain and obvious.
20. Aggrieved by the summary Judgment and the ruling dated 14<sup>th</sup> May, 2020, the court applied for the setting aside of the same on the ground that its erstwhile advocate had conspired with the Plaintiff’s advocate towards the summary Judgment. The court *vide* the ruling dated 11<sup>th</sup> March, 2021 determined the same in favour of the Defendant by setting the summary Judgment aside but on condition that the Defendant deposits the decretal sum in a joint interest-earning account as security within forty five (45) days thereof.
21. In my view, it will not be a sufficient ground for review for this court to find that the court could have taken a different view of the matter or that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. In asking the court to vacate the condition it found fit for setting aside the summary Judgment would be tantamount to inviting the court to consider a different view it would have taken in deciding the matter. If the court was to reconsider its decision on such invite, then it would be sitting on its own appeal which is outside the scope and ambit of Order 45 Rule 1 of the *Civil Procedure Rules* that empowers the court to reconsider its decision based on an apparent mistake, new evidence which could not have been available on exercise of due diligence or such similar sufficient ground. Any other attempt, except on the highlighted grounds would amount to an abuse of the liberty given to the Court under the Law to review its judgment or order. The underlying objective of the court’s discretion under Order 45 Rule 1 of the *Civil Procedure Rules* is neither to enable the court to write a second Judgment nor to give a second inning to the party who has lost the case because of his/her/its negligence or indifference.
22. In my humble view, the invite by the Defendant to review and or reconsider the order for deposit of security on ground that the security order would deny a fair hearing owing to the Defendants financial predicament is an invite to the court to write a second Judgment on the same issues. Thus, I find that the Defendant/Applicant has not demonstrated the existence of any of the three scenarios set out under Order 45 Rule 1 of the *Civil Procedure Rules* to warrant review of the ruling dated 14<sup>th</sup> May, 2020.
23. I now turn to the next issue on whether the court should issue a Third Party Notice to the intended Third Party governed by Order 1 Rule 15 (1) of the *Civil Procedure Rules* stipulates that:
  - “(1) Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the Third Party)—
    - a. that he is entitled to contribution or indemnity; or



- b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the Plaintiff; or
- c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the Third Party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a Third Party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...”

24. The above provision implies that for a Defendant to apply for leave to issue A Third Party notice, it is important to show that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant, thus should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff, the Defendant and the Third Party or between any or either of them.
25. In the instant case, the issue in question as between the Plaintiff and the Defendant is the non-payment of the supplies made to the Defendant by the Plaintiff, which the Defendant seeks indemnity of by the intended Third Party on the claim against the Plaintiff claim by virtue of Clause 3.0 of the Agreement dated 14<sup>th</sup> February, 2018 which provided that the Third Party would make adequate financial arrangements to ensure direct suppliers are paid. The issue between the Defendant and the Intended Third Party is therefore substantially the same.
26. I have also taken into account the Court of Appeal’s decision in *Gachago v Attorney-General* [1981] KLR 232, relied by the Defendant wherein the Court of Appeal demonstrated that Third-Party proceedings are not dependent on there being a contract binding the intended Third Party, nor on there not being a different case pending before the High Court or a Court of Equal Status. Provided that there exist a basis for liability of the Third Party, it would suffice to enjoin the Third Party notwithstanding the question of privity of contracts.
27. Based on the contract dated 14<sup>th</sup> February, 2018, I am persuaded that indeed there is a triable issue between the Defendant/Applicant and the intended Third Party on whether the Third Party had made financial arrangement to ensure the payment of direct suppliers including the Plaintiff herein. It is therefore conclusive that the Third-Party Notice should issue against the intended Third Party “Rama Homes Ltd” to enable the court to determine on whether the Third Party should indemnify the Plaintiff on claims by direct suppliers for work done on the Third Party’s sites.
28. In the end, the Defendant’s application dated 22<sup>nd</sup> April, 2021 partly succeeds and partly fails. It fails to the extent of prayer No.(3) since the Defendant/Applicant failed to established grounds upon which there can be a review of the ruling dated 11<sup>th</sup> March, 2021. However, the period within which the Defendant is to comply with the said ruling is hereby extended for a further fourteen (14) days from the date hereof. The Application succeeds in respect to prayer No.(4) whereby leave is hereby granted to the Defendant to issue a Third Party Notice to Rama Homes Ltd. The Third Party shall be served with pleadings for it to file and serve response(s) within the next 30 days.
29. Each party shall bear its own costs.



It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2023.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Maranga counsel for Respondent Decree-Holder

M/S Ntungu holding brief for Senior Counsel Fred Ngatia counsel for Applicant/Defendant

