



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC 564 OF 2014**

**EDWIN NG'ONG'A K'OGWE.....PLAINTIFF**

**VERSUS**

**PINKERTONS KENYA LIMITED.....DEFENDANT**

**AND**

**ARPRIM CONSULTANTS.....1<sup>ST</sup> THIRD PARTY**

**CHINA WU YI COMPANY LIMITED.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

1. The plaintiff commenced this suit vide a plaint dated 3<sup>rd</sup> December 2014 seeking for judgment against the defendant for:

- a. The remittance of the total amount of; Kshs 22,986,667 plus USD, 2552;
- b. Loss of income;
- c. Interests thereon at court rates
- d. Costs of this suit herein
- e. Any search other further relief as this honorable may deem fit to grant.

2. The plaintiff's case in brief is that, he advanced the defendant the sum claimed herein to enable the defendant service a contract for the proposed; remodeling, renovation and associated new building works at the Kenya School of Monetary Studies, Ruaraka Campus.

3. Pursuant thereof, the plaintiff entered into an Investment Agreement (herein "the agreement"), with the defendant to help the defendant secure the deliverable as per the requirements of the project. The terms of the agreement provided that, the plaintiff would remit to the defendant a sum of; Kshs 14,500,000, being the capital investment sum and the defendant would repay the same with a return on investment of; Kshs 8,486,667, on or before 14<sup>th</sup> of February 2014.

4. Consequently, the plaintiff remitted funds to the defendant's bank account number 0102080730600 at the Standard Chartered Bank on diverse dates as follows: -

- a. Kshs 9,000,000 on the 25<sup>th</sup> November 2013;
- b. Kshs 3,000,000 on the 16<sup>th</sup> December 2013;

c. Kshs 2,500,000 in respect of supply of equipment and Government duty and taxes.

5. The plaintiff, further supplied the defendant with equipment valued at; USD 2552. However, the defendant has failed to honour his obligation under the contract and/or pay the outstanding amount of; Kshs 22,986,667, together with USD; 2552, and interest which continues to accrue as from; February 2014.

6. That, as a direct consequence of the breach of contract, the plaintiff has suffered loss of income and damage as follows: -

a. Paralyzed operations assessed at; Kshs 1,500,000 per month;

b. Loss of prospective investments.

c. Loss of income in the sum of; Kshs14,500.000 and USD. 2

d. Loss of investment in the sum of; Kshs8,486,667

7. However, the defendant filed a statement of defence dated 29<sup>th</sup> January, 2015 and denied the plaintiff's claim and averred that, at no time did the defendant board of directors, pass a resolution for the defendant, a limited liability company to enter into a contract with the plaintiff and neither did the defendant enter into the contract with the plaintiff.

8. That, at all material times in relation to this suit, one Henry Kithome, was acting in his own personal capacity and not as a director, employee and/or agent of the defendant and the defendant cannot therefore be held liable for any acts done by the said Henry Kithome for his own exclusive benefit.

9. That on or about the 4<sup>th</sup> November 2013, the defendant was awarded and commissioned, as a sub- contractor to carry out the installation of wireless access control at; Kenya School of Monetary Studies, Ruaraka Campus. However, in spite of having performed its part of the contract with respect to the project fully, and despite numerous demands for payment, it has, as at the date of filing the defence, not received payment from the main contractor.

10. However, the defendant admitted receipt of a sum of; Kshs. 9,000,000, on the 25<sup>th</sup> November 2013, from the plaintiff and a sum of Kshs. 3,000,000, on the 16<sup>th</sup> of December 2013, from Centurion Cable Network Limited, which is not a party to this suit. But pleaded that, the plaintiff has no locus standi to sue on behalf of Centurion Cable Network Limited.

11. Further, it shall move the court to stay the proceedings herein pending receipt of payment from the main contractor and/or consultant on the basis that the suit is premature in nature. In the alternative and without prejudice to the aforesaid, the defendant will as the court under the provisions of; Order 1 Rule15, to enjoin the main contractor and/or consultant as a third party in the present suit for the reasons inter alia that, the defendant is entitled to a relief and/or remedy related or connected to the subject matter of the present suit.

12. The defendant admitted having received a demand letter from the plaintiff's advocates dated 14<sup>th</sup> October 2014, and averred that, it was responded to appropriately by its advocates through a letter of the 16<sup>th</sup> October 2014. That, the subject matter of the suit is not commercial in nature as per the Chief Justice's direction of the 18<sup>th</sup> November 1997, the defendant would at the opportune time seek to have the matter transferred to the Civil Division of the High Court.

13. However, the plaintiff filed a reply to the defendant's defence on 6<sup>th</sup> March 2016 and reiterated the averments in the plaint save to add that, all the correspondence done by the director of the company; in their capacity as directors of the defendant and all the funds remitted to the defendant were deposited in the defendant's account No. 0102080730600, at Standard Chartered Bank Limited on diverse dates and all the funds remitted to the defendant were used to accomplish the terms of the subject contract.

14. That, the plaintiff is a director of; Centurion Cable Network Limited and a resolution was passed by the company to remit the funds to the defendant and thus he has the locus standi to sue on behalf of; Centurion Cable Network Limited. That, Henry Kithome was acting as an agent of the defendant and all actions done by him were done as if done by the defendant.

15. Subsequently, the defendant filed a chamber summons application dated 13<sup>th</sup> November, 2015, seeking for a third party notice to issue, against the third parties herein. The application was heard and allowed. The defendant's claim against the third parties jointly and severally is the sum of; Kshs 33,412,176, general damages of breach of contract, costs and interest.

16. The 1<sup>st</sup> third party filed its statement on 9<sup>th</sup> February 2017, denying each and every allegation by the defendant and averred that, there is no relationship whatsoever between the 1<sup>st</sup> third party and the plaintiff, neither is the 1<sup>st</sup> third party privy to any contractual relationship between the plaintiff and the defendant.

17. That, the 1<sup>st</sup> Third party was the architect and the lead consultant to the project herein and invited tenders for the position of main contractor, which tenders were subsequently awarded to the 2<sup>nd</sup> third party, China Wu Yi Company Limited, for both phase (1) and (2) of the project. The 2<sup>nd</sup> Third party as the main contractor was at liberty to sub-contract various functions and it subsequently sub- contracted the defendant to; install an access control system in phase (1) of the project as per the client's instructions.

18. The 1<sup>st</sup> third party approved the said sub-contract since the funds for the same had been factored in phase (2) of the Project. Having

already installed the wireless access control system in phase (1) of the project, the defendant ought to have followed the contractual procedure for demanding payment from the 2<sup>nd</sup> Third party, who would then claim the payment from the 1<sup>st</sup> third Party which procedure is well set out in paragraph 23 of the sub-contract dated 17<sup>th</sup> December 2013. That, no such demand for payment has been made to him by the 2<sup>nd</sup> third party on account of the work done by the defendant.

19. The 2<sup>nd</sup> third party filed a statement of defence dated 30<sup>th</sup> June 2016 and amended on 26<sup>th</sup> May 2017, and denied each and every allegation contained in the defendant's statement of defence. It was averred that, the 2<sup>nd</sup> third party sub-contracted the services of the defendant in two separate sub-contracts, for installation of audio visual equipment works, installation of an access control and security system and equipment works as per the Kenya School of Monetary Studies sub contracts.

20. The defendant completed the said works and was paid in full by the 2<sup>nd</sup> third party save for the retention money as stipulated in the sub contracts. The defendant was very much aware of the two building works sub-contracts and the bills of quantities in respect of the same between the defendants and the 2<sup>nd</sup> third party.

21. That, pursuant to the main contract between the employer and the 2<sup>nd</sup> third party, the 2<sup>nd</sup> third party had itself installed normal locks on certain doors in the project. The works for the installation of these normal locks by the 2<sup>nd</sup> third party was not part of any sub-contract between the defendant and 2<sup>nd</sup> Third party. The 2<sup>nd</sup> third party carried out these works itself and did not sub-contract them to the defendant or any other party thereof.

22. However, following the completion of installation of the normal locks by the 2<sup>nd</sup> third party, the employer issued a fresh tender for the installation of special locks on the same doors that, the 2<sup>nd</sup> third party had itself installed the normal locks. The defendant passed all the evaluation stages of the said tender as required by the employer However, the defendant and the employer did not sign a contract to that effect.

23. The defendant commenced the works and modified the normal locks installed by the 2<sup>nd</sup> third party and took advantage of the lock cylinders of the mentioned locks to install the specialized access control locks. The 2<sup>nd</sup> Third party never received instructions from the project architect or Kenya School of Monetary Studies to install specialized access control locks or any other type of special locks on the doors forming the subject matter of this case. The 2<sup>nd</sup> third party installed the normal type of locks on all wooden doors in the phase 1 project, in conformity with the terms of the contract and the bill of quantities between itself and the employer. The 2<sup>nd</sup> third party was not and will never be paid by the employer for the special access control locks installed by the defendant as they were never part of their tender bill of quantities.

24. The works done by the defendant in installing the specialized access control locks were only done following the invitation to tender; and subsequently the bidding of the employer's tender by the defendant. The 2<sup>nd</sup> third party was never part of this tender or contract. Any monetary claim for works purported to have been done by the defendant regarding the doors and special locks in dispute therefore cannot and should not be recovered from the 2<sup>nd</sup> third party.

25. However, the 2<sup>nd</sup> Third party, averred that, without prejudice to the aforesaid, it acknowledges that there is an unpaid amount of; Kshs 792,760.00, being the retention money that, the 2<sup>nd</sup> third party is entitled to retain for seven (7) days from the date of receipt of the total retention money from the employer. That, the 2<sup>nd</sup> Third party has not yet been paid the same but has no objection to releasing to the plaintiff the said amount of; Kshs 792,760.00 only upon payment by the employer and if the Honourable court so determines.

26. Further the 2<sup>nd</sup> third party avers that the defendant's defence is based on misinformation and outright falsehood and is devoid of merit and should be paid costs for being enjoined in this suit when it is clear that it was not contracted to install special locks.

27. However, the defendant filed a reply to the 2<sup>nd</sup> third party's defence and averred that, the 2<sup>nd</sup> third party send the defendant a contract by email to sign, which was duly signed by the parties. The 2<sup>nd</sup> third party went ahead and cut the doors to fit the locks supplied by the defendant as per contract.

28. The defendant was given written instructions and indeed installed the locks in phase one; Library and academic wing, including the wooden, aluminum and glass doors after the sample had been duly approved. The amount provided in the main contract as Iron Mongery is to the tune of; Sixty-Seven Million Kenya Shillings (Kshs.67,000,000).

29. Further, retention money referred to is actually Kshs 3,698,010.00 and not Kshs 792,760.00 as alleged by the 2<sup>nd</sup> third party and in respect of the other contracts which are not subsequent of this case. In addition, before the locks were procured, the samples from Salton the Supplier were ordered, approved by Kenya Bureau of Standard (KEBS) and 2<sup>nd</sup> Third Party had to cut the doors to fit the locks.

30. However, before the case was heard, the plaintiff and the defendant engaged in a court initiated mediated settlement under Article 15(9) of the Constitution of Kenya, 2010, and entered into a negotiated consent whereby the parties recorded a consent settlement on 13<sup>th</sup> March 2018, in the following terms;

The sum acknowledged as advanced to the defendant and admitted as owing is as follows;

a. Kshs. 9,000,000 advanced at first and a further Kshs. 3,000,000 subsequently advanced giving a total of Kshs. 12,000,000;

b. USD 2,552 advanced but has been repaid therefore although claimed in the plaint, the same has already been cleared and that claim is spent;

c. The interest payable on the sum of; Kshs. 12,000,000 has been agreed at Kshs. 4,900,000;

d. Therefore, the total sum owing and payable is Kshs. 12,000,000 plus interest of; Kshs. 4,900,000 giving rise to a total sum of; Kshs. 16,900,000.

e. It is hereby agreed that, the plaintiff's claim against the defendants will be settled at Kshs. 16,900,000 plus interest at court rates from the date of Judgment to payment in full;

f. The parties to draft an appropriate consent based on the above terms for adoption by the court.

31. A further consent was recorded on 18<sup>th</sup> September 2018, between the two parties as follows: -

“By consent of the parties, in particular the plaintiff and the defendant, it is hereby agreed that the claim between the two parties is settled in the following terms: a sum of Kshs. 19,400,000 in favour of the plaintiff plus interest against the defendant. The said sum shall attract interest effect from today 18<sup>th</sup> September 2018 at court rates until payment in full.”

32. As a result, the case proceeded to hearing as between the defendant and the third parties. The defendant's case was supported by the evidence of; Henry Kithome Mutinda, a director of the defendant's company. He relied on his written statement dated 13<sup>th</sup> September 2018 which he adopted as his evidence along the bundle of documents filed. He basically reiterated the averments in the amended defence.

33. During cross examination by the 2<sup>nd</sup> third party, he stated that, the contract between the defendant and 2<sup>nd</sup> third party is dated 17<sup>th</sup> October 2013 and is in relation to the academic wing and the library which are con-joint to the residence and the hospitality area. The list of work to be done are contained in the sub-contract. The bills of quantities determined the works and price, and there are no bills of quantities document signed by the 2<sup>nd</sup> third party, but there is an email in which the 2<sup>nd</sup> third party agreed the works be done as evidenced by the delivery notes and confirmed all locks were delivered to the 2<sup>nd</sup> third party.

34. He stated that, he was not aware whether the handing over of the certificate was prepared. That, some door locks could not lock and the defendant had to repair them. In Re-examination, he stated that, the certificate of completion is issued by the architect to the main contractor and the defendants were sub-contractors. That the defendant has not been paid and yet, it worked and completed all the works.

35. The 1<sup>st</sup> third party's case was supported by the evidence of Jared Momanyi who relied on his witness statement dated 9<sup>th</sup> February 2017 and reiterated the averments in its statement of defence and maintained that, it has been improperly enjoined in the suit as the 2<sup>nd</sup> third party admitted in its defence having entered into a contract with the defendant and by virtue of the same the 1<sup>st</sup> third party is not liable. Further the defendant has not demonstrated how he is entitled to the relief and or the remedy or contribution from the 1<sup>st</sup> third party in connection with the subject matter of the suit.

36. In cross examination, the witness stated that he was aware of the contract between the 2<sup>nd</sup> third party and the defendant. The 1<sup>st</sup> Third party was both the architect and the project manager. The works were worth Kshs. 67,500,000 but he could not confirm if it was paid as he did not have the final bill of costs. He stated that, the entire locking system was provided for in the provisional sum of; Kshs. 67,500,000 and broken down in the bills of quantities. The work was done for; Kshs. 33,412,176.

37. However, the inspection was not done and he could not tell if the installation was done, although the defendant has provided an email that works was done. He did not participate in the inspection and works have not been commissioned due to the dispute between the parties that is in use. That, he witnessed the contract between the defendant and the 2<sup>nd</sup> third party and he is not aware there is any forgery. He stated that he was not aware the defendant borrowed money to finance the project.

38. The 2<sup>nd</sup> third party's case was supported by the evidence of Yang Jing Guang; the company's project manager. He relied on two witness statements filed in court dated 23<sup>rd</sup> October 2017 and 21<sup>st</sup> November 2017 and a supplementary statement dated 28<sup>th</sup> June 2017. He too reiterated the averments in the amended statement of defence, save to add that, the subject locks belong to phase (1) of the project and the sub contract referred to is for phase (2). That the defendant did not supply any locks for phase (2). Therefore, he has no claim against the 2<sup>nd</sup> third party.

39. That, the bills of quantities regarding the sub-contract for the installation of an access control and security system equipment works did not have provision for installing special locks but just normal locks. However, the defendant on his own volition and in blatant breach of the terms of the said sub-contract installed specialized access control information as well as the special locks instead of the normal locks as indicated in the bill of quantities.

40. The 2<sup>nd</sup> Third party later learnt that the employer had invited tenders for the installation of specialized access control locks, and that the defendant had successfully tendered for the same. The 2<sup>nd</sup> third party thereafter received a sample of electronic locks for measurement purposes only and was not involved in the procurement or installation of the locks. The receipt of the samples was not and should not be an indication that the 2<sup>nd</sup> third Party contracted the defendant to install special locks.

41. In cross examination, he stated that, the 2<sup>nd</sup> third party did not sign any contract with the defendant. That the defendant was sent an email

and forwarded a draft agreement but it was not signed. The purported signature on the agreement is fake and it is a forgery. The request for a sample of the locks was to enable him design the fitting of the locks. The defendant supplied locks of; Kshs. 118,000 instead of; Kshs. 33,000 as per the bills of quantities. The 2<sup>nd</sup> third party suggested it could pay Kshs. 15,000,000 but he did not pay as the defendant refused to accept the offer to settle the case.

42. The 2<sup>nd</sup> third party witness Mr. Gao Kejian further relied on the witness statement dated 21<sup>st</sup> November 2017 and stated that the signature on the impugned contract was forged. That he only signed one contract with the defendant.

43. The parties filed their final submissions, whereby the defendant submitted that, before the contract was signed, there was due diligence by the service providers including the 1<sup>st</sup> third party, the project manager, and the initial preliminaries which included supply of the drawings, door schedules, quantities specification of the locks.

44. That at one stage the quantity surveyor of the project; Moses Matheka wrote to the manufacturer of the locks directly seeking confirmation of the prices. Therefore, all along the price of the lock was known to all the parties. The 1<sup>st</sup> third party witness who is the project manager, confirmed that the contract was signed between the defendant and the 2<sup>nd</sup> third party and the work has been done. That a court cannot re write a contract for the parties as held in the cases of; Rufale versus Umon Manufacturing Co. (Ramsboltom) (1918) I.R 1KB 592, and Attorney General of Belize et al versus Belize Telecon Ltd and Another (2009), 1WLR 1980 at page 1993. Citing Lord Person in Trollope Colls Ltd versus North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609.

45. That, the 2<sup>nd</sup> third party has alleged fraud but not proved it all. Fraud must be specifically pleaded with particulars and proven: as held in Koinange & Others versus kaoinange [1986] KLR 23, Okere versus Kiiyukia & Others [2007] 1 EA 304. Further, as held in Derry versus Peek [1990] 14 A. C. 337, 334, fraud is proven when it is shown that a false representation has been made;

- a. Knowingly or;
- b. Without belief in its truth or;
- c. Recklessly, careless, whether it be true or false.

46. Similarly, in the case of; Hadley Vs Baxendale (154) 9. Exch 214 Anderson P, stated that the probable result of a breach of contract is damages;

“where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, as such may reasonably be supposed to have been in contemplation on both parties at the time they made a contract as probable result of a breach of it”

47. The 1<sup>st</sup> Third party submitted that, it was a consultant acting as a link between the main contractor and the client Kenya School of Monetary Studies. That the defendants’ witness Mr. Kithome also confirmed during the hearing that, the defendant did not have a contract with the 1<sup>st</sup> third party but with the 2<sup>nd</sup> third part and that, the 1<sup>st</sup> third party in its letter to the defendant on the contract subject matter was to inform them that, they were to sign a sub-contract with the 2<sup>nd</sup> third party

48. Finally, it was submitted that, the defendant had failed to demonstrate how it is entitled to indemnity and/or contribution from the 1<sup>st</sup> third party and has misled the court on the liability of the 1<sup>st</sup> third party. The 1<sup>st</sup> third party relied on the case of; Sango Bay Estates & Others v Dresdner Bank Ag (No.2) [1971] E.A 307 which held that, the defendant has to satisfy the court that there is a proper question to be tried as to liability of third party.

49. The 2<sup>nd</sup> Third party submitted that, there were two independent contracts for construction of the proposed library and academic wing building and associated works, being contract number KSMS/PROC/10/10-1 for Phase I, signed on 10<sup>th</sup> of January 2011 and the proposed remodeling, expansion and modernization of hospitality buildings being contract number KSMS/PROC/38/12-13 Phase II which was signed on 15<sup>th</sup> October 2013. That it is evident that these were two separate and distinct projects. Therefore, the two cannot be treated as one.

50. The locks were fitted under phase (I) contract which had a different allocation for the same. The price of total locks in the bills of quantities provided in the tender, for wooden and glass doors excluding the access control system are 182 locks worth Kshs. 4,094,864 at an average Kshs. 22,499 per lock.

51. In installing the expensive locks, the defendant contravened the Public Procurement and Asset Disposal Act 2015, which states that:

- 139.(1) An amendment or a variation to a contract resulting from a procurement proceeding is effective only if;
  - (a) the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity;
  - (b) any contract variations or amendments for goods, works and services shall be as prescribed.
- (3) No contract price shall be varied upwards within twelve months from the date of the signing of the contract.

(4) For the purposes of this section, any variation of a contract shall only be considered if the following are satisfied:

(a) the price variation is based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;

(b) the quantity variation for goods and services does not exceed fifteen per cent of the original contract quantity;

(c) the quantity variation of works does not exceed twenty per cent of the original contract quantity;

(d) the price or quantity variation is to be executed within the period of the contract; and

(e) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty-five per cent of the original contract price.

(5) An accounting officer of a procuring entity shall submit a quarterly report of their varied or amended procurement contracts to the authority.

(6) Where variations result in an increment of the contract price by more than twenty-five percent, such variations shall be tendered for separately.

52. The 2<sup>nd</sup> third party further submitted that, all issues relating to the phase (2) contract are irrelevant to the present case, including whether the signature of Mr. Gao Kejian was forged or not. Further the defendant acted beyond the authority conferred to it by the sub-contract and breached clause 3.0 in the agreement and conditions of sub-contract for building works which states as follows:

### 3.0. General obligation of the Sub Contractor.

3.1. The sub-contractor shall be deemed to have notice of all the provisions of the main contract except the detailed pieces of the contractor included in the bills of quantities or in the schedule of rates.

3.2. the sub-contractor shall carry out and complete the sub-contract works in accordance with the sub-contract and in all respects to the reasonable satisfaction of the contractor and of the Architect and in conformity with all reasonable directions and requirements of the contractor regulating the due carrying out of the contract works.

3.3. The sub-contractor shall observe, perform and comply with all the provisions of the main contract on the part of the sub-contractor to be observed, performed and complied with so far as they relate and apply to the sub-contract works or any portion thereof and are not inconsistent with the express provisions of this sub-contract as if all the same were set out herein.

3.4. without prejudice to the generality of the foregoing requirements, the sub-contractor shall especially observe, perform and comply with the provisions of clauses 9.0, 18.0, 19.0, 22.0, 30.0, 31.0, 34.0, 36.0 of the main contract as they apply to the sub-contract works.

53. That a draft contract document was sent to the defendant by the 2<sup>nd</sup> third party on 12<sup>th</sup> December 2013 and by that time, Mr. Gao Kejian who allegedly signed on behalf of the 2<sup>nd</sup> third party was not authorized to undertake any signing for the project as he was no longer working for the 2<sup>nd</sup> third party. Mr. Yang Jing Guang is the only authorized person to negotiate and sign any contract on behalf of the 2<sup>nd</sup> third party as he is the Manager thereof.

54. The 2<sup>nd</sup> Third party submitted that, the general rule in Agency is that, a principal is bound by, and is entitled to the benefit of the contract of his agent made on his behalf within the scope of such agent's actual authority. This is so, whether the agent at the time of acting named or identified his principal or merely indicated that he was acting for a principal but did not identify him. This rule can also be extended to fit in the undisclosed principle.

55. That, in the case of; *Karanja versus Phoenix of EA Assurance Company Ltd, Civil Case No 56 of 1987*, the court held that; an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests

56. The parties also filed their respective issues for determination. The defendant invited the court to consider the following issues: -

a. Whether there is a contractual relationship between the defendant and the third Parties;

b. Whether there is a contract between the defendant and the 2<sup>nd</sup> third party;

c. If so, what did the contract require of each of the party and was the contract modified at any point;

d. Was the contract breached and if so, was the breach material to the contract; and does the breaching party have legal defence to enforcement of the contract;

e. Whether the defendant installed locks and wireless access control at; Kenya School of Monetary Studies as a sub-contractor of the 2<sup>nd</sup> third party;

f. Whether the defendant is entitled to payment and indemnity from the third parties and if so, how much.

g. Whether the defendant has demanded payment of outstanding amount from the third parties.

57. The 1<sup>st</sup> Third party filed the following issues for determination: -

a.. Whether there is a contractual relationship between the defendant and the 1<sup>st</sup> third party

b. Whether the defendant is entitled to any relief and or remedy against the 1<sup>st</sup> third party

c. Whether the 1<sup>st</sup> third party ought to be granted the costs of the suit against the defendant in any event.

61. The 2<sup>nd</sup> third party on its part invited the court to consider the following issues: -

a. Were there two contracts; and did the defendant performed its obligations as provided for in the sub-contract;

b. Was there an agency relationship between Kenya School of Monetary Studies and the 2<sup>nd</sup> third party;

c. Is the sub-contract No: CWY/KSMS/PROC/001 dated 17<sup>th</sup> December, 2013 between Pinkertons (K) Ltd and China Wu Yi Ltd for the project at Kenya School of Monetary Studies; supplemental to contract No. KSMS/PROC/38/ 12-13 a forged/ fraudulent document?

d. What was the type and the price of the locks quoted in the bill of quantities as issued by the employer (KSMS) to the 2<sup>nd</sup> third party?

e. Did the 2<sup>nd</sup> third party install the locks as quoted in the bill of quantities in in all the wooden doors of the project?

f. Did the employer (KSMS) pay the 2<sup>nd</sup> third party the amount of money for the normal types of locks installed in the wooden doors as quoted in the bill of quantities?

g. Who instructed the defendant to remove the normal types of locks already installed by the 2<sup>nd</sup> third party and install the more expensive locks?

62. At the conclusion of the matter and in considering the evidence adduced in total, I find that several issues have arisen as to: -

a. Whether there was a contract between the parties herein;

b. If so was the contract breached and if so by who; and/or

c. Did the defendant fully perform its contractual obligations and/or

d. Is the defendant entitled to the relief sought;

e. Who should bear the cost of the suit?

63. As regards the first issue, I find the evidence reveals that the defendant and the 2<sup>nd</sup> third party signed several contracts. The 2<sup>nd</sup> third party has produced two sub contracts dated 26<sup>th</sup> January 2011 referring to the main contract of; 29<sup>th</sup> December 2010. The two sub contracts relate to the sums of; Kshs 7,243,844 and Kshs 23, 746, 220 respectively. The sub contracts are signed by both parties. To the contrary, the defendant has produced a sub contract document dated 17<sup>th</sup> December 2013, which refers to the main contract dated 15<sup>th</sup> October 2013. The sub-contract is for a sum of Kshs 67,500,000 and is signed by both parties on 15<sup>th</sup> February 2014 and the 1<sup>st</sup> third party as a project manager.

64. It is evident the contracts reveal that, the project was to be carried out in two phases; phase 1 and phase 2. It does appear that, the sub-contracts produced by the 2<sup>nd</sup> third party relates to phase 1, whereas the sub contract produced by the defendant relates to phase 2. Further, the contract produced by the defendant seem to have been executed after, KSMS published a tender on; 27<sup>th</sup> March 2013. The tender was for supply, installation and commissioning of specialized access control for the academic wing and library with a closing date of 29<sup>th</sup> April 2013.

65. However, the 2<sup>nd</sup> third party has disputed the authenticity of the contract produced by the defendant. By a letter dated 2<sup>nd</sup> August 2017, the firm of; Wambugu & Muriuki Advocates, on behalf of the 2<sup>nd</sup> third party wrote to; Nairobi County Criminal Investigation officer, seeking for investigation into an alleged forged signature endorsed on the contract of 17<sup>th</sup> December 2013, on behalf of the 2<sup>nd</sup> third party.

By a letter dated 21<sup>st</sup> March 2018, the forensic document examiner Chief Inspector V. Owoko, confirmed that, the contract was a valid contract.

66. Therefore, based on that investigative results, the allegations herein, by the 2<sup>nd</sup> third party that, the signature on that contract is forged and the denial of the same, by the 2<sup>nd</sup> third party's second witness, does not lie. Neither does the arguments that, the same was signed in ignorance and/or without authority. In conclusion I find that, all the contracts and in particular the contract of 17<sup>th</sup> December, 2013, was signed by the defendant and the 2<sup>nd</sup> third party.

67. However, it is clearly evident that, the contracts were not signed by the 1<sup>st</sup> third party at all. The 1<sup>st</sup> third party is therefore not privy thereto and I concur with its submissions that, it is not liable under the same. In fact, it is the 1<sup>st</sup> third party that wrote to the defendant in relation to the same as follows: -

*Pinkertons Kenya Limited*

RE: proposed Re-modeling, renovation and associated New Building works at Kenya school of Monetary Studies, Ruaraka Campus.

“installation of wireless access control to library, Academic wing and phase 11

Your quotation for the proposed supply, installation and commissioning of wireless access control solution for the library, Academic Wing and phase 11 of Kenya School of Monetary Studies Kenya Shillings Sixty-Seven Million Five Hundred Thousand plus 16% VAT (67,500,000 plus 16% VAT) and the accompanying drawings and specifications has been approved.

This is therefore to commission you to undertake the works pending finalization and signing of contract as sub- contractors for China Wu Yi Ltd, the main contractors for the works since the sums for the works are provided for as provisional sums in their contract.

Note that the works are of high urgency

If you are in agreement with the above terms, kindly sign the attached copy of this letter and forward to us.

Signed

Aprim Consultants

68. The 1<sup>st</sup> and 2<sup>nd</sup> third issues will be dealt with together. These issues are the bull's eye in the dispute herein. It is indeed not in dispute that; the defendant supplied locks that were used in the project at KSMS. However, a lot of other issues are very grey in this matter. The first issue is how; the defendant bid for the tender advertised by KSMS and upon successfully winning the same entered into a contract with the 2<sup>nd</sup> third party to fulfil the tender.

69. Secondly; it is not clear as to why the locks supplied by the defendant were fitted in phase 1 of the project, when according to the 1<sup>st</sup> third party the financial provision thereof; was provided for in phase 2. It is equally not quite clear; what kind of locks were supplied whether “ordinary” or “expensive”. Further, whether the locks were replacement of the simple locks alleged fitted by the 2<sup>nd</sup> third party or not.

70. Whatever the case maybe, the main issue remains; whether the contract was performed by the parties. The defendant alleges that the locks were delivered in the months of; January and February 2014, after the contract executed on 17<sup>th</sup> December, 2013. The 2<sup>nd</sup> third party alleges that, the locks supplied were not the same as those in the bills of quantities. However, it suffices to note that, before the locks were delivered, there was a lot communication on the specifications of the locks, as evidenced by the correspondence exchanged by the parties.

71. By an email dated 13<sup>th</sup> June 2013, KSMS, indicates that, it was carrying out a major upgrade of hotel rooms and had identified Saito Locks for installation on hotel room doors. They wanted a confirmation that the Saito locks are compatible with the Fidelio System and will cause no issues in integration.

72. On 14<sup>th</sup> June 2013, one Mr. Amit Walia replied to that email and stated that; Saito locks do not have an approved interface with Fidelio. In response KSMS, requested him to provide a list of door lock makes and models with approved Fidelio interfaces. On 18<sup>th</sup> June 2013, Paul Mugunga wrote to; Jared Momanyi and Henry Kithome to the effect that; Saito is integrated with Fidelio. That, one only has to order the Hotel Version (HAMS) if the PMS is Fidelio. This information was forwarded to the architect of the project and asked to check with Saito vendors the interface that they had for connection to Fidelio under the name HAMS.

73. On 14<sup>th</sup> June 2013, Amit Walia responded that, those were the most common ones used locally, and once the client identifies the one they would like to use, they should inform them so that they could send the quote for the same. It is therefore clear from the above correspondence that, the parties had discussed and agreed on types of locks required. The question that arises is: if the locks were not the type required; why were they acknowledged and fitted and are indeed still in use.

74. Be that as it were, the locks were eventually delivered to KSMS, as per the delivery notes dated; 17<sup>th</sup> January 2014, 30<sup>th</sup> January 2014

and 26<sup>th</sup> February 2014 and signed for by the 2<sup>nd</sup> third party and eventually fitted. A note has been produced dated, 16<sup>th</sup> February 2013, that reads; "I Robert have received the above items on behalf of; M/s China Wuyi from M/s Pinkertons(K) Limited by Henry Kithome this day of 16<sup>th</sup> February 2013".

75. However, the next issue is; whether the defendant performed the contract fully. The defendant has produced site inspection reports, of the inspection carried out on the 24<sup>th</sup> April 2014, allegedly on the functionality of door locks in the academic block "as a confirmation that works were successfully carried out". Thus according to the defendant the contract was performed and it is not in breach.

76. However, it is noteworthy that, the defendant is not claiming a total sum of; Kshs 67,500,000 plus 16% VAT. The claim against the third parties is for a sum of; a sum of; Kshs. 33,412,176. What does this amount represent? What percentage of the contract was performed? Who has certified the amount claimed as being due? What do the terms of the contract stipulates concerning the payments and the procedure of claiming the same?

77. In answer to these questions the defendant has referred to a document of its own assessment of the works done and the amount due to support its claim. The 2<sup>nd</sup> third party faults the document for non-compliance with clause 23 of the contract. I also note from page 20 of the contract signed on 17<sup>th</sup> December 2013, a tabulation of items to be supplied, where they were to be fitted and the total sum of; Kshs 67,500,000.

78. However, as with any other construction contract, the contractor and/or subcontractor cannot self-assess its works. The works and/or materials for construction must comply with the bills of quantities. In this instant matter the evidence in relation to the same is scanty. There was no analysis of what the defendant delivered and what was not delivered. It is not even clear whether the goods delivered were in accordance with bills of quantities for phase 1 or 2. In further evidence and/or submission the defendant merely states that; the previous invoices were delivered and paid for without any issue, yet it is not clear as to what was paid for and in relation to what.

79. Similarly, from the documents produced in relation to mediated dispute resolution agreement the defendant was supposed to finish some remedial works on or before December 2017. It is not clear whether that was done.

80. However, it is clear the contractual terms on payments have not been complied with. In that regard, the provisions of; clause 23 of the contract between the parties, provides inter alia that; the sub-contractor would lodge a claim to be processed in the same manner as the main contractors'. The claim would be verified by the quantity surveyor and the project manager/architect and be paid by the main contractor.

81. The 1<sup>st</sup> third party confirmed that to date, the 2<sup>nd</sup> third party has never written to them as is required to conduct inspection. The works were to be commissioned but this was not done due to the dispute between the defendant and the 2<sup>nd</sup> third party and neither has the defendant moved them to do a valuation of the work done and neither has the 2<sup>nd</sup> third party applied to the client for payment of the work done.

82. As properly submitted, the role of the court is to interpret the terms of the contract between the parties and not to re write the contract for them. If the court were to allow the defendant to circumvent the contractual terms of clause 23, the court would be sanitising the breach of the contract and or varying its terms.

83. Be that as it were, what is evident is that the defendant delivered locks that were received by the 2<sup>nd</sup> third party. The quality and quantity thereof must be verified in accordance with the bills of quantities that provided for the same, so as to inter alia; address the concern raised of "expensive locks".

84. The 2<sup>nd</sup> third party on its part denies liability to pay the sum claimed. But the contract of; 17<sup>th</sup> December 2013, clearly provides that, the 2<sup>nd</sup> third party was to pay the defendant as a sub-contractor. Therefore, the arguments that, it is the client who floated the tender and is reliable to pay and/or it has not been paid by the client is neither here or there.

85. Before I conclude the matter, I wish to observe that, the 2<sup>nd</sup> third party's submissions contained a lot of material facts inter alia; breach of procurement laws, which were neither pleaded or testified to at the trial. I did not refer to the same.

86. In conclusion I find that; the responsibility to verify the works done by the defendant in accordance with the provisions of clause 23 of the contract, lies with the 2<sup>nd</sup> third party. In that regard, I order that, the defendant shall submit its claim to the 2<sup>nd</sup> third party, if that has not been done. Once received, the 2<sup>nd</sup> third party shall cause the quantity surveyor to assess the claim and advise the architect accordingly on the amount payable and/or to be included in the certificate of the main contractor's payment. The same shall be done within the timelines provided for in the contract and if not provided for within twenty-one (21) days of the date of this order. However, it suffices to note that, the project ended some time back and may cause challenges to the valuation but the inspection referred to herein should be of help in the assessment.

87. The order is informed by the fact that; in the absence of the certified amount to be paid, the court is not able to make final orders in the matter. It will be thus unfair and unjust to dismiss the defendant's claim for lack of evidence, when it did not have the responsibility to assess its own claim, just as it will be unjust and unfair to allow a claim that has not been fully assessed.

88. In that case the parties should ascertain the amount payable to the defendant to enable the court make final orders in the matter. The matter will then be placed before the court for final orders, as to the remaining issues on the liability of the parties, interest and costs.

89. It is so ordered.

**Dated delivered and signed on this 26<sup>th</sup> day of June, 2020**

**G. L NZIOKA**

**JUDGE**

In the presence of:

Mr. Muganda for the plaintiff

Mr. Ombati for the defendant

Mr. Njagi for Mr. Mugendi for the 1<sup>st</sup> third party

Mr. Charles Ojuki for the 2<sup>nd</sup> third party

Robert -----Court Assistant