



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 606 OF 2019

CYTONN REAL ESTATE

(on behalf of CYTONN DEVELOPMENT PARTNERS ONE LLP)....APPELLANT

VERSUS

PETER KAMAU MWANGI ..... 1<sup>ST</sup> RESPONDENT

JOSEPH MUCHOKI KAMENJU T/A

BONNY NJAGUA VENTURES .....2<sup>ND</sup> RESPONDENT

(Being an Appeal from the entire Ruling of Honourable D. O. Mbeja (Mr) (Senior Principal Magistrate) delivered at the Magistrates' Court at Nairobi (Milimani Law Courts) on 20<sup>th</sup> September 2019)

#### JUDGMENT

1. The Respondents, Peter Kamau Mwangi and Joseph Muchoki Kamenju T/A Bonny Njagua Ventures were the Plaintiffs in the lower court while the Appellant Cytonn Real Estate (on behalf of Cytonn Development Partners One LLP) was the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were Zaweria Wangari Muchiri T/A Riza Works Limited and John Kibiribiri Mwangi respectively.
2. The Plaintiffs filed the Application dated 12/6/2019 which principally sought orders that **this Honourable Court be pleased to issue an injunction restraining the 1<sup>st</sup> Defendant/Respondent from processing any payments due to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents unless the said 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents remit to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants Kshs. 6,095,976/= due to them for construction work, delivery of cement and payment of workers' salaries for construction of boundary wall, guard houses and main gate for the proposed Situ Village Residential Development in Ololua Ridge, Karen.**
3. Secondly, that **the 1<sup>st</sup> Defendant/Respondent be ordered to deposit in this Honourable Court Kshs. 6,095,976/= being the amount due to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants for construction work, delivery of cement and payment of workers' salaries for construction of boundary wall, guard houses and main gate for the proposed Situ Village Residential Development in Ololua Ridge, Karen.**
4. The application was premised on the grounds set out on the face of the application and the affidavits in support sworn by the Plaintiffs. It was stated that the 1<sup>st</sup> Defendant, (Cytonn Real Estate on behalf of Cytonn Development Partners One LLP) entered into an agreement with the 2<sup>nd</sup> Defendant, (Zaweria Wangari Muchiri T/A Riza Works Limited) for the construction of a perimeter wall, guard houses and a gate for a proposed Residential Development.
5. That the 2<sup>nd</sup> Defendant entered into an agreement with the 3<sup>rd</sup> Defendant (John Kibiribiri Mwangi) to finance the project. That the 3<sup>rd</sup> Defendant then entered into an agreement with the 1<sup>st</sup> Plaintiff Peter Kamau Mwangi further finance the project. That the 2<sup>nd</sup> Defendant subcontracted the 2<sup>nd</sup> Plaintiff, (Joseph Muchoki Kamenju T/A Bonny Njagua Ventures) to supply building materials for the project. That the 1<sup>st</sup> Plaintiff obtained a loan and expended Kshs. 2,772,380/= on the project. That the 2<sup>nd</sup> Plaintiff supplied building materials worth Kshs. 3,243,620/= but none of them were paid by the 2<sup>nd</sup> Defendant.
6. The Plaintiffs' contention was that the 1<sup>st</sup> Defendant being the principal was vicariously liable for the default of it's agents, the 2<sup>nd</sup> and 3<sup>rd</sup>

Defendants.

7. In opposition to the application the 1<sup>st</sup> Defendant filed grounds of opposition dated 2/7/2019 and a replying affidavit. The grounds of opposition were as follows;

- 1. The Notice of Motion Application does not disclose any cause of action as against the 1<sup>st</sup> Defendant/Respondent.**
- 2. There is no privity of contract between the Plaintiffs/Applicants and the 1<sup>st</sup> Defendant/Respondent.**
- 3. The 1<sup>st</sup> Defendant/Respondent did not enter into any Contractual relationship whether primary or secondary regarding the Situ works with the Plaintiffs/Applicants herein.**
- 4. The 1<sup>st</sup> Defendant/Respondent is a stranger to the alleged contractual relationship between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with the Plaintiffs and therefore is not in any way obliged to make good the breach on such contracts.**
- 5. The suit is an abuse of the process of this Honourable Court.**
- 6. It is in the interests of justice that the Application be denied as the same does not disclose any cause of action as against the 1<sup>st</sup> Defendant/Respondent herein.**

8. The replying affidavit conceded the existence of the agreement with the 2<sup>nd</sup> Defendant dated 23/10/2020. It was averred that clause 8 of the said agreement prohibited sub-contracting and any claims of the 1<sup>st</sup> Defendant's indebtedness by the Plaintiffs were denied. It was further stated that there was no privity of contract between the 1<sup>st</sup> Defendant and the Plaintiffs and that the principal of vicarious liability does not apply herein.

9. The 1<sup>st</sup> Defendant further contended that the Plaintiffs' case did not meet the threshold for the grant of the orders sought.

10. The Plaintiffs filed a supplementary affidavit and contended that the exclusion clause referred to is extremely wide and should be declared unconstitutional and illegal. That the construction of the boundary wall, guard house and main gate was carried out on the 1<sup>st</sup> Defendant's property and the 1<sup>st</sup> Defendant was therefore the Principal while the 2<sup>nd</sup> Defendant was the agent of the 1<sup>st</sup> Defendant and with authority to enter into contractual relationships with 3<sup>rd</sup> parties for the benefit of the 1<sup>st</sup> defendant and that they even shared office space.

11. That some of the 1<sup>st</sup> Defendants employees were based at the site office where the 2<sup>nd</sup> Defendant also had an office. That the Local Purchase Order and Delivery Notes for the construction work were signed by the 2<sup>nd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant. That the Plaintiffs supplied the materials to the site and that the 1<sup>st</sup> Defendant was aware of the same. That payments to the Plaintiffs had been delayed and that the 1<sup>st</sup> Defendant was estopped by virtue of equitable estoppel from pleading privity of contract.

12. It was further asserted that the 2<sup>nd</sup> Defendant issued the Plaintiffs with cheques that bounced and issued Promissory Notes for payment. That the 1<sup>st</sup> Plaintiff borrowed money heavily to finance the project and even executed a Chattels Mortgage with Daraja Capital Partners Limited and now stands the risk of having his truck auctioned in order to settle the Chattels Mortgage and also face legal consequences in respect of money borrowed through his spouse from Family Bank Limited.

13. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not participate in the proceedings before the lower court.

14. After hearing the application, the same was allowed with costs against all the Defendants/Respondents.

15. The Appellant was aggrieved by the said ruling and appealed to this court. The Appellant raised 7 grounds of Appeal which were condensed into 5 grounds in the written submissions as follows;

- a. Whether there was a contract between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Appellant at all?**
- b. Whether in the wake of the express prohibition on sub-contracting, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents could claim against the Appellant?**
- c. Whether, against the backdrop of privity of contracts, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had a prima facie case against the Appellant?**
- d. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is not one capable of compensation by way of damages against a third party not enjoined in these proceedings?**
- e. Where does the balance of convenience tilt towards?**

16. The Appeal was canvassed by way of written submissions which this court has considered.

17. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

18. It is not in dispute that the agreement dated 23/10/2018 was between the Appellant and Riza Works Limited. The contract was for the construction of the boundary wall, guard house and gate by Riza Works Limited. Clause Number 8 of the said agreement prohibited subcontracting without prior notice to the Appellant.

19. On privity of contract, the Court of Appeal in the case of **City Council of Nairobi Vs. Wilfred Kamau T/A Githua Associates & another [2016] eKLR** stated as follows;

**“In this regard Halsbury’s Laws of England, 4<sup>th</sup> Edition Volume 9(1) Paragraph 748 states;**

**The General rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are.....”**

20. On the exceptions to the privity of contract rule, the Court of Appeal in the case of **William Muthee Muthami Vs. Bank of Baroda [2014] eKLR** stated as follows;

**“The Appellant’s father did not bring himself within the well-known exceptions to the doctrine of privity of contract. For example, he did not demonstrate the existence of:**

- i. a collateral contract to the one in question in which he was a party,**
- ii. an agency relationship in which the Appellant transacted on his behalf,**
- iii. a trust by which the Appellant contracted and held the property in trust for him (the witness),**
- iv. an express provision or implied term in the agreement made for the benefit of the Appellant’s father.**

21. On the principal/agent relationship, the court in the case of **David Njuguna Ngotho Vs. Family Bank & another [2018] eKLR** observed as follows;

**“...Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, defines such a relationship to be:-**

**...a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”**

22. On estoppel by conduct, the Court of Appeal in the case of **John Mburu Vs. Consolidated Bank of Kenya [2018] eKLR** made reference to the case of **D&C Builders Vs. Sidney Rees [1966] 2 QB 617** where Lord Denning, M. R. stated;

**“It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.”**

23. Turning to the case at hand, the Appellant is aggrieved by *inter alia*, the orders of injunction issued by the trial court.

On whether to issue the restraining injunctive orders, the principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**.

**“To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.”**

24. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

**“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

25. In the case at hand, the Respondent’s assertions were that materials were delivered to the Appellant’s site and were received by the Appellant’s employees/agents who signed the Delivery Notes and the Local Purchase Orders. That the Appellant was aware of the Respondent’s existence and therefore estoppel by conduct from relying on the privity of contract rule. That is an issue that if proved during the trial could bring the Respondents into the exceptions to the privity of contract rule. I therefore hold that the Respondents have established a *prima facie* case.

26. In the plaint, the Respondents prayed for Judgment against the Defendants for the sum of Kshs. 6,095,970/=, general damages for breach of contract, interest and costs. The claim is also quantified in the application the subject of this Appeal. The claim is therefore a liquidated one and the Respondents can be compensated in monetary terms.

27. On the balance of convenience, it is noteworthy that the Respondents’ position is that they contracted directly with the Riza Works Limited. The Respondents still have that avenue to pursue. On the other hand, the Appellant who asserts that it owes no contractual obligation to the Respondents has argued that the orders if allowed by the trial court will expose it to failure to honour its’s contracts and the stalling of their project. In my view, the balance of convenience tilts in favour of the Appellants.

28. With the foregoing, I allow the Appeal with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2021**

**B.THURANIRA JADEN**

**JUDGE**