



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 644 OF 2012**

**DEWDROP ENTERPRISES LIMITED.....APPELLANT**

**- V E R S U S -**

**RENOCON.....RESPONDENT**

*(Appeal from the decree and judgment of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts (Hon. T.W.C Wamae) dated 14<sup>th</sup> September, 2012 in Civil Case No. 10203 of 2003)*

**JUDGEMENT**

1. Renocon and Dewdrop Enterprises Ltd, the Respondent and Appellant herein respectively executed a sub-contract dated 29.8.2001. In the aforesaid sub-contract, the Appellant was to carry out and complete "the structured cabling installation to proposed remodelling of the National Bank (K) Ltd, Harambee Avenue Branch". The value of the sub-contract was indicted to be kshs.1,953,924/=. The Respondent was the main contractor and had separately executed a contract hereinafter referred to as the main contract with National Bank of Kenya Ltd. Due to variations during the execution of works, the architect certified as payable to the Appellant a sum of ksh.2,812,675/= out of which the Respondent paid a total of kshs.2,720,789/23 as at the time the matter was pending before the trial court leaving a balance of ksh.22,046/=.

2. The Appellant filed an action against Respondent before the Chief Magistrate's Court, Milimani Commercial Courts by way of the amended plaint dated 10<sup>th</sup> March 2010 claiming for *inter alia* payment of kshs.1,093,502/81 plus interest. The Respondent filed a defence and denied the Appellant's claim.

3. The suit was heard and in the end the Appellant was awarded ksh.7,994/97 with interest at court rates.

4. The Appellant was dissatisfied and was therefore prompted to prefer this appeal. On appeal the Appellant put forward the following grounds:

***1. The learned magistrate erred in law and in fact in failing to decide on all matters in controversy between the parties herein.***

***2. The learned magistrate erred in law and in fact in holding that the Appellant had no right to claim any benefits contained in the Main Contract.***

***3. The learned magistrate erred in law and in fact in failing to find that it was a term of the subcontract between the parties herein that the Respondent guarantees the performance of contractual obligations by the employer and the employer's agents;***

**4. The learned magistrate erred in law and in fact in failing to find that it was a term of the subcontract between the parties herein that all payments due to the Appellant were payable within 28 days upon certification of the same by the project architect;**

**5. The learned magistrate erred in law and in fact in her finding that it was not a term of the subcontract between the parties herein that all delayed payments shall accrue interest at commercial bank lending rate in force during the period of default;**

**6. The learned magistrate erred in law and in fact in failing to find that the project architect issued certificates for payment as particularized in paragraph 5A of the Amended Complaint dated 10<sup>th</sup> March 2010;**

**7. The learned magistrate erred in law and in fact in failing to find that the Respondent issued delayed part payments in breach of the subcontract as particularized in paragraphs 5B and 5C of the Amended Complaint dated 10<sup>th</sup> March 2010;**

**8. The learned magistrate erred in law and in fact in failing to find that the Respondent issued withholding tax certificates to the Appellant totalling kshs.69,807.95;**

**9. The learned magistrate erred in law and in fact in failing to find that the Respondent was not entitled to an invoice from the Appellant as a re-condition for payment.**

**10. The learned magistrate erred in law and in fact in failing to find that the Respondent was indebted to the Appellant in the sum of kshs.424,126,58 as at 6<sup>th</sup> August 2003 in respect of work done, valued and certified by the project architect;**

**11. The learned magistrate erred in law and in fact in failing to find that the Respondent was indebted to the Appellant in the sum of ksh.35,511.61 as at 31<sup>st</sup> July 2005 in respect of work done, valued and certified by the project architect;**

**12. The learned magistrate erred in law and in fact in her finding that the Respondent was not liable to pay the Appellant and accrued late-payment interest as at 31<sup>st</sup> July 2005;**

**13. The learned magistrate erred in law and in fact in totally disregarding the Appellant's evidence;**

5. When the appeal came up for hearing parties recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have too, considered the rival submissions. Though the Appellant put forward a total of thirteen grounds, in my view the main ground which can determine this appeal is the question as whether or not the main contract entered between the Respondent and National Bank of Kenya Ltd covered the contractual relationship between the Appellant and the Respondent. There is no doubt that the learned Chief Magistrate formed the opinion that the Appellant had no right to claim any rights and benefits contained in the main contract since it was not privy to the main contract. It is the submission of the Appellant that the holding was erroneous. It was argued that the Appellant was entitled to claim rights and benefits under the main contract. It was further submitted that if parties to an existing main contract nominate a sub-contractor under the terms of the main contract and the said sub-contractor has inspected the main contract before entering into a sub-contract agreement, then the parties to the main contract are estopped from pleading that the sub-contractor is not privy to the terms of the said main contract. On the other hand the Respondent is of the view that as far as the main contract is concerned there is no privity of contract between the Respondent and the Appellant or between the Respondent's employer (National Bank of Kenya Ltd) and the Respondent.

6. Having re-evaluated the evidence presented before the trial court and having taken into account the rival submissions, it is clear from the evidence presented that the sub-contract between the parties herein

is supplemental to the main contract. In Clause 19 of the sub-contract the sub-contractor has a claim to rights and benefits under the main contract between the Respondent and the National Bank of Kenya Ltd.

7. In such a case the supplemental agreement has to be read in conjunction with the main contract.

8. I have examined Clause 31 of the main contract and it is apparent that the Appellant was nominated as a sub-contractor for structured cabling installation works with the project. Having considered all the material presented to this court, I am convinced that the Appellant is entitled to claim rights and benefits under the main contract. I am also convinced that if the parties to an existing main contract nominate a sub-contractor under the terms of the main contract, and the said sub-contractor has inspected the main contract before entering into the sub-contract agreement, then the parties to the main contract are estopped from pleading that the said sub-contractor is not privy to the terms of the said main contract.

9. A careful perusal of the judgment of the learned Chief Magistrate will show that the decision was arrived at on the basis that the Appellant was not entitled to claim rights and benefits from the main contract. Having come to a contrary opinion, it is therefore obvious that the appeal must succeed. I have purposely avoided to make a determination on the grounds of appeal touching on the merits of the case because I have formed the opinion that there is need to have the suit reheard afresh.

10. In the end the appeal is allowed. Consequently the judgment of the learned chief magistrate is set aside. The suit is to be heard afresh expeditiously before another magistrate of competent jurisdiction other than Hon. T.W.C Wamae.

11. The Appellant is given costs of the appeal

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of June, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent