



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

Civil Case 641 of 1998

ZENITH STEEL FABRICATORS LIMITED.....PLAINTIFF

VERSUS

**CONTINENTAL BUILDERS LIMITED.....
.....DEFENDANT**

AND

**ELTEX (EPZ) LIMITED.....
.....THIRD PARTY**

J U D G M E N T

The plaintiff's claim against the defendant is for the balance of contractual fee due to it for work carried out where the plaintiff alleges the defendant agreed to pay it kshs 20, 500, 000. The plaintiff stated in its plaint that it had been paid kshs 16, 331, 800 leaving a balance due of kshs 4, 283, 320/-.

The defendant denied that it is contractually liable to pay the amount claimed and averred in its defence that the plaintiff was a nominated sub contractor and accordingly payment of the amount claimed by the plaintiff was payable by the employer. The defendant joined the said employer as a third party in this action.

P W 1 was **ABBAS TAYEBJI BIVIJI**. He said that he is a director of the plaintiff company.

He said that there was no signed contract between the plaintiff and defendant relating to this claim. He referred to a letter dated 29th June 1994 and said that he wrote this letter to the defendant to confirm the

discussion that took place at a meeting.

P W 1 said that this letter was confirming the contract between the plaintiff and defendant; it is therefore necessary to set out some parts of it here. It is the plaintiff's letter addressed to the defendant and copied to the third party. The letter is in the following terms:

“RE ROOFING WORK FOR SPINNING MILL @ ATHI RIVER

We refer to our meeting with you and the clients and wish to confirm the discussion during the meeting as follows:

(1) The clients have confirmed that we have to carry out roofing at a price of kshs 20, 500, 000/-. The price is excluding VAT and Duty.

(2)

(3)

(4)

(5)

(6)

(7) Payment terms:

(a) 15% advance immediately with order.

(b) Balance to be paid as per suppliers requirement

.....” (Underling mine).

P W 1 further stated that the plaintiff began to perform the contract on 29th September 1994. That the main contract was between the defendant and the third party whilst the defendant nominated the plaintiff as its sub contractor to carry out the roof job at the value of shs 20.5 million on the third party's premises. That amount of kshs 20.5 million was payable by the defendant to the plaintiff.

The witness referred to the letter dated 12th July 1994 and said that they were nominated sub contractor by the defendant. This letter written by the defendant to the plaintiff and copied to the 3rd party in part states: -

“We have been appointed as main contractors on the above project as per letter of offer from the clients dated 11th July 1994 and accordingly we hereby appoint you as nominated sub contractor for steel works and roofing work as per quotation dated 29th June 1994 amounting to kshs 20, 500, 000 excluding VAT and duties.”

The witness further stated that letter dated 1st December 1994 also confirmed that the plaintiff was the defendant's nominated contractor. That letter was written by the defendant to the plaintiff copied to the third party. Some portions of that letter provide: -

“Please take note of the following:

(1) You are our nominated sub contractor for structural steel works roofing and ceiling works all as agreed and discussed directly with the client.

(2) We are not responsible for any design, detail or acquisition of any materials of your part of the works.

(3) At a pre-contract meeting held at the client's offices in your presence, it was agreed by all present that payments would be affected to the main contractor including your sub-contract pro-rata amounts as follows: Advance payment 15% of contract sum for six months.

Whilst we fully agree with your predicament regarding the issue of payments, we are in no position to assist you unless the client is willing to issue additional payment for your use.....”

P W 1 in summing up the afore stated letters, said **“for all purposes and intents the main contractors (Continental) ought to have paid us – not ELTEX,”** (EPZ) Ltd. To support this the witness referred to a fax message dated 8th December 1994 by the 3rd party to the plaintiff. That fax message stated: -

“Please kindly note that our main contractors are M/S Continental Builders Ltd and that you are a sub contractor directly co-ordinating with the main contractor. You therefore should liase with the main contractor in respect of all payments and site work schedules. We are not responsible for payment to you directly.”

The witness said that the plaintiff made several demands for payment to the defendant but payment was not made. As a consequence of that non-payment, D W 1 said that the plaintiff wrote a letter dated 1.2.1995 to the defendant copied to the 3rd party and stated in part.

“Since you have problem of paying us due to under payment by clients, we request you to authorise the clients immediately to pay us directly, so payment come directly from client without delay.”

The witness said that the 3rd party declined to pay the plaintiff directly.

P W 1 concluded his examination in chief by saying that the plaintiff completed the contractual work and that the defendant paid the plaintiff kshs 16.3 million and the balance due to the plaintiff was kshs 4.2 million plus costs and interest.

On being cross examined by defendant counsel P W 1 accepted that the payment due to the plaintiff was payable by the client, the 3rd party. That the plaintiff's payment was made by the 3rd party through the defendant and that although the plaintiff asked the 3rd party to remit its payment directly to the plaintiff, that was not done. He further accepted that he had not shown a document in this case which would show that the defendant received any payment from 3rd party on behalf of the plaintiff, which payment the defendant had failed to remit to the plaintiff.

P W 1 on being asked the definition of a nominated sub- contractor, he responded that he knew the definition and said, **“to be a nominated sub contractor.....it is 3rd party”** who **“referred and recommended us to the defendant”**. He further stated, **“3rd party is not co-operating that is why we have not sued them.”**

On being cross examined by the 3rd party counsel P W 1 said that the plaintiff accepted to work for the defendant as seen in the letter of 29th June 1994. On further cross examination, P W 1 said that the plaintiff was nominated by the 3rd party then, contradicted himself by saying that the plaintiff was appointed by the defendant and that the plaintiff expected to be paid by the defendant whether or not the defendant received money from the 3rd party.

D W 1 was **GURDID SINGH RUPRA**. He said that he works for the defendant and has done so for the last 35 years. That he is also a director of the defendant company. That the defendant is a company which carries out building and civil engineering works. He said that he had 35 years experience in construction industry and building contracts.

He said that the plaintiff was a nominated sub contractor for the works at EPZ Athi River for the principal client Eltex (EPZ) Ltd; 3rd party.

That the 3rd party was constructing at Athi River, EPZ, a garment and spinning plant. That the principal was the 3rd party, the defendant was the contractor to carry out the building works.

D W 1 defined nominated contractor as a contractor who is employed by the principal.

He said that the 3rd party agreed with the plaintiff that the plaintiff was going to carry out design work, build steel works and roof works at the 3rd party's premises EPZ Athi River. That the defendant wrote the letter of 12th July 1994 appointing the plaintiff as nominated sub contractor but that the agreement of the contractual terms was between the plaintiff and the 3rd party.

D W 1 defined domestic sub-contractor as one who is appointed by the main contractor. In this case the main contractor was the defendant and in such a case it would be the defendant who would be responsible to pay such a domestic sub-contractor whether or not the main contractor received the money from the principal. He said that the plaintiff was a nominated rather than a domestic sub-contractor and that being the case the plaintiff should have directed its claim to the principal, the 3rd party.

D W 1 said that all the payments that were made to the defendant by the 3rd party, that were for the plaintiff, were forwarded to the plaintiff without retaining any amount. He described the defendant as a conduit of those payments.

On being cross examined by the plaintiff D W 1 said that the plaintiff agreed with the 3rd party the amount of the contract and the figure agreed was communicated to the defendant. He said that the plaintiff forwarded to the defendant its request for money and that request was forwarded to the 3rd party for settlement as it was, without amendment.

On cross examination by counsel for the 3rd party D W 1 said that the 3rd party to date still owed the defendant a balance of the contractual figure being kshs 21, 224, 242. 75. That when payments were received by the defendant from the 3rd party there was always details of how much would go to the plaintiff.

3rd party did not offer any evidence.

The court granted orders on 21st September 2000 that the question of liability of the 3rd party to indemnify the defendant was to be tried at the same time as the trial.

From the evidence submitted in court is clear that the parties contractual relationship was not reduced into writing.

It is however, not denied that the defendant was the 3rd party's contractor.

The plaintiff alleges that it was a nominated sub-contractor of the defendant. The plaintiff in making this allegation in its submission refused or stirred away from defining what a nominated sub-contractor is. The only definition of this term on behalf of the plaintiff is to be found in the testimony of P W 1, in cross-examination. P W 1 said that it was the 3rd party who recommended the plaintiff to the defendant. The Building Contract Dictionary 3rd edition defines that term Nominated sub-contractor as: -

“Generally, a sub-contractor named by the employer.....”

The word ‘**Nomination**’ in the same dictionary is defined as: -

“In general, the naming of a person or firm to undertake a particular task or office. In building contracts, nomination refers to the naming of a person or firm to undertake part of the work or to supply goods. Such nomination is done by the employer.”

The employer in our case is the 3rd party.

P W 1 perhaps after realising that he had stated that the liability to pay the plaintiff lay on the 3rd party quickly on being cross examined by the 3rd party counsel made a retreat and changed his testimony to say that the liability lay with the defendant. The court did not believe P W 1, in his second version on liability but believes that the plaintiff was indeed the nominated sub-contractor of the 3rd party. This finding gets support from various correspondence exchanged between the parties and which were exhibited before court. Notably is the defendants letter of 12th July 1994, addressed to the plaintiff and copied to the defendant. In part it stated: -

“We hereby appoint you as nominated sub-contractors.....”

In another letter dated 1st December 1994, written by defendant to the plaintiff copied to the 3rd party, the defendant wrote:

“You are our nominated sub-contractor for structural steel works.....”

There are many other letters written by the defendant to the plaintiff copied to the defendant where the defendant repeatedly stated that the plaintiff was a nominated sub-contractor of the 3rd party and all those letters did not receive a negative response from either the plaintiff or the 3rd party. The only response touching on their contractual relationship was the 3rd party’s fax message dated 8th December, 1994, which stated in part: -

“.....that you are a sub-contractor directly co-ordinating with the main contractor.....we are not responsible for payment to you directly.”

The 3rd party did not deny in this message that the plaintiff is the nominated sub-contractor of the 3rd party. The court does find that as clearly indicated in the various correspondences that the parties are relying on as their contract, that the plaintiff was a nominated sub-contractor of the 3rd party, that the plaintiff was named by the 3rd party to undertake design, supply, fabricate and erect steel work, to carry out roofing work and paint the same at the 3rd party’s garment factory at Athi River.

The definitions in the Building Contract Dictionary do not assist to determine who pays the fees of the nominated sub-contractor. P W 1 on being cross examined stated that the 3rd party was not co-operating that is why the plaintiff sued the defendant.

The plaintiff wrote to the 3rd party on 23rd August 1994 and therein submitted break down of further costs of their work. Again by their letter of 30th September 1994, they wrote to the 3rd party requesting them to raise an order in favour of **“Doshi Hardware Stores”** as per proforma invoices indicated therein. The 3rd party very tellingly, wrote a letter dated 24.10.94 to the plaintiff and part of it stated.

“Reference is made to our various meetings in your office regarding above issue. Please note that we have accepted the 10 mm silvachip boards instead of asbestos sheets as earlier indicated. Therefore please send us a credit note for the difference in value”.

The defendant wrote a letter dated 1st December 1994 to the plaintiff copied to the 3rd party, the defendant stated that the payments both of the defendant and the plaintiff were payable by the 3rd party. The plaintiff responded to that letter of the defendant by its letter dated 1st December 1994 addressed to the defendant and copied to the 3rd party as follows in part: -

“We agree fully with the contents of your letter and there is no dispute of what we have agreed.”

The plaintiff again by its letter of 10th January 1995 addressed to the 3rd party and copied to the defendant states: -

“This is not acceptable by us as we want payment from you on basis of work done by us or payment terms agreed by us at the start of work”.

This last letter confirms, undoubtedly that the plaintiff’s payment was payable by the 3rd party even though through the defendant. P W 1 did state as stated herein before that the plaintiff sued the defendant because the 3rd party was not cooperating.

The issues formulated by the plaintiff for courts’ consideration are as follows: -

1. Did the plaintiff enter into sub-contract with the defendant as pleaded at paragraph 4 of the plaint?

The court responds in the negative. The plaintiff was a nominated sub contractor of the 3rd party.

2 (a) What were the terms of the said sub-contract if any?

The terms discerned from the correspondence was that the said subcontractor was to perform its duties in co-operation with the main contractor, see 3rd party’s fax message of 8th December 1994.

2(b) What in particular were the terms regarding payment to the plaintiff?

payment of the plaintiff was payable by the 3rd party.

2(c) Was the plaintiff to be paid by the defendant only upon receipt of payment from Eltex EPZ Ltd?

The court’s response is in the positive

3. Did the plaintiff fully and faithfully discharge its obligation under the sub-contract with the defendant? Is the defendant accordingly in breach of its contract with the plaintiff in failing, refusing and/or neglecting to pay the plaintiff?

The plaintive did not have a contract with the defendant accordingly there is no obligation on the defendant to pay the plaintiff any amount.

4. Is the plaintiff entitled to the relief it has claimed?

The answer is in the negative.

5. Who shall pay the costs of the suit?

The costs shall follow the outcome of this judgment, that is they shall be paid by the plaintiff who has failed to prove its case against the defendant, and accordingly there is no liability found against the defendant which requires to be indemnified by the 3rd party.

The judgment of this court is that this case is dismissed and the costs of the defendant and the 3rd party shall be borne by the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 16th March 2006.

MARY KASANGO

JUDGE