



**Constituencies Development Fund Board v Milestone Engineering Limited & another
(Civil Appeal 290 of 2017) [2023] KEHC 64 (KLR) (Civ) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 64 (KLR)

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

CIVIL

CIVIL APPEAL 290 OF 2017

DAS MAJANJA, J

JANUARY 17, 2023

BETWEEN

CONSTITUENCIES DEVELOPMENT FUND BOARD APPELLANT

AND

MILESTONE ENGINEERING LIMITED 1ST RESPONDENT

DAGORETTI SOUTH CONSTITUENCY DEVELOPMENT FUND

COMMITTEE 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. E. K. Usui, SPM dated
12th May 2017 at the Milimani Magistrates Court in CMCC No. 5321 of 2014)*

JUDGMENT

1. The appellant appeals against the judgment of the subordinate court allowing the 1st respondent's claim against the appellant and 2nd respondent, jointly and severally, to pay the 1st respondent Kshs. 845,477.60, costs and interest.
2. According to the plaint dated September 4, 2014, the 1st respondent was awarded a contract to carry out landscaping works at Dagoretti Mixed Secondary School, it completed the works and was issued with a certificate of completion. Kshs. 845,477.60 being the certified and invoiced amount remained unpaid despite demand and notice of intention to sue being issued which prompted the 1st respondent to file the suit against the respondents.
3. The appellant ("Board") entered appearance and filed a statement of defence dated September 30, 2014. It denied the 1st respondent's claim. It stated that it was not party to the contract. Further, that the *Constituencies Development Fund Act*, 2013 ("the CDF Act") under which it is established, it does not engage contractors or other personnel at the constituency level hence it is not liable. It contended



that the suit was instituted prematurely as the 1st Respondent ought to have invoked the arbitration process provided for under the CDF Act.

4. The 2nd respondent entered appearance and filed a statement of defence dated February 16, 2015. It denied all the allegations made by the 1st respondent. It further stated that it was wrongly sued as the subject school where the contract was undertaken was within Dagoretti North Constituency and not Dagoretti South Constituency. It added that the suit was fatally defective as it lacked capacity to be sued.
5. In due course, the 1st respondent sought and was granted leave to amend its plaint. The amended plaint filed pursuant to leave granted on July 13, 2015 was amended for the 2nd respondent to read Dagoretti South Constituency Development Fund Committee (“the Committee.”). On August 3, 2016, the Board filed a Notice of claim against the Committee claiming contribution and/or indemnity.
6. The suit proceeded to full hearing with the parties calling their witnesses whereupon the court delivered the judgment dated May 12, 2017 (“the Judgment”). In the Judgment, the trial magistrate addressed the issue whether the 1st respondent had proved its case. The court found that it was common ground that the contract was awarded to the 1st respondent and that part payment was made leaving the balance claimed in the suit. The court held that the 2nd Respondent made the first payment under the contract in 2013 hence it was aware that the contract was within its jurisdiction and that it approved a further payment hence it was liable. As regards the Board, the court observed that the only reason the amount was not paid, is that the 2nd respondent failed to provide the relevant documents. The court further held that 2nd respondent failed to move the appellant to make payment hence it too, was liable.
7. It is this Judgment which has culminated in this appeal by the Board and which is grounded on the Memorandum of Appeal dated June 8, 2017. The Board has raised five grounds of appeal but in its submissions has condensed them into two broad grounds. It argues that the trial court erred in failing to take cognisance of the fact that the Board was not liable as it was not privy to the subject contract and that the 1st respondent failed to prove its case on the balance of probabilities. It urges that the suit was filed prematurely as the 1st respondent ought to have invoked the dispute resolution procedures under the CDF Act.
8. As this is a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The principle was summarised in *Selle and another v Associated Motor Boat Co. Ltd and others* [1968] EA 123 as follows:

[T]his court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...

9. I have considered the facts and evidence on record and it is not in dispute that the 1st Respondent applied for and was awarded a tender for proposed landscaping at Dagoretti Mixed Secondary School for Kshs. 3,559,570.00 inclusive of VAT by the Dagoretti Constituency, Constituencies Development Fund (CDF) by the letter dated August 27, 2012. Following the issuance of a Variation Order No. 1 dated February 20, 2013, the Dagoretti Constituency Development Fund Committee at its meeting held on March 21, 2013 approved a variation of the contract works to the extent of Kshs. 845,477.60 to cover extra works on the drainage systems and metal grills on stairs with a provision for use by persons with disabilities for the financial year 2013/2014. The works were completed and a Certificate



of Completion dated July 10, 2013 issued. It was executed by the Project Engineer on behalf of the Dagoretti Constituency Development Fund.

10. Despite completion of the work, the 1st Respondent was not paid. From several letters addressed to the 1st respondent and to its bankers, the Fund Account Manager of Dagoretti Constituency Development Fund, confirmed that Kshs. 845,477.00 was due to the 1st Respondent and that the Board would release funds to it to enable it settle the 1st Respondent's liability to the bank. From the totality of the evidence especially the uncontested documentation produced by the parties, I have no difficulty in holding that the 1st respondent is entitled to Kshs. 845,477.00 for work done at Dagoretti Mixed Secondary School and I would uphold the trial court's decision on that account.
11. The substantial issue for consideration in this appeal is who is liable to pay the amount? The appellant asserts that it was not privy to the contract and does engage contractors in view of the provisions of the CDF Act while the 2nd respondent pleaded that it lacked capacity to be sued. Admittedly, the trial magistrate did not delve into these issues which were clearly raised by the parties in the pleadings and particularly in light of the CDF Act. It is to these issues I now turn.
12. The Constituencies Development Fund is established under section 4 of the CDF Act and is administered by a Board of Directors established under section 5 as a body corporate capable of suing and being sued. The functions of the Board are set out in section 6 as follows:

Functions of the Board

- (1) The functions of the Board shall be to –
 - (a) to ensure timely and efficient disbursement of funds to every constituency;
 - (b) to ensure efficient management of the Fund;
 - (c) to receive and discuss annual reports and returns from the constituencies;
 - (d) ensure the compilation of proper records, returns and reports from the constituencies;
 - (e) receive and address complaints and disputes and take any appropriate action;
 - (f) consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;
 - (g) perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.
13. Section 9 of the CDF Act outlines the procedure for disbursements from the Fund. In summary each and every disbursement must be approved by the Board and all disbursements shall be for specific projects as submitted by constituencies. The disbursements are made through constituency bank accounts maintained for every constituency. The responsibility to submit proposed projects for approval by the Board is vested in the Constituency Development Fund Committee under Part III of the Act. The Constituency Development Fund Committee is established under section 24(1) and is



generally charged with the responsibility of developing and implementing projects at the Constituency level.

14. Against the aforesaid background, the appellant has submitted at length on the doctrine and privity of contract and its application to the circumstances of this case. The general rule is that only parties in a contract have rights and obligations under that contract and a third party cannot enforce it. The court in *Securicor Guards (K) Limited v Mobamed Saleem Malik and another* NRB HCCA No. 209 of 2016 [2019]eKLR succinctly explained the doctrine as follows:

What constitutes privity of contract has been described by *Chitty on Contracts*, 2004 Edition as follows:

“The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.”

This basically means that a contract cannot confer rights or impose obligations on any person other than the contracting parties; that a contract cannot be enforced by or against a 3rd party. The effect of this legal principle is that only parties who are privity to a contract can sue to enforce its terms. This position was reinforced by the court in *Agricultural Finance Corporation v Lengitia Limited* (1985) KLR 765 where the court held inter alia that:

“As general rule a contract affects only the parties to it and it cannot be enforced by or against a person not a party even if the contract is made for his benefit and purports to give the right to sue or to make him liable upon it.”

15. In light of the general understanding of the doctrine of privity of contract, I would agree with the Board that since it was not a party to the contract then the contract cannot be enforced against it. However, this rule is not cast in stone, over time courts have established exceptions. For example, where there is a collateral contract relating between the two parties accompanied by a collateral contract between one of them and third party (see *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe and another* [2015] eKLR).
16. This case is not merely a case of a contract but one for payment under a contract entered into by the Constituency Development Fund Committee. Under the statutory scheme I have outlined above, the Board does not enter into contracts with third parties for implementation of projection identified by the Committees. It considers and approves project proposal coming from Committees, allocates and sends funds to the constituency fund in line with its core functions and, “ensures timely and efficient disbursement of fund to every constituency.” It is the Board, which is imbued with corporate personality, that a party who seeks to be paid must look to. In the circumstances, I hold that the Board cannot use the shield of privity of contract to avoid its obligation to fund a project that is approved under the provisions of the CDF Act. It is for this reason that the Fund Manager accepted liability for the debt and informed the 1st Respondent’s bankers that it was waiting for funding from the Board in order to clear the debt. What is also clear from a reading of the CDF Act is that the Constituency Development Fund Committee is not a corporate body and is incapable of suing and being sued. I therefore accept the 2nd Respondent’s defence that the suit against it was fatally defective. Further in view of the Board’s responsibility to provide funds and ensure timely payment, the suit against the 2nd Respondent could not survive being struck out.



17. Having found that the Board is liable to fund duly approved projects, what happens when a contractor is not paid? Section 49 of CDF Act provides for a dispute resolution process as follows:

49. Dispute resolution

- (1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.
- (2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.
- (3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.
- (4) Notwithstanding sub-section (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, the Cabinet Secretary may appoint an arbitrator whose costs shall be jointly borne by the parties.

18. From the aforesaid provision, any dispute or complaint concerning administration of the Act shall be forwarded to the Board in the first instance and then referred to arbitration if no settlement is reached. Such complaints or disputes include complaints regarding non-payment or for payments due from the Fund as is present in this case. It is now settled that where the Constitution and Parliament establish a specific procedure to address a specific grievance then that procedure must be utilised (see *The Speaker of The National Assembly v The Hon James Njenga Karume*, Civil Application No 92 of 1992 (UR), *Kipkalya Kiprono Kones v Republic & another ex-parte Kimani Wanyoike & 4 others*, (2008) 3 KLR (EP) 291).

19. In this instance, the appellant is correct to point out that the 1st respondent ought to have approached the Board in accordance with section 49 aforesaid hence the Subordinate Court did not have jurisdiction to entertain the claim in view of the statutory procedure prescribed. This was the position taken by the court in the decision cited by the appellant; *Philip Omondi Ogolla v Honourable John Olago-Aluoch and another* KSM HCCC No. 21 of 2013 [2013]eKLR where the court struck out filed in contravention of section 49 (see also *Obulo Building Construction Limited v Constituency Development Fund Board BSA* HCCC No. 2 of 2014 [2015] eKLR).

20. I agree with the appellant that in light of section 49 of the CDF Act, this suit was filed prematurely and ought to have been struck out on a proper application before the trial court. Although the objection was raised in the pleadings, the Appellant did not take it up as a preliminary point or file an appropriate application. The parties proceeded to full hearing by calling their witnesses resulting in the judgment. In the circumstances, I will not mulct the 1st respondent with costs of the suit.

21. For the reasons I have set out above, I allow the appeal on the following terms:

- a. The judgment of the Subordinate court dated May 12, 2017 is set aside and substituted with a judgment striking out the suit.
- b. Each party shall bear its own costs of the suit and this appeal.
- c. The order of stay in force is discharged and the monies held in the joint account in the names of the appellant and 1st respondent's advocates shall be released to the appellant's advocates.



DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2023.

D. S. MAJANJA

JUDGE

Mr Chege instructed by Amolo and Gacoka Advocates for the Appellant.

Mr Joroge instructed by James Joroge and Company Advocates for the 1st Respondent.

Mr Kamande instructed by Muturi Kamande and Company Advocates for the 2nd Respondent.

