



**Patronics Services Limited v EPCO Builders Limited & another (Commercial Case 227 of 2017)
[2025] KEHC 13047 (KLR) (Commercial and Tax) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 227 OF 2017
RC RUTTO, J
SEPTEMBER 22, 2025**

BETWEEN

PATRONICS SERVICES LIMITED PLAINTIFF

AND

EPCO BUILDERS LIMITED 1ST DEFENDANT

PROCTOR & ALLAN (EA) LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 29th May 2017 against the Defendants seeking, inter alia:
 - a. A declaration as to which of the Defendants is liable to pay the Plaintiff and to what extent;
 - b. The sum of Kshs.28, 049, 334.13 being the total amount owing to the Plaintiff under Interim Payment Certificates Nos. 16 & 17.
 - c. Interest on (b) above.
 - d. Damages for breach of contract.
 - e. Costs of the suit.
2. The Plaintiff's case, as pleaded, is that vide a contract dated 26th June 2014 between the Plaintiff and the 1st defendant it was subcontracted to undertake electrical installation works at the construction of the 2nd defendant's factory. The Plaintiff states that the sub contract was supplemental to the main contract for building works concluded between the 1st Defendant and the 2nd Defendant to which the Plaintiff was not a party to. The Plaintiff alleges that the subcontract provided that the procedure for originating and processing of applications for payments and payment certificates were to be the same as those prescribed under the main contract. The process was that the Project Architect Messrs. Triad



Architects would issue an Interim Payment Certificate for completed works upon an application being made for payment by the Contractor and sub-contractors and upon valuation by the project quantity surveyor Messrs. Karkan Partnership.

3. The Plaintiff avers that on 1st April 2016, the Project Quantity surveyor issued an Interim Valuation Statement No. 16 recommending that an interim payment of Kshs.33,663,414.05 be made to the 1st Defendant. Out of this amount a net amount of Kshs.14,808,916.59(inclusive of VAT) was apportioned to the Plaintiff. Subsequently on 7th April 2016, the architect issued an interim payment certificate No. 16 for Kshs.33,663,414.05 in favour of the 1st Defendant.
4. The Plaintiff further states that on 4th October 2016 the Project Quantity Surveyor issued an interim valuation statement No. 17 recommending a payment of Kshs.15,909,897. 29 to the 1st Defendant out of which Kshs.13,240,417.54(Inclusive VAT) was apportioned to the Plaintiff. On 17th October 2016, the Architect issued an Interim Payment Certificate No. 17 for Kshs.15,909,897.29 in favour of the 1st Defendant.
5. The Plaintiff relies on Clause 23.6 of the sub contract, which provides that payments to the sub-contractor were to be made by the contractor within 7 days of receiving payment from the 2nd Defendant. Accordingly, by a letter dated 18th January 2017, the plaintiff demanded payment from the 1st Defendant for the amounts due under Interim Payment Certificates Nos. 16 & 17.
6. In response, the 1st Defendant by a letter dated 23rd February 2017 claimed that the responsibility for paying the Plaintiff had been assigned to the 2nd Defendant through a letter dated 10th December 2014 asserting that this constitutes a valid tripartite agreement on payment. However, the plaintiff avers that Clause 23.9 of the sub contract under only permits such assignment under two conditions; first, upon application by the Plaintiff and second, where the 1st Defendant fails to make payment as required under Clause 23.6 and continued in default for 14 days. In either case the Architect is required to issue a payment certificate directly to the Plaintiff.
7. The Plaintiff states that although Interim valuation statements Nos. 16 & 17 both provided that payments were to be made directly by the 2nd Defendant to the Plaintiff and other sub-contractors, no payment certificates were ever issued directly to the Plaintiff contrary to Clause 23.9 of the sub contract.
8. The plaintiff further states that the issuance of the payment Interim Valuation statement Nos.16 & 17 by the architect confirmed that all work had been completed in accordance with the Contract. Therefore, neither the 1st nor the 2nd Defendant can claim that the amounts are being withheld due to any default on the part of the Plaintiff.
9. The Plaintiff avers that it has made several demands for payment to the 1st Defendant who has consistently redirected the Plaintiff to the 2nd Defendant, claiming that it is no longer responsible for payment. The Plaintiff also states that it has made several demands to the 2nd Defendant all of which have been ignored. Having fulfilled its contractual obligations, the plaintiff maintains that it is entitled to payment of Kshs28,049, 334.13 for certified works under Interim Certificates Numbers 16 and 17.
10. The 1st Defendant filed an Amended Statement of Defence and Counterclaim dated 26th October 2022 denying the key averments in the Plaint. It asserted that the Plaintiff was a subcontractor nominated by the architect and was subject to the procedure outlined in the main contract including supervision, variations, valuations and payment. While acknowledging that the Plaintiff was not a party to the main contract, the 1st Defendant maintained that the subcontract between itself and the plaintiff was governed by the provisions of the main contract in relation to the execution and payment for the sub contract works.



11. The 1st Defendant further stated that interim payment certificates covered not only completed work but also materials on site as well. It added that following its letter dated 10th December 2014 authorizing the 2nd Defendant to make direct payments to the Plaintiff, the 2nd Defendant paid a total of Kshs.78,128,301.80 to the Plaintiff in certificate numbers 12, 13, 14 and 15 without any reference to the 1st Defendant.
12. The 1st Defendant acknowledged that the duty to certify work rested with the Architect and admitted that Interim Payment Certificate Nos. 16 and 17 were duly issued, containing the stated amounts. It also confirmed that the total sum of Kshs.28,049,334.13 was arithmetically correct.
13. The 1st Defendant denied refusing to pay as alleged. Referring to Clauses 23.6 and 23.7 of the sub-contract, it stated that it had only received Kshs.3,500,000/= in relation to certificates Nos 16 and 17. This amount was paid pursuant to a partial settlement agreement dated February 2017 but effective December 2016, intended to settle the 1st Defendant's portion of Certificate No. 16. The Agreement was premised on the understanding that the 2nd Defendant would continue making direct payments to the plaintiff as had been done previously.
14. . The 1st Defendant averred that it has not received the full amounts due under certificates Nos. 16 and 17 and therefore had not been placed in funds to satisfy the plaintiff entitlement under those certificates, in accordance with Clauses 23.6 or 23.7 of the sub contract.
15. The 1st Defendant further stated that, in addition to its cross claim against the 2nd Defendant, it has declared a dispute and initiated the dispute resolution procedure under clause 45 of the main contract. This process seeks to recover all outstanding payments from the 2nd defendant, including amounts due to the 1st Defendant and sub-contractors, the Plaintiff included, as well as accrued interest for the period of non-payment.
16. The 1st Defendant stated that once it receives payment from the 2nd Defendant in respect of Certificate Nos. 16 and 17, it will remit the Plaintiff's dues, including interest, as provided for in Clause 23.7 of the sub contract. Additionally, the 1st Defendant raised a jurisdictional objection, arguing that the sub contract contains an arbitration clause which designates arbitration as the agreed method of dispute resolution between the parties.
17. In its Counterclaim against the 2nd Defendant, the 1st Defendant sought the following reliefs:
 - a. An order directing the 2nd Defendant to pay the 1st Defendant the sum of Kshs.46,073,311.34 due in Certificates Nos. 16 and 17;
 - b. An award of interest against the 2nd Defendant on the amount of Kshs.46,073,311.34 as per the contract.
 - c. An award of costs of this suit.
18. In support of its Counterclaim, the 1st Defendant/Counterclaimant averred that it entered into a contract titled "The Proposed Relocation of Proctor and Allan (EA) Operations to Limuru on 28th April 2014 in the amount of Kshs.466,790,867.21. The Plaintiff was nominated by the architect to undertake electrical installations works for a contract sum of Kshs.67,471,243/= inclusive of VAT. On the architect advice, the 1st Defendant/Counterclaimant entered into a subcontract with the Plaintiff on 26th June 2014.
19. The 1st Defendant stated that, at the Plaintiff's request, it issued a letter dated 10th December 2014, authorizing the 2nd Defendant to make direct payments to the Plaintiff for its portion of the



architect's certificate. Pursuant to this arrangement, the 2nd Defendant paid the Plaintiff a total of Kshs.78,128,301. 80 under certificate Nos. 12, 13, 14 and 15.

20. The 1st Defendant/ Counterclaimant further stated that Certificate No. 16 issued by the architect on 7th April 2016 was for Kshs.33,663,414.05 comprising of Kshs.18,854, 497.46 for the 1st Defendant and Kshs.14,808,016. 59 for Plaintiff. However, the 2nd Defendant failed to pay the Plaintiff in accordance with the direct payment arrangement, nor did it remit the amount to the 1st Defendant/ Counterclaimant as required under the contract.
21. The 1st Defendant/Counterclaimant avers that the architect issued Interim Payment Certificate No. 17 dated 17th October 2016 for the sum of Kshs.15,909,897. 29 which included Kshs.13,240,417. 54 due to the Plaintiff as the nominated subcontractor. However, the 2nd Defendant failed to remit this amount either to the Plaintiff or to the 1st Defendant/counterclaimant, contrary to the terms of the contract.
22. The 1st Defendant/Counterclaimant further states that following a demand and notice to invoke recovery proceedings dated 25th July 2016, the 2nd Defendant acknowledged the debt and requested time to commence full commercial production at its factory to be able to finalize financing arrangements to enable payment.
23. The 1st Defendant/ Counterclaimant avers that this undertaking to pay was formalized through a partial settlement agreement signed on 17th February 2017 and 6th March 2017 respectively by the 1st Defendant and the 2nd Defendant. Despite this, the 2nd Defendant defaulted on the agreement having only paid Kshs.3,500,000/= by April 2017.
24. The Counterclaimant avers that the 2nd Defendant owes the Plaintiff a total of Kshs.46,073,311.34 comprising of Kshs.30,163,414.05 from Certificate No. 16 and Kshs.15,509,897.29 from Certificate No. 17. It relies on Clause 34.6 of the main contract and Clause 23.7 of the sub contract both of which provide for interest on delayed payment. Additionally, Clause 34.21.3 of the main contract defines any net amount due in the final account as a debt if it remains unpaid 14 days after presentment of the certificate to the 2nd Defendant.
25. In its Statement of Defence dated 11th July 2017, the 2nd Defendant confirmed the existence of the main contract with the 1st Defendant dated 28th April 2014. The contract was later amended by an addendum dated 12th May 2014.
26. The 2nd Defendant acknowledged that the 1st Defendant sub-contracted the electrical installations works to the Plaintiff but emphasized that it had no role in pre-qualifying, pricing, selecting, negotiating terms of the Plaintiff's sub-contract. . It further clarified that it is was not party to the sub-contract and was unaware of its terms.
27. The 2nd Defendant admitted that the project Quantity Surveyor issued an interim valuation statement No. 16 on 1st April 2016 and that the architect subsequently issued an Interim Certificate No. 16 Serial No. 996680 on 7th April 2016 in favour of EpcO Builders Limited for the sum of Kshs.33,663,414.05. however, it denied that any apportionment was made in favour of the Plaintiff and argued that the Quantity Surveyor lacked authority under the main contract or in law to apportion
28. The 2nd Defendant maintained that the Interim Certificate was issued solely in favour of the 1st Defendant and that the Plaintiff, could only claim directly against the 2nd Defendant if a Special Payment Certificate had been issued under the conditions outlined in the main contract. it argued that the Plaintiff lacked locus standi to claim as against it based on Interim Certificate No 16 and that any claim must arise from breach of the Settlement Agreement. It further stated that negotiations regarding



Certificate No 16 led to the execution of a partial settlement and release agreement, which now governs any claim.

29. The 2nd Defendant also admitted that the Interim Valuation Statement No. 17 was issued on 4th October 2016 for Kshs.15,909,897.29 and that Interim Certificate No. 17 Serial No. 1000425 was issued in favour of Epco Builders Limited for the same amount. however, it denied any apportionment to the Plaintiff and disclaimed knowledge of the letters dated 23rd February 2017 and 10th December 2014. It added that the final account for the project had not yet been prepared and submitted by the Quantity Surveyor and that upon its presentation and the expiry of the defects liability period, it intended to pursue claims against the 1st Defendant for breach of contract. The 2nd Defendant also denies ignoring the Plaintiff's demands for payment, asserting that it was under no obligation to pay the Plaintiff directly.
30. In its reply dated 15th March 2018 the 1st Defendant responded to the 2nd Defendant Statement of Defence by asserting that the Plaintiff was not an elective subcontractor but a nominated subcontractor appointed under Clause 31 of the main contract. It argued that the 2nd Defendant's involvement in the sub contract was evident, as it or its agents selected the Plaintiff, supervised its work, issued instructions, valued and certified its work, and made direct payments. It also claimed that the 2nd Defendant issued variation orders and altered the scope of work without consulting the 1st Defendant and paid for the additional scope directly.
31. The 1st Defendant emphasized that; Clause 31 of the main contract governs the employment and terms of subcontractors and that the subcontract was supplemental to a main contract under clause 31.5.1. It cited Clause 23.1 of the sub contract read with clauses 31.5.7 and 34 of the main contract, as governing the payment process. It also referenced Clauses 31.7 and 34.3 of the main contract and clause 23.6 of the sub0contract; regarding issuance of the interim certificates.
32. The 1st Defendant reiterated that interim valuation statement No. 16, apportioned Kshs.14,808,916.59 to the Plaintiff out of a total valuation amount of Kshs.33,663,414.05 and that Statement No 17 apportioned Ksh.13,240,417.54 to the Plaintiff out of Kshs.15,909,897.29. It argued that the Quantity surveyor is empowered under Clauses 6.1, 34.1 and 34.2 of the main contract and Clause 23.3 of the sub-contract to make such valuations, and that there is no prescribed format preventing apportionment of subcontractors.
33. The 1st Defendant maintained that it is the standard industry practice for Quantity Surveyor to indicate amounts due to the main contractor and nominated subcontractors in each valuation. - It added that the architect relies on these valuations to advise on payments due to subcontractors under Clause 31.6 of the main contract. Clause 23.2 if the sub-contract also allows the sub-contractor to submit details of the amounts claimed for the relevant period.
34. The 1st Defendant asserts that although a partial settlement agreement was reached between the 1st and 2nd Defendant in December 2016, the 2nd Defendant has failed to fulfill its obligations; it argued that the agreement does not bar recovery of the agreed amounts. It stated that interim certificate Nos. 16 and 17 which include amounts due to the plaintiff, have not been challenged by the 2nd Defendant and were payable within 14 days of presentation.
35. In its reply to the 2nd Defendant's defence, the 1st Defendant reaffirmed that the quantity surveyor issued interim valuation No. 17 and denied the claim that the quantity surveyor lacked authority under the contract or in law to apportion the payments as he did. It further stated that Interim Certificate No. 17 was not challenged by the 2nd Defendant and that the amounts therein continue to accrue interest in accordance with Clause 34.6 of the main contract. Additionally, the 1st Defendant avers that



the obligation to pay for electrical work remains a primary responsibility of the 2nd Defendant under Article 2.5 and Clauses 3.4, 31.2, 34.5, 34.6 and 34.21.3 of the main contract.

36. The 1st Defendant noted that at the time of filing its defence, the final account had not yet been prepared or submitted by the quantity surveyor. However, it confirmed that the final account has since been completed and indicates a net amount of Kshs.28,698,318.57 due to it. When added to the amounts outstanding in Certificate Nos. 16 (Kshs.30,163,414.05 and 17 (Kshs.15,909,897.29), the total principal amount due to the 1st Defendant stands at Kshs.74,663,414.05. The 1st Defendant seeks interest on delayed payment and prolongation costs. The 1st Defendant further stated that it is unaware of any claims the 2nd Defendant intends to bring against it, as no claims have been formally presented.
37. During the trial, each party called one witness. The Plaintiff witness PW1, Kayal Patel reiterated the contents of his witness statement. During cross examination, he admitted that he did not sign the subcontract agreement and has no formal training in construction, being a pharmacist by training. He confirmed that the Plaintiff had undertaken multiple projects and clarified that the dispute was not about figures but which party between the 1st and 2nd Defendant was responsible for payment.
38. He stated that the Plaintiff had previously received direct payments from the 2nd Defendant. He stated that he was unaware whether the 1st Defendant was owed money under certificates No's 16 and 17 or whether the 1st Defendant had been paid. He also acknowledged non-compliance with Clause 31.5 of the contract and confirmed that Clause 31.1 provides for arbitration in case of disputes. During re-examination, he expressed frustration, stating that the Plaintiff was being "tossed around" and that none of the correspondence between the Defendants had been copied to the Plaintiff. He emphasized that the Plaintiff was not a party to the arbitration proceedings and could not enforce any resulting award. He also noted that the court had ruled on 8th March 2021 that there was no dispute to be referred to arbitration.
39. The 1st Defendant witness, DW1, Ramji Devji Varsani adopted his witness statement and produced all documents filed by the 1st Defendant. He testified that the 2nd Defendant, as the employer, instructed it to enter into a contract. He confirmed that the 1st Defendant had not received payment for Certificates Nos. 16 and 17 and therefore had no funds to pay the Plaintiff.
40. During cross examination, DW1 admitted that the 1st Defendant did not dispute the amount owed to the Plaintiff but maintained the 2nd Defendant was responsible for payment. He acknowledged that there was no clause in the contract explicitly stating that states that the 2nd Defendant was responsible for payment to the plaintiff although Clause 23.6 of the sub-contract implies such an obligation. He clarified that the 2nd Defendant was not a party to the subcontract.
41. He explained that the authorization letter issued to the 2nd Defendant was intended to save time and manage tax obligations, and that the 2nd Defendant did not respond to it because it was considered an automatic directive. He confirmed that previous payments to the Plaintiff had been made by the 2nd Defendant. DW1 also stated that the Plaintiff was indirectly involved in the arbitration proceedings along with other subcontractors, although the Plaintiff was not a witness in those proceedings. He testified that the arbitral award is in the process of being adopted by the court and that the Plaintiff's claim was included in the counterclaim filed by the 1st Defendant. He emphasized that the Plaintiff lacks the capacity to enforce the arbitral award and reiterated that the 1st Defendant cannot pay the Plaintiff until it receives payment from the 2nd Defendant. He also confirmed that the court had ruled on a preliminary objection, directing that the matter be referred to arbitration. During cross examination by the 2nd Defendant's counsel, DW1 testified that the parties to the main contract were the 1st and 2nd Defendant and that the employer, the 2nd Defendant, was responsible for paying the



- Plaintiff. When referred to the letter dated 10th December 2014 from the 1st Defendant to the 2nd Defendant authorizing direct payments to nominated sub-contractors DW1 stated that the letter was not responded to because it was a directive, not requiring a reply and that it was implemented. He stated that although the sub-contract was not formally amended, the letter served as an addendum..
42. During re-examination, DW1 stated that the Plaintiff was not nominated by the 1st Defendant but was instead procured by the 2nd Defendant. He emphasized that the main and subcontract were interrelated and must be interpreted together. DW1 confirmed that the 1st Defendant had not received payments and had not refused to pay the Plaintiff. Regarding the letter dated 10th December 2014, he testified that the Plaintiff is copied in the correspondence and raised no objection. He also clarified that not all certificates involve every contractor, but in this case, Certificates Nos. 16 and 17 did involve the Plaintiff.
43. DW2, the 2nd Defendant's witness, Paul Mwangi Nduati, adopted his witness statement dated 4th October 2023 and produced the 2nd Defendant's list and bundle of documents dated 2nd August 2022. During cross examination, he confirmed that the 2nd Defendant nominated the Plaintiff as a subcontractor. However, when referred to the letter dated 10th December 2014, he stated that the 2nd Defendant did not see or acknowledged receipt of the letter. He denied that the 2nd Defendant paid the Plaintiff directly although he acknowledged that the letter purported to authorize such payment. He maintained that the contract was never varied
44. . DW2 also confirmed that the 2nd Defendant had not paid the 1st Defendant. He stated that he did not recall receiving any demand letter from the Plaintiff. He acknowledged awareness of the arbitral award, and stated that four parties were involved in the arbitration; itself, the 1st Defendant, the Plaintiff and Volcanic Plumbing. He was uncertain whether the Plaintiff could enforce the award. He admitted that the 2nd Defendant had not paid the Plaintiff, citing the contract's structure between the 1st Defendant and the 2nd Defendant. He claimed that the company lacked funds due to ongoing restructuring and insisted that the Plaintiff should follow the contract. He also stated that he is not aware of the ruling and does not recall the preliminary objection.
45. Upon further cross examination by the 1st Defendant's counsel, DW2 conceded that the 2nd Defendant failure to pay its contractors reflected poorly on its reputation. He reiterated that the company was experiencing financial difficulties and was seeking investors. . He admitted that the 2nd Defendant did not denying that they owe the 1st Defendant and confirmed that it had not been involved in any legal proceedings with the Plaintiff.
46. DW2 acknowledged that the 2nd Defendant was in occupation of the completed complex and conducting business there. He confirmed that the counterclaim in the arbitration proceedings had been dismissed. He testified that both the architect and the Quantity Surveyor were employees of the 2nd Defendant, that the figures in the certificates were not disputed, and that the 2nd Defendant had no objection to the certificates themselves.
47. He stated that the 2nd Defendant was not under insolvency or winding up proceedings. He urged the court to enforce the contract as it had not been varied. He further testified that the 1st Defendant's obligation to pay the Plaintiff arose after receiving payment from the 2nd Defendant.
48. At the close of the trial, all parties filed their respective submissions. The Plaintiff's submissions were dated 10th January 2025; the 1st and 2nd Defendant's submissions are both dated 19th March 2025 Parties highlighted their submissions on 20th March 2025.



Plaintiff's submissions

49. In its written submissions, the Plaintiff, provided a comprehensive overview of its case and the Defendant's positions, as presented during trial. It identified the following five issues for determination: (a) Whether the Plaintiff is entitled to payment of Kshs.28,049,334.13; (b) If the answer to (a) is in the affirmative, who between the 1st and 2nd Defendants is liable to pay the Plaintiff; (c) whether the Plaintiff is entitled to interest on the outstanding amount; (d) whether the Plaintiff's claim against the Defendants should be referred to arbitration as prayed by the 1st Defendant and (e) Who should bear the costs of the suit.
50. On the first issue, the Plaintiff submitted that the amount of Kshs.28,049,334.13 as evaluated by the project Quantity Surveyor (QS) and certified by the Project Architect in certificates Nos. 16 and 17 is not in dispute. Citing the case of Dawynaus Limited versus FG Minter Limited [1971] 2 ALL ER 1389, the Plaintiff submitted that the issuance of certificates by the Architect affirms that the work was completed in accordance with the contract. It submitted that Both DW1 and DW2 acknowledged that the amount of Kshs.28,049,334.13/= due to it under certificates Nos. 16 and 17 is undisputed. . The plaintiff also referred to the court's ruling dated 14th June 2021, which dismissed the Defendant's preliminary objection and acknowledged the 1st Defendant's admissions that the Plaintiff is owed Kshs.28,049,334.13.
51. On the second issue, the Plaintiff submitted that, it was not a party to the main contract between the 1st and 2nd Defendant but was a party to the sub contract with the 1st Defendant. While making reference to the case of Agricultural Finance Corporation versus Lengetia Limited & Jack Mwangi [1985] eKLR, the Plaintiff argued that contractual right or obligation cannot accrue to a party who is not privy to the contract unless the matters fall within the known exceptions such as assignment or novation of contractual rights and obligations. The Plaintiff contended that the 1st Defendant's denial of payment obligation is based on two contradictory argument; first, that it assigned its payment obligation to the 2nd Defendant via a letter dated 10th December 2014 and second, that the obligation to pay only arises upon receipt of payment from the 2nd Defendant under Clauses 23.6 and 23.7 of the sub-contract. The Plaintiff argued that these positions are legally untenable and would result in an unjust outcome leaving it without a remedy despite having fulfilled its contractual obligations.
52. The Plaintiff maintained that the 1st Defendant's claim of assigned must be considered within the context of the sub-contracts express contractual provisions. It argues that Clauses 23.6 and 23.7 of the subcontract commonly referred to as "pay-when-paid" or "back-to-back" clauses do not absolve the 1st Defendant of its payment obligations. According to the Plaintiff, these clauses only regulated the timing of payment and do not transfer liability. While relying on the decision in Zenith Steel Fabricators Limited v Continental Builders Limited & Another [2018] eKLR, the Plaintiff asserts that the contractual responsibility to pay remained with the 1st Defendant.
53. The Plaintiff further submits that Clause 23.9 of the subcontract only allows direct payment by the 2nd Defendant in limited circumstances: upon the Plaintiff's application, and where the 1st Defendant fails to pay within 14 days prompting the Architect to issue a direct payment certificate to the Plaintiff. Since no such certificate were issued, the Plaintiff argued that the 1st Defendant remained liable under the subcontract.
54. The Plaintiff contends that the 1st Defendant's letter dated 10th December 2014 cannot be construed as a valid assignment of its payment obligation. The issue of assignment was first raised in the 1st Defendant's letter dated 23rd February 2017, in response to the Plaintiff's demand for payment. The



- plaintiff argued that this correspondence contradicted Clause 15 of the subcontract, which required written consent from both the Plaintiff and the 2nd Defendant for any assignment. No such consent was provided. The Plaintiff also noted that no evidence of business custom was presented to support the 1st Defendant's claim that such an authorization letter constituted a valid assignment. .
55. While relying on *Helstan Securities v Hertfordshire C.C* [1978] 3 All E.R. 262 and *Rockview Investments Limited v Mungei* (Civil Appeal E078 of 2021) [2023] KEHC 21042, the Plaintiff submitted that the 1st Defendant's letter authorising direct payment cannot legally amount to an assignment or variation of the subcontract. It reiterates, citing *Zenith Steel Fabricators Limited v Continental Builders Limited & Another* [2018] eKLR, that the 1st Defendant's payment responsibility remained intact, even though the Plaintiff received direct payments from the 2nd Defendant for Interim Payment Certificates Nos. 12 to 15.
56. The Plaintiff further referred to decisions from the United Kingdom, Australia, and India, including the case of *Kingstone Enterprises v NBCC (India) Limited & Another*, W.P (C) No. 4517 of 2023, to support its argument that Clauses 23.6 and 23.7 of the subcontract merely regulated the payment timeline and do not make the 1st Defendant's liability contingent on prior payment from the 2nd Defendant. It argued that Clause 34.5 of the main contract obligated the 2nd Defendant to pay the 1st Defendant within 14 days of receiving an interim payment certificate, and that the 1st Defendant was then required to pay the Plaintiff within seven days of receipt. Therefore, the 1st Defendant cannot avoid liability by claiming non-payment from the 2nd Defendant. The Plaintiff emphasized that only the 1st Defendant has the contractual capacity to pursue the 2nd Defendant for payment under the main contract.
57. On the third issue, the Plaintiff submitted that its claim has remained unpaid since 2016, comprising Kshs.14,808,916 under Certificate No. 16 and Kshs.13,240,417.54 under Certificate No. 17. Although the main contract required the 2nd Defendant to pay within 14 days of certificate presentation, the 1st Defendant did not provide evidence of when Certificates Nos. 16 and 17 were presented. As a result, it is difficult to determine the exact date from which interest should accrue. The Plaintiff argued that, due to uncertainty in payment timelines, the need for interest assessment by the Quantity Surveyor, and lack of clarity on prevailing commercial bank lending rates at the time, calculating precise interest is impractical. Nonetheless, the Plaintiff maintained that it is entitled to interest, as both the subcontract and main contract contemplated interest on delayed payments. In support of this position, it relied on *Nalinkumar Shah v Mumias Sugar Company Limited* [2010] eKLR, *Omega Enterprises Kenya Limited v Eldoret Sirikwa Hotel Limited & Others*, Civil Appeal No. 235 of 2001 and *Ramji Ratma & Company Limited v Attorney General* [2020] eKLR. It submitted that, as a matter of right, it is entitled to interest on the total outstanding sum of Kshs.28,049,334.13/=.
58. On the fourth issue, the Plaintiff submitted that the question of jurisdiction was conclusively determined by this Court in its ruling of 14th June 2021, which dismissed the Defendants' preliminary objection. That ruling was never appealed and therefore, the issue is *res judicata*. Finally, relying on *Morgan Air Congo Limited v Everest Enterprises Limited* [2014] eKLR, the Plaintiff submitted that it is entitled to costs of the suit against both the 1st and 2nd Defendants jointly and severally. In conclusion, the Plaintiff urged the Court to allow the plaint as prayed with costs.

1st Defendant's submissions

59. The 1st Defendant commenced its submissions with an overview of the case, as previously outlined in its defence and reply to defence. It then identified three issues for determination: (i) whether the Plaintiff



is entitled to payment of Kshs.28,049,334.13 and, if so, by whom; (ii) whether the counterclaim or cross-claim is merited; and (iii) who should bear the costs of the suit.

60. On the first issue, the 1st Defendant submitted that the certified sums under Interim Payment Certificates Nos. 16 and 17 constitute a debt payable to the Plaintiff. It noted that both DW1 and DW2 admitted during cross-examination that the money is due and payable to the Plaintiff. However, it maintained that it is not liable to pay the Plaintiff in respect of IPC Nos. 16 and 17, citing the assignment letter dated 10th December 2014. It argued, that this letter authorized the 2nd Defendant to make direct payments to subcontractors, including the Plaintiff.
61. The 1st Defendant further submitted that letters from the Project Quantity Surveyor, an agent of the 2nd Defendant, dated 1st April 2016 and 4th October 2016, and addressed to the Project Architect, who was also an agent of the 2nd Defendant, contained clear instructions for direct payment to subcontractors. Based on those instructions, the 1st Defendant only demanded Kshs.18,854,497.46 from the 2nd Defendant under IPC No. 16, which it considered its own entitlement, and not the entire certified amount of Kshs.33,909,897.29. It added that it subsequently entered into a Partial Settlement and Release Agreement (“the settlement agreement”) with the 2nd Defendant for Kshs.18,854,497.46, and not for the entire certified sum. . Therefore, any payment made under the settlement agreement was toward satisfying the debt owed to the 1st Defendant and not the Plaintiff.
62. The 1st Defendant submitted that the Plaintiff initially issued demand notices to the 2nd Defendant regarding IPC Nos. 16 and 17. It stated that two such notices were sent in 2016, before any demand was made to the 1st Defendant. The first demand to the 1st Defendant was only issued on 18th January 2017, after the 2nd Defendant failed to pay. The 1st Defendant argued that if the Plaintiff had any objection to the payment arrangement, it had ample opportunity to raise it earlier but did not. Instead, the Plaintiff appeared to accept the arrangement and only turned to the 1st Defendant when payment from the 2nd Defendant failed. As such, the 1st Defendant contended that the Plaintiff is estopped from denying knowledge or acquiescence to the direct payment arrangement, as its conduct throughout the contract period—particularly regarding IPC Nos. 16 and 17—suggests otherwise. The 1st Defendant further argued that both the Plaintiff and the 2nd Defendant acknowledged that payment to the subcontractor was to be made in accordance with Clause 23.6 of the subcontract. It maintained that Clause 23.6 is a contingent payment provision—commonly referred to as a “pay-when-paid” clause—which is standard in construction contracts. Relying on *Zenith Steel Fabricators Limited v Continental Builders Limited & Another* [2018] eKLR, the 1st Defendant submitted that under such clauses, the main contractor acts merely as a conduit for payment, and the ultimate obligation to pay lies with the employer. Therefore, until the contractor receives payment, its obligation to pay the subcontractor does not arise.
63. The 1st Defendant emphasized that Clause 23.6 is unequivocally a “pay-when-paid” clause, meaning its obligation to pay the Plaintiff is contingent upon receiving funds from the 2nd Defendant. It argued that this is the only reasonable interpretation of the clause. Citing *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited* [2002] 2 E.A 503; [2011] eKLR, the 1st Defendant asserted that parties are bound by the terms of their contract and that the Court should not rewrite those terms. It maintained that both parties are bound by the subcontract dated 28th April 2014, and specifically by Clause 23.6. It was their submission that they had not received any payment under those certificates and stated that it would have no objection paying the Plaintiff once the funds were received.
64. On this basis, the 1st Defendant argued that its obligation to pay has not crystallized, and that the claim against the 1st Defendant is premature, the debt not having accrued. It therefore urged the Court to dismiss the claim against it.



65. On the counterclaim, the 1st Defendant submitted that its claim against the 2nd Defendant was based on the non-payment of Kshs. 46,073,331.34 under Interim Payment Certificates Nos. 16 and 17, together with interest as provided under Clause 34.6 of the main contract and Clause 23.7 of the subcontract. It stated that, pursuant to Clause 45 of the main contract, it initiated arbitration proceedings against the 2nd Defendant in 2018, which culminated in a final award published on 11th September 2023 and a subsequent award on costs issued on 22nd November 2023.
66. The 1st Defendant further submitted that it obtained leave of the Court in HCCOMMMISC/E1044/2023 to enforce the arbitral award as a judgment and decree, through a ruling delivered on 3rd February 2025. Although execution proceedings had commenced, they were halted following a court order after the 2nd Defendant was placed under receivership. The 1st Defendant contended that, having successfully pursued its claim through arbitration and obtained a binding award, the counterclaim and the claim against the 2nd Defendant in this suit have effectively abated.
67. In conclusion, the 1st Defendant submitted that the Plaintiff has failed to establish a valid claim against it for payment of any sums under IPC Nos. 16 and 17 and urged the Court to dismiss the suit with costs awarded in its favour.

2nd Defendant's submissions

68. The 2nd Defendant began its submissions with a brief background of the case before identifying four issues for determination: (i) whether the 2nd Defendant has any contractual obligation to pay the Plaintiff; (ii) whether the letter dated 10th December 2014, which allegedly varied the contract, created any enforceable right against the 2nd Defendant; (iii) whether the Plaintiff has established a valid claim against the 2nd Defendant; and (iv) who should bear the costs of this suit.
69. On the first issue, the 2nd Defendant relied on *Zenith Steel Fabricators Limited v Continental Builders Limited & Another* [2018] eKLR and submitted that Clause 23 of the subcontract clearly states that the 1st Defendant is responsible for paying the Plaintiff upon receipt of payment from the 2nd Defendant. It argued that there was no privity of contract between the 2nd Defendant and the Plaintiff, and, therefore, as a matter of principle, the Plaintiff cannot bring a direct claim against the 2nd Defendant.
70. It further submitted that during the hearing, PW1 admitted that the Plaintiff had no contractual right to claim against the 2nd Defendant, as there was no direct contractual relationship between them. PW1 acknowledged that the claim against the 2nd Defendant was premature and that only the 1st Defendant had the locus standi to pursue a claim against the 2nd Defendant, which it did by referring the dispute to arbitration as stipulated in the main contract.
71. In further support of its position, the 2nd Defendant cited *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & The Automobile Association of Kenya* [2015] eKLR, arguing that it was not a party to the subcontract, it owed no contractual obligation to the Plaintiff. Consequently, it submitted that any dispute arising under the subcontract must be resolved exclusively between the Plaintiff and the 1st Defendant.
72. On the second issue, the 2nd Defendant submitted that it did not endorse or consent to the purported variation referred to in the Plaintiff's letter. It argued that any modification of a contract requires a meeting of minds between the parties. The 2nd Defendant contended that the alleged variation is invalid and unenforceable for failing to meet the legal requirements for a valid contractual variation. Specifically, it contended, first, it never expressly consent to the purported variation; second, that it only



received the letter after the works were nearly completed and payments had already been made to the 1st Defendant; and lastly, that a valid variation must include mutual agreement and consideration which was absent in this case. The 2nd Defendant therefore submitted that the letter dated 10th December 2014 cannot be relied upon to alter the terms of the JBC contract and any claims arising from it are legally unfounded.

73. On the third issue, whether the Plaintiff has established a valid claim against it, the 2nd Defendant submitted that the Plaintiff failed to demonstrate any contractual, statutory, or equitable basis for imposing liability. It maintained that the only binding agreement was the subcontract between the Plaintiff and the 1st Defendant, rendering any claims against it legally untenable.
74. Regarding the 1st Defendant's counterclaim, the 2nd Defendant submitted that the dispute forming its basis has already been heard and conclusively determined through arbitration. As such, it argued that the matter is now *res judicata*.
75. In conclusion, the 2nd Defendant prayed that both the Plaintiff's claim and the 1st Defendant's counterclaim be dismissed with costs to it.

Analysis and determination

76. The Court has considered the pleadings, record, the evidence presented as well as the submissions by parties. The issues for determination are: -
 - a. Whether the Plaintiff is entitled to the sum of Kshs 28,049,334.13 as claimed under Interim Payment Certificates Nos. 16 and 17.
 - b. If the answer to (1) is in the affirmative, who between the 1st and 2nd Defendant bears the liability to pay the Plaintiff?
 - c. Whether the Plaintiff is entitled to interest on the outstanding amount and if so, at what rate and from when.
 - d. Whether the 1st Defendant's counterclaim against the 2nd Defendant is sustainable in light of the arbitral proceedings and award.
 - e. Who should bear the costs of the suit.

Whether the Plaintiff is entitled to the sum of Kshs.28,049,334.13 as claimed under IPC Nos. 16 and 17.

77. On this issue, the Plaintiff's claim is based on Interim Payment Certificates No. 16 and 17 issued by the Project Architect and supported by the interim valuation statements from the Project Quantity Surveyor's. These documents indicate that the sum due to the Plaintiff for electrical installation works under the subcontract amounts to Kshs.28,049,334.13. The Plaintiff produced these documents in evidence and its witness, PW1, confirmed the figures. Neither the Defendants disputed the arithmetic accuracy of the figures or challenged the validity of the certificates. Indeed, both DW1 and DW2 acknowledged in their oral testimony that the amounts stated in IPCs 16 and 17 were correct and that the Plaintiff's work was properly certified. No evidence was presented to suggest that the works were defective or that the certifications were issued in error.
78. Architects' certificates and QS valuations issued in accordance with a JBC contract carry significant evidentiary weight. While such certificates are not conclusive in all circumstances, they serve as *prima facie* evidence of the certified amount and the state of the works at the time of certification.



Such certificates may be displaced only by proof of fraud, collusion, manifest error or a contractual mechanism allowing revision. No such challenge was demonstrated on this instance.

79. The 2nd Defendant's general assertion that the QS lacked authority to apportion sums to subcontractors was unsupported by any evidence or contractual interpretation demonstrating that the valuation process was flawed. The 1st Defendant for its part, expressly stated that it had no issue with the quantum, only that it had received partial payment from the employer, the 2nd Defendant. That position relates to liability not to the correctness of the amount certified.
80. The Plaintiff has therefore discharged its burden of proof on this issue. It presented clear documentary evidence of certification, corroborated by consistent and credible testimony. The Defendants did not rebut the figures nor demonstrate any illegality or irregularity in the certification process. The fact that the 1st Defendant made a partial payment of Kshs.3,500,000/= pursuant to a settlement agreement does not extinguish the certified entitlement; any sums proved to have been paid will simply be accounted for at the stage of satisfying judgment.
81. In the absence of any evidence challenging the validity of IPCs 16 and 17 or the apportionments made therein and considering that both Defendants acknowledged the correctness of the certified amounts, I find that the Plaintiff has proved, on a balance of probabilities, that it is entitled to the sum of Kshs.28,049,334.13 as the value of works certified in IPCs 16 and 17. The question of who between the Defendants is liable to pay that amount, and whether interest is due, is addressed under subsequent issues.

Who is liable to pay the Plaintiff between the 1st and 2nd Defendants?

82. This issue concerns which of the two Defendants bears the legal obligation to pay the Plaintiff the certified sum of Kshs.28,049,334.13. The Plaintiff was not a party to the main contract between the 1st Defendant (Epc Builders Ltd) and the 2nd Defendant (Proctor & Allan (E.A.) Ltd). Its contractual relationship is founded on the subcontract dated 26th June 2014 with the 1st Defendant.
83. The general rule in contract law, as reaffirmed in *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] eKLR, is that no contractual right or liability may accrue to a person who is not privy to the agreement, unless there is a valid novation, assignment or statutory exception. The court in this case stated that;

“As a general rule, a contract affects only the parties to it, and it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or make him liable to it. The fact that a person who is a stranger to the consideration of a contract stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”
84. Applying this principle it follows that , prima facie the 2nd Defendant does not have a direct obligation to the Plaintiff. The 1st Defendant, however, contends that it is not liable to pay the Plaintiff because of two main reasons:
 - a. First, that Clause 23.6 of the subcontract operates as a “pay-when-paid” clause, making its obligation to pay conditional upon receipt of funds from the 2nd Defendant and;
 - b. Second, that through a letter dated 10th December 2014, it authorized the 2nd Defendant to pay subcontractors, including the Plaintiff, directly, a practice that was followed in earlier payments under IPCs 12 to 15. when the 2nd Defendant made payments directly to the Plaintiff.



85. The 2nd Defendant rejects any suggestion of novation or assignment. It argue that the letter of 10th December 2014 did not amount to a contractual variation as it did not consent to it, nor sign it sign any agreement creating a direct obligation to the Plaintiff. It maintains that due to lack of privity the Plaintiff cannot claim against it.
86. From the evidence and submissions, it is clear that the subcontract remained in force and there was no formal variation executed by all parties transferring liability from the 1st Defendant to the 2nd Defendant. While the letter of 10th December 2014 purported to authorize direct payments the 2nd Defendant denied endorsing or consenting to that arrangement, and no documentary evidence was produced to demonstrate its acceptance. Furthermore, PW1 testified that the Plaintiff never agreed to discharge the 1st Defendant from liability and DW1 conceded that the subcontract was never amended. The fact that the 2nd Defendant paid the Plaintiff directly under IPC Nos. 12 to 15 does not in law, amount to novation; at best, it was an administrative arrangement to facilitate cash flow and it did not extinguish the 1st Defendant’s contractual obligation to the Plaintiff.
87. Turning to Clause 23.6, it is correct that the subcontract states that the 1st Defendant shall pay the subcontractor within seven days of receiving payment from the employer. Such clauses are common in construction contracts and are known as “pay-when-paid” provisions. Courts, including in *Zenith Steel Fabricators Ltd v Continental Builders Ltd & Another* [2018] eKLR, have held that such clauses ordinarily regulate the timing of payment but do not extinguish the fundamental obligation to pay the subcontractor. Unless the clause expressly makes payment conditional upon receipt from the employer, the Court will interpret it as postponing, not eliminating, liability.
88. In this case, Clause 23.6 provides that, “Within 7 days of receipt by the Contractor of payment by the Employer, the Contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works less the portion of the retention money attributable to the sub-contract works and less amounts previously paid to the sub-contractor.”
89. The above clause does absolve the 1st Defendant of liability if the employer fails to pay. It only provides a set timeline for payment upon receipt. To accept the 1st Defendant’s interpretation would leave the Plaintiff without a remedy despite having fully performed its contractual obligations, which would offend commercial fairness. Therefore, the proper construction of the subcontract is that the 1st Defendant remains liable to pay the Plaintiff, and any recourse it has for reimbursement from the 2nd Defendant ought to be pursued under the main contract.
90. The Plaintiff cannot also sue the 2nd Defendant as there is no privity of contract and no valid novation or assignment was proved. The architect’s apportionment of sums to subcontractors in the QS valuations does not create a contractual relationship between the 2nd Defendant and the Plaintiff. Such apportionments are for internal administration of the contract and does not override the absence of privity.
91. Accordingly, I find that the 1st Defendant, is contractually liable to pay the Plaintiff the certified amount under IPC Nos. 16 and 17. The 2nd Defendant, is not liable to the Plaintiff in this suit under the prevailing circumstances. The 1st Defendant’s argument that its liability has not crystallized due to non-payment by the 2nd Defendant is rejected; that defence is not sustainable in law for the reasons outlined above.



Whether the Plaintiff is entitled to interest on the outstanding amount and if so, at what rate and from when.

92. Both the subcontract and the main contract contain provisions that contemplate interest for delayed payment. Clause 23.7 of the subcontract expressly provides that interest shall accrue where payment to the subcontractor is delayed beyond the stipulated period. Similarly, Clause 34.6 of the main contract imposes interest obligations on delayed payments to the contractor. These provisions demonstrate that the parties anticipated interest as a consequence of delayed settlement. Therefore, as a matter of contractual expectation and equity, the Plaintiff is entitled to interest on the certified sum.
93. The next question then is from what date should interest run. Interim Payment Certificate No. 16 was issued on 7th April 2016 and IPC No. 17 was issued on 17th October 2016. Under the main contract, the employer (2nd Defendant) was required to pay the contractor within 14 days of presentation of an interim certificate. Clause 23.6 of the subcontract then required the contractor to pay the subcontractor within seven days of receiving funds from the employer.
94. In an ideal scenario, interest would run from the expiry of these contractual periods. However, the evidence before the Court does not establish the exact dates when these certificates were presented to the employer or when, if at all, the 1st Defendant received any payments from the 2nd Defendant in respect of the two certificates. This evidentiary gap makes it impractical to determine a precise contractual default date from which interest should accrue.
95. In such circumstance, courts often adopt a practical and equitable approach by awarding interest from the date the suit was filed. By that point, the amount claimed had crystallized into a dispute and was being actively pursued in court. This approach balances the Plaintiff's right to be compensated for being kept out of its money and avoids speculative computations unsupported by evidence. The Plaintiff filed this suit on 29th May 2017. From that date, it was clear that payment had not been made and the Plaintiff had resorted to litigation to recover the debt.
96. As to the rate of interest, in the absence of proof of the prevailing commercial rate or any special contractual stipulation for a different rate, the default position under Section 26 of the *Civil Procedure Act* applies. Interest shall be awarded at court rates. The Plaintiff did not adduce sufficient evidence to justify a rate other than the statutory court rate.
97. Accordingly, I find that the Plaintiff is entitled to interest on the sum of Kshs.28,049,334.13/= at court rates from 29th May 2017, being the date of filing suit, until payment in full.
- Whether the 1st Defendant's counterclaim against the 2nd Defendant is sustainable in light of the arbitral proceedings and award.
98. The 1st Defendant seeks to hold the 2nd Defendant liable for any sums found payable to the Plaintiff, claiming that its inability to pay stems from non-payment by the 2nd Defendant under the main contract. The counterclaim essentially mirrors the 1st Defendant's rights under the main contract and seeks indemnity or contribution from the 2nd Defendant.
99. It is not disputed that the main contract between the 1st and 2nd Defendants contained an arbitration clause, and that the 1st Defendant invoked that clause by referring its dispute with the 2nd Defendant to arbitration and an award issued. These facts are uncontested.
100. The legal effect of these developments is significant. The *Arbitration Act*, read together with Section 7 of the *Civil Procedure Act* and the doctrine of res judicata, prevents a party from litigating in Court matters that have already been conclusively determined by arbitration and whose award has been



adopted by the Court. The issues raised in the 1st Defendant's counterclaim essentially claims for sums due under the main contract were the subject of the arbitration and resolved by the arbitral award. To allow the counterclaim to proceed would be to permit duplication and risk inconsistent outcomes, which the law seeks to avoid.

101. Moreover, the 1st Defendant, conceded in its submissions, that the existence of the arbitral award has rendered the dispute between the 1st and 2nd Defendants abated.

102. Based on the foregoing analysis, the Court makes the following orders;

- a. Judgment is hereby entered for the Plaintiff against the 1st Defendant in the sum of Kenya Shillings Twenty-Eight Million Forty-Nine Thousand Three Hundred Thirty-Four and Thirteen Cents (Kshs.28,049,334.13).
- b. The said sum shall attract interest at court rates from 29th May, 2017 being the date of filing suit, until payment in full.
- c. The 1st Defendant's counterclaim is hereby dismissed with costs.
- d. Costs of this suit are awarded to the Plaintiff only as against the 1st defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... Plaintiff

..... Defendant

Selina Court Assistant

