



REPUBLIC OF KENYA



KENYA LAW
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**Econobuild Limited v Islambo & another (Civil Case 27 of 2018)
[2023] KEHC 21727 (KLR) (Civ) (25 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21727 (KLR)

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

CIVIL

CIVIL CASE 27 OF 2018

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

ECONOBUILD LIMITED APPELLANT

AND

WILLIAM ISALAMBO 1ST RESPONDENT

HARI ENTERPRISE 2ND RESPONDENT

*(Being an appeal from the judgment and decree of Hon. G. A. Mmasi
(SPM) in Milimani CMCC No. 5948 of 2014 delivered on 13/12/2017)*

JUDGMENT

1. The respondent in this case, WILLIAM ISALAMBO filed Milimani CMCC No. 5948 of 2014 seeking general damages and special damages for injuries the respondent sustained while working for the appellant company.
2. The respondent attributed the injuries he sustained on 16/8/2014 to the negligence of the appellant company. The respondent was moving a heavy machine on the material day when it slid and injured the respondent.
3. The respondent averred that the appellant was negligent in failing to provide him with gloves which would have minimized his injuries.
4. The appellant denied the respondent's claim and stated the 3rd party was 100% liable pursuant to a subcontract between the appellant and the 3rd party.



5. The trial court found that the appellant did not deny that the respondent was its employee and found the appellant 100% liable in negligence and assessed general damages at ksh.100,000 and special damages at ksh.8,000.
6. The trial entered judgment against the 3rd party and the appellant in jointly and severally plus costs and interest at court rates.
7. The appellant is aggrieved by the said judgment and decree and has filed this appeal on the following grounds;
 - i. That the trial court erred in law and fact by holding that the respondent was the employee of the appellant when the respondent testified that he was employed by the 3rd party.
 - ii. That the trial court erred in law and fact by finding that the appellant was 100% liable contrary to the sub-contract agreement dated 1/4/2014 which stated in Clause 2 that the 2nd what the 3rd party shall provide.
 - iii. That the trial court erred in law and fact by failing to take into consideration the fact that an *ex parte* interlocutory judgment was entered against the 3rd party on 2/11/2015 upon the 3rd party failing to enter appearance or file a defence.
 - iv. That the trial court's judgment in favour of the appellant was inconsistent with the interlocutory judgment entered against the 3rd party on 2/11/2015.
8. The parties filed written submissions in this appeal which I have duly considered. The appellant submitted that by agreement dated 1/4/2014, the appellant engaged the 3rd party Hari Enterprise as in independent contractor to provide labour, supervision and requisite Insurance and further that the respondent was an employee of the 3rd party.
9. Further, that on or about 16/8/2014, the respondent got injured while in the course of his employment with the 3rd party and the 3rd party is therefore responsible for the injuries.
10. The appellant also submitted that on 31/3/2015, they were granted leave to join the 3rd party in these proceedings and interlocutory judgment was entered against the 3rd party for failure to enter appearance on 23/11/2015.
11. The appellant also submitted that in cross-examination, the respondent admitted that he was an employee of one Umesh trading as Hari Enterprise (the 3rd party).
12. The appellant urged the court to find the 3rd party 100% liable in negligence.
13. The respondent approved the appeal and submitted that the apportioning of liability between the appellant and the 3rd party was a finding of fact by the trial court.
14. Further, that the respondent testified that he was employed at the appellant company on a casual basis in July 2014 and injured on 1/8/2014 while on site.
15. The respondent submitted that he was not aware of any sub-contract between the appellant company and the 3rd party and that the first time he heard about the 3rd party was in court.
16. Further that the appellant did not rebut the evidence adduced by the respondent and therefore the same stands.



17. I have considered the rival submissions filed by the parties and the authorities relied on.
18. This being a first appeal, the duty of the first appellate court is re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
19. The issues for determination in this appeal are as follows;
 - i. Whether the respondent proved his case to the required standard.
 - ii. Whether the respondent was an employee of the appellant or 3rd party.
 - iii. Whether the trial court was right in apportioning liability between the 3rd party and the appellant.
 - iv. Who pays the costs of this appeal?
20. On the issue as to whether the respondent proved his case to the required standard in civil suits, the respondent said he was working for the appellant when he was injured on 18/8/2014.
21. The respondent said he was not aware of the sub-contract between the appellant and the 3rd party. He said he had worked for 1½ months when he was injured.
22. I find that the trial court was right in holding that the respondent evidence was that he was employed by the appellant. The respondent was not aware of the sub-contract and neither was he privy to the same.
23. The Appellant gave notice to the third party under order 1 rule 15 of the *Civil Procedure Rules* but the third party failed to enter appearance.
24. However, the Appellant ought to have followed the procedure set out in order 1 rule 19 which is as follows;

“When a third party makes default in entering an appearance in the suit, or in delivering any pleading, and the defendant giving the notice suffers judgment by default, such defendant shall be entitled, after causing the satisfaction of the decree against himself to be entered upon the record, to judgment against the third party to the extent claimed in the third party notice, the court may upon the application of the defendant pass such judgment against the third party before such defendant has satisfied the decree passed against him.

Provided that it shall be lawful for the court to set aside or vary any judgment passed under this rule upon such terms as may seem just.”
25. I find that the above procedure was not followed by the Appellant and Trial court ought not have entered judgment against the third party unless the same was applied for by the appellant under order 1 rule 19 as stated above.
26. I accordingly set aside the trial court’s order apportioning liability between the 3rd party and the appellant.
27. I find that the respondent’s evidence was that he was working for the appellant and not the 3rd party at the time he was injured.
28. I find that the respondent proved that he was hired by the appellant and further that he was not aware of the 3rd party and neither was he privy to the sub-contract between the appellant and the 3rd party.



- 29. On the issue as to whether the respondent was an employee of the 3rd party, I find that the respondent's evidence was that he was an employee of the appellant. He was not aware of the 3rd party until the same was mentioned in this case. The trial court was right in finding that the respondent was an employee of the appellant and not the 3rd party.
- 30. I find that the respondent is not privy to the said sub-contract and he was not aware of it when he was hired by the appellant and therefore he cannot be dragged into it.
- 31. I find that the appellant is 100% liable in negligence. The appellant did not comply with order 1 rule 19 before seeking judgment against the 3rd party.
- 32. I accordingly set aside the judgment entered jointly and severally against the 3rd party and the appellant and I enter judgment in favor of the respondent against the appellant only in the sum of ksh.108,000 together with costs and interest at court rates from the date of the judgment in the trial court (13/12/2017) until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

.....

A. N. ONGERI
JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent/Third Party

