



REPUBLIC OF KENYA



KENYA LAW

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**Virat Builders Limited v Peponi Paradise Limited & 4 others (Civil Case 67 of 2019)
[2025] KEHC 436 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 67 OF 2019
PM MULWA, J
JANUARY 23, 2025**

BETWEEN

VIRAT BUILDERS LIMITED PLAINTIFF

AND

PEPONI PARADISE LIMITED 1ST DEFENDANT

HARIA PRAKASH SHANTILAL 2ND DEFENDANT

HARIA DIPTI PRAKASH 3RD DEFENDANT

DINESHCHANDRA DEVCHAND JAKHARIA 4TH DEFENDANT

PARIHAR AVINASH KUMAR 5TH DEFENDANT

JUDGMENT

1. The Plaintiff initiated a suit against the Defendants for breach of contract, as outlined in the plaint dated 14th February 2019, which was amended with court approval on 17th September 2019. The Plaintiff seeks judgment against the 1st, 2nd and 3rd Defendant as follows:
 - a. Payment of the sum of Kshs. 64,574,105.00 in payment of 2 applications of more than 2 quarters based on the valuation on the works done less Kshs. 15,000,000.00 already paid.
 - b. Compensation for loss of user due to the Plaintiff's idle plant and Machinery at the property amounting to the sum of Kshs. 18,188,742.00
 - c. In the alternative to (a) & (b) an order for valuation of the works done and idle plant & Machinery to be conducted by an independent quantity surveyor and payments to be made in respect thereof:



- d. Interest in a, b, and c above
 - e. Costs of the suit
 - f. Any other relief this Honourable court may deem fit and just to grant.
2. The Plaintiff's claim arises from a construction agreement initially entered into with the 2nd and 3rd Defendants and subsequently with the 1st Defendant for the development of eight residential townhouses on Land Reference No. 1870/VIII/129, Grant No. 68854, located off Peponi Road in Nairobi County. The agreed contract price was Kshs. 240 million, with a three-year project timeline commencing on 1st December 2016. The agreement was governed by the conditions of contract for works as published by the Joint Building Council of Kenya, with the Plaintiff expected to follow architectural designs prepared by the 4th and 5th Defendants. The Payment was to be made based on the interim certificates based on valuations of work done every four months.
 3. The Plaintiff alleges that the 1st, 2nd and 3rd Defendants breached the agreement by consistently underpaying and delaying payments for interim certificates, thereby causing significant project delays. The Defendants also failed to appoint a quantity surveyor, a key contractual obligation, further impacting the valuation of work and payments under the contract. These breaches, according to the Plaintiff, disrupted the project's progress and caused financial losses.
 4. As a result, the Plaintiff holds the 1st, 2nd and 3rd Defendants responsible for the breaches and urges the court to enter judgment against them for the reliefs outlined in the amended plaint.
 5. In their amended statement of defense dated 24th October 2019, the 1st, 2nd and 3rd Defendants deny all allegations in the Plaintiff's amended plaint, asserting that no contract existed between the Plaintiff and themselves. Instead, they contend that the 2nd and 3rd Defendants entered into an agreement with the 4th and 5th Defendants for the construction of eight residential townhouses on Land Reference No. 1870/VIII/129, Grant No. 68854, off Peponi Road in Nairobi County. Under this arrangement, the 4th and 5th Defendants were responsible for overseeing, financing, and supervising the entire project. Upon completion, the agreement stipulated that the 4th and 5th Defendants would retain five units as reimbursement for their expenses and deliver three units to the 1st, 2nd and 3rd Defendants.
 6. The 1st, 2nd and 3rd Defendants deny any involvement in the construction process or with the Plaintiff, maintaining that they did not engage or contract the Plaintiff for any work. They argue that any claims made by the Plaintiff should be directed toward the 4th and 5th Defendants, who were allegedly responsible for the project's management. Additionally, the Defendants assert that since 2017, the Plaintiff abandoned machinery at the site and was always free to retrieve it, negating any claims for loss or damages regarding the equipment.
 7. In their statement of defense dated 4th October 2019, the 4th and 5th Defendants assert that they entered into a contractual agreement in 2015 with the 2nd and 3rd Defendants to act as project managers and consultants for the construction of townhouses on Land Reference No. 1870/VIII/129, Grant No. 68854, located off Peponi Road in Nairobi County. Their responsibilities, as outlined in the agreement, were primarily limited to processing and obtaining all necessary development approvals and building plans and providing supervisory oversight for the project.
 8. The 4th and 5th Defendants deny any additional liability or direct involvement in the Plaintiff's claims, suggesting their role was confined to managerial and advisory capacities rather than any contractual or financial engagement with the Plaintiff. The 4th and 5th Defendants distant themselves from the



financial obligations alleged in the suit, potentially shifting the focus of liability back to the 2nd and 3rd Defendants as well as the Plaintiff's contractual claims. They also alleged non-payment for work done.

9. The case proceeded to full trial, with both the Plaintiff and the Defendants presenting their respective cases through two witnesses each. The Plaintiff's witnesses testified to support claims of unpaid work, breach of contract, and financial losses incurred during the construction of eight residential townhouses on the disputed property. On the other hand, the Defendants' witnesses presented evidence denying any direct contractual relationship with the Plaintiff.

Plaintiff's evidence

10. Karsani Gordhan Chaya, a director of the Plaintiff company, testified as Pw1. He adopted his written testimonial dated 14th February 2019 alongside the list of documents. He testified that the Plaintiff is suing for unpaid work performed under a contract with the 2nd and 3rd Defendants, who are shareholders in the 1st Defendant company. He told the court the Plaintiff commenced work on 1st December 2016, based on architectural plans provided by the Defendants, with an agreed cost of Kshs. 140 million. Pw1 testified that the Plaintiff received only Kshs. 15 million in partial payment and claims the value of completed work amounts to Kshs. 64 million, with additional unpaid certificates worth Kshs. 18 million. Despite the lack of a formal written contract, the Plaintiff relied on a Bill of Quantities (BQ) prepared by the Defendants, which outlined the terms of engagement.
11. During cross-examination, Pw1 admitted he could not produce the signed BQ and highlighted missing details like the property's Land Reference Number. Claims for additional costs, tools, idle time, and interest lacked supporting documentation. He estimated 60-80% of the work was completed, including partial work on two out of eight planned houses.
12. Pw2 - Titus Mwangi Macharia, a Quantity Surveyor, testified based on his prepared valuation, which criticized the Defendants' valuation methodology. He noted discrepancies and deviations from standard practice in both valuations. Titus acknowledged that his report did not include his name or authorship details, clarifying that he prepared it at the contractor's request and was not a party to the contract. He emphasized the importance of transparency, stating that he typically involves clients or their representatives during site visits to ensure clarity and accuracy. His testimony highlighted critical discrepancies in valuation methodologies and their impact on the claims in the dispute.
13. During cross-examination, the graduate Quantity Surveyor (QS) confirmed he prepared a report while holding a valid practicing certificate and working for the Ministry, though he left government service in 2002. They acknowledge their professional responsibilities under the *Architects and Quantity Surveyors Act*, including the requirement to sign reports, which their report does not comply with. He told the court the report also lacks necessary details such as the Land Reference (L.R.) number, proper property descriptions, and the date of the site visit.

Defence case

14. Dw1 - Haria Prakash testified on behalf of the 1st and 3rd Defendants, adopting his witness statement dated 10th March 2021. He stated that the 4th and 5th Defendants financed and managed the construction of the eight townhouses, instructing the Plaintiff to execute the work. He clarified that financial records demonstrated the 4th and 5th Defendants solely funded the project, which remains incomplete, with only two townhouses partially constructed. He further testified that the Kshs. 5 million paid from the 1st Defendant's account was actually sourced and deposited by the 4th and 5th Defendants.



15. He told the court he authorized a valuation of the suit property in August 2020 to determine the value of the Plaintiff's completed work and the amounts claimed. The resulting valuation report showed that the 1st Defendant had paid Kshs. 15 million, while the total value of the work completed amounted to Kshs. 39,680,633.09. The report identified an outstanding amount of Kshs. 24,680,638.09 owed to the Plaintiff, which remains unpaid.
16. Dw2 - Onesmus Mwangi Gichuru, a Consulting Quantity Surveyor with MGA Consultants, corroborated Dw1's testimony by presenting his valuation report dated 26th August 2020. He told the court he visited the suit property and assessed the work completed. He calculated the total gross value of completed works at Kshs. 39,680,633.00, as detailed on page 4 of his report. Page 45 outlined the outstanding balance due to the Plaintiff, totaling Kshs. 24,680,630.00 after deducting prior payments. Dw2's expert testimony provided a detailed professional assessment of the valuation, aligning with the findings presented by Dw1. These testimonies reinforce the defense's stance on the outstanding payment and the project's incomplete status.
17. Dw3 - Parihar Avinasa Kumar, testifying on behalf of the 4th Defendant, adopted his witness statement dated 4th October 2019. He testified that the 2nd and 3rd Defendants provided Kshs. 7 million to the 4th and 5th Defendants, part of which was given in cash while the remainder was deposited into the 1st Defendant's account. He stated that the 4th and 5th Defendants were responsible for overseeing and financing the project but are now seeking reimbursement from the 1st, 2nd and 3rd Defendants for expenses incurred.
18. Dw3 confirmed that the construction project remains incomplete, with only partial work done on the eight townhouses. His testimony reinforced the argument that financial obligations for the project lie with the 1st, 2nd and 3rd Defendants, while the 4th and 5th Defendants acted primarily in a managerial and facilitative capacity.
19. At the conclusion of the trial, parties submitted written arguments which I have considered. I frame the key issues for determination as follows:
 1. whether a valid contract existed and
 2. if so, whether there was a breach and by whom.
 3. what reliefs the plaintiff ought to be granted

Whether a valid contract existed

20. I have carefully considered the evidence presented and the legal principles governing contracts. In this case, it is undisputed by all parties that no formal written contract was executed for the construction of the eight townhouses on Land Reference No. 1870/VIII/129. The absence of a formal contract raises critical questions about the enforceability of obligations and the evidentiary basis for claims and defences.
21. While no formal contract was executed, the Plaintiff contends that an agreement was implied based on architectural designs provided by the 2nd and 3rd Defendants, the Bill of Quantities, and instructions issued by the Defendants. The Plaintiff further relies on partial payments made and their continued execution of work as evidence of an operational contract. Conversely, the 1st, 2nd and 3rd Defendants deny any direct contractual relationship with the Plaintiff, attributing responsibilities to the 4th and 5th Defendants as project managers and financiers. The 4th and 5th Defendants acknowledge receiving Kshs. 7 million from the 2nd and 3rd Defendants but argue that they were facilitators, not the principal



- parties to any agreement with the Plaintiff. No contract has been adduced to demonstrate that the 1st 2nd and 3rd Defendants engaged the 4th and 5th Defendants to oversee and finance the project.
22. Under the principles of contract law, verbal agreements can be binding if the essential elements of a contract are present, that is; offer, acceptance, consideration and an intention to create legal relations. In this case, I must say there is need to evaluate the evidence, including actions taken by the parties in order to establish whether these elements existed. In my view, the partial payments and the Plaintiff's substantial performance of the work may demonstrate mutual assent and consideration, creating an implied contract.
23. I must emphasize that the absence of a formal document, does not negate the possibility of a binding agreement if the parties' conduct aligns with contractual principles. The court of appeal in the case of *William Muthee Muthamia v Bank of Baroda* (2014) eKLR observed that:
- “In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is not only when those three elements are available that an innocent party can bring a claim against the party in breach.”
24. The provision of architectural designs, the use of the Bill of Quantities (BQ) to guide valuation, issuance of instructions for work, partial payments made to the Plaintiff, and the execution of construction activities are all elements that conform to principles of a verbal contract. It is my finding that based on the evidence adduced and legal principles, the verbal agreements between the parties, reinforced by their partial performance, establish a valid and enforceable contract
25. Based on the foregoing, I am of the view that the implied contract bound the parties, requiring the Plaintiff to carry out the construction work as specified and obligating the 1st, 2nd and 3rd Defendants to compensate the Plaintiff for the work performed.
26. The next issue will be on whether the obligations under this implied agreement were fulfilled or breached and by which party.

If so whether there was a breach and by whom

27. With the validity of the contract established, I will now address the issue of whether there was a breach of this contract and, if so, by whom. In determining so I will evaluate and analyze the parties' obligations under the agreement, whether those obligations were fulfilled, and identifying any failures or delays that resulted in non-performance or partial performance.
28. It is evident that each party had a duty to perform under the implied contract. A court will not rewrite a contract between the parties (see *National Bank Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Anor* 2001 eKLR).
29. The Plaintiff claims that the Defendants' persistent delays in paying interim certificates and underpayments hindered the project's progress. This assertion was backed-up by the valuation reports and testimonies, such as Dw2's acknowledgement of an unpaid balance of KShs. 24,680,630.00.
30. Conversely, the Defendants argue that only two townhouses were partially constructed out of the eight planned, citing the Plaintiff's failure to meet deadlines and adhere to quality standards as primary causes for the incomplete work. Plaintiff rebuts this by attributing delays to the Defendants' actions, including the failure to appoint a quantity surveyor, which disrupted the project's continuity.



31. From the evidence presented, it is clear that some work was carried out by the Plaintiff and that some payment remains outstanding. The primary contention between the parties is not whether payment is due but rather the exact amount owed for the work performed.
32. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist (Section 107 (1) of the *Evidence Act*).
33. The Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
34. The Plaintiff emphasizes the value of the completed work, whereas the Defendants contest the Plaintiff's valuation. Both parties have submitted their respective valuation reports for consideration. However, upon review, I find that neither report sufficiently addresses the issue of the completed work. The Plaintiff's valuation report, in particular, fails to meet the requisite standards for accuracy and thoroughness, as it lacks detailed justification for the proposed figures and omits crucial supporting information necessary to substantiate the valuation. Pw2 testified that he was the author of the valuation report but informed the court, the report did not bear his signature and neither does it illustrate the description of the property in question. It is my considered view that based on the inadequacies in the valuation report the plaintiff failed to prove its case on a balance of probability.
35. Similarly, the Defendants' valuation report appears overly speculative and does not provide a reliable basis for determining the actual value of the completed work. This lack of crucial information creates significant doubt in the Court regarding the appropriate amount to be paid for the pending work, highlighting the need for an independent valuation to resolve the matter fairly and conclusively.
36. However, in light of Dw2's testimony and his valuation report, which identifies an outstanding balance of Kshs. 24,680,630.00 owed to the Plaintiff for work already completed, as well as Dw1's admission of the amount due and owing, I find that this acknowledgement of unpaid amounts serves as a partial concession to Plaintiff's claim of non-payment for services rendered. It further reflects the Defendants' recognition of a failure, to some extent, to fulfil their financial and operational obligations.
37. This Court acknowledges the significance of the admission as partial validation of the Plaintiff's claim. A judgment on admission can be passed at any stage of the proceedings, either upon the application of either party or by the Court suo moto. However, for an admission to be valid and relied upon, it must be very clear and unequivocal (*Guardian Bank Limited vs Jambo Biscuits Kenya Limited* (2014) eKLR).
38. I am of the considered view that the admission by Dw1 and Dw2 regarding the unpaid amount for the completed work is clear and provides sufficient basis to partially affirm the Plaintiff's claim.
39. The court finds that no sufficient nexus has been established between the Plaintiff and the 4th and 5th Defendants to attribute any direct liability to them for the claims made. While the 4th and 5th Defendants were involved in financing and overseeing the project, their role was limited to acting as facilitators and project managers under an agreement with the 2nd and 3rd Defendants. No evidence has



been adduced to demonstrate that the 4th and 5th Defendants were principal parties to any contractual arrangement with the Plaintiff.

40. The Plaintiff's claims lie on instructions allegedly issued by the 2nd and 3rd Defendants and payments made from the 1st Defendant's account, which was funded by the 4th and 5th Defendants. However, the mere facilitation of funds and project supervision does not establish a direct contractual relationship or legal obligation on the part of the 4th and 5th Defendants toward the Plaintiff. Consequently, any claims by the Plaintiff for payment or damages cannot be sustained against the 4th and 5th Defendants.
41. The court, therefore, dismisses the Plaintiff's claims against the 4th and 5th Defendants for lack of evidence demonstrating a contractual nexus or direct liability.
42. Consequently, the court enters judgment in favour of the Plaintiff against the 1st, 2nd and 3rd defendants for the admitted sum of Kshs. 24,680,630.00 being the balance due.
43. The Plaintiff seeks compensation amounting to Kshs 18,887,742.00 for losses allegedly incurred due to idle machinery over a period of 258 days. However, after reviewing the evidence and submissions from both parties, the court finds no basis to grant this claim. The Defendants argued that the Plaintiff was at liberty to remove its machinery from the site but failed to do so. There is no evidence to suggest that the Defendant actively prevented the Plaintiff from retrieving the machinery or otherwise contributed to the delay in its removal. The photographs attached as evidence by the Plaintiff fail to sufficiently illustrate or establish that the Defendant's actions or omissions directly contributed to the machinery being idle on the site. While the images may show the presence of machinery, they do not demonstrate causation on the defendant's part.
44. To justify damages, the Plaintiff must demonstrate that the Defendant's actions or omissions directly caused the machinery to remain idle and resulted in financial losses. I find no evidence establishing a causal link between the Defendant's conduct and the Plaintiff's alleged losses. The claim is thus speculative and unsubstantiated.
45. It is my considered view that the Plaintiff has not proved its case for damages arising from idle machinery. Consequently, the claim for Kshs. 18,887,742.00 is dismissed.
46. In the alternative the plaintiff seeks an independent valuation of the works completed and the idle plant and machinery, with the aim of determining compensation. However, during the hearing, it was revealed that the suit property has been sold to third parties and construction ongoing on the property.
47. In light of these developments, the court finds that granting this prayer would not serve any meaningful purpose or advance the interests of justice.

Final Orders:

48. I make the following orders:
 - i. Judgment is entered in favour of the Plaintiff against the 1st, 2nd and 3rd Defendants jointly and severally for the admitted sum of Kshs. 24,680,630.00.
 - ii. The above sum will attract interest at court rates from the date of filing the suit until payment in full.
 - iii. The Plaintiff is awarded costs of the suit plus interest on the costs at court rates.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.



P.M MULWA

JUDGE

In the presence of:

Mr. Maranga for Plaintiff

Ms. Nkatha h/b for Mr. Kamau for 1st – 3rd Defendants

N/A for 4th & 5th Defendants

Court Assistant: Carlos

