



REPUBLIC OF KENYA



**Vlan Construction Limited v Rama Homes Limited (Commercial Appeal E196 of 2022)  
[2023] KEHC 3727 (KLR) (Commercial and Tax) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E196 OF 2022**

**EC MWITA, J**

**APRIL 14, 2023**

**BETWEEN**

**VLAN CONSTRUCTION LIMITED ..... APPELLANT**

**AND**

**RAMA HOMES LIMITED ..... RESPONDENT**

*(Appeal from judgment and decree of the Small Claims Courts, Nairobi  
(D S Aswan) dated 16th November 2022 in SCCOMM No E3999 of 2022)*

**JUDGMENT**

1. The Thames Electricals Ltd (the respondent), filed a claim before the Small Claims Court, in Nairobi against Vlan Construction Ltd, (the appellant) and Manjinder Singh Sondh. The claim was for Kshs. 383, 718 for electrical goods the respondent supplied to the appellant, on various dates in 2018 and 2019.
2. The appellant filed a statement of defence denying the respondent's claim. The appellant admitted that electrical goods had been supplied but pleaded that the goods were fitted at the premises of Rama Homes Limited, a third party, who had contracted the respondent in February 2018 to construct premises. Rama Holdings had the duty to ensure that subcontractors were paid and, in turn, suppliers were to be paid for.
3. Rama Homes Ltd had failed to pay as agreed despite the appellant doing its work. This forced the appellant to file a suit against Rama Homes Limited (CMCCC No. 341 of 2019) claiming Kshs. 90,612,920. The appellant stated that any liability was to be borne by Rama Homes Limited.
4. The appellant joined Rama Homes Ltd as a third party in the proceedings before the Small Claims Court but Rama Homes Ltd did not enter appearance or file a defence.



5. The trial adjudicator heard the dispute and found in favour of the respondent against the appellant. The claim against Manjinder Singh Sondh, as well as that against the third party was, however, dismissed.
6. The appellant was aggrieved and lodged this appeal through a memorandum of appeal dated 2<sup>nd</sup> December 2022, raising the following grounds, namely;
  - a. That the learned magistrate erred in law and fact in dismissing the 1<sup>st</sup> respondent's claim against the third party
  - b. That the learned magistrate erred in law and fact in finding that the outstanding debt of Kshs. 383, 718 for goods procured in the development of the third party's project was payable by the 1<sup>st</sup> respondent thereby arriving at a wrong conclusion
  - c. That the learned magistrate erred in law and fact by totally disregarding the evidence adduced by the respondents thus arriving at a wrong conclusion
  - d. That the learned magistrate erred in law and fact in failing to apportion liability on the part of the third party who were in violation of their financial obligation to the 1<sup>st</sup> respondent
  - e. That the learned magistrate erred in law and fact in failing to consider the evidence by the 1<sup>st</sup> respondent that there existed a contract that superimposed an obligation on the third party to pay any and all suppliers in good time thus arriving at a wrong finding and conclusion
  - f. That the learned magistrate erred in law and fact in failing to consider the respondents' submissions in totality thereby arriving at a wrong finding.
7. This appeal was disposed of through written submissions. The appellant filed written submissions dated 17<sup>th</sup> February 2023, while the respondent's submissions were dated 23<sup>rd</sup> February 2023.
8. The 1<sup>st</sup> appellant's case is that the adjudicator was wrong in dismissing the third party claim on the basis that there was no privity of contract. This, the appellant argues, was a misapprehension of the law relating to third party proceedings. According to the appellant, Order 1 rule 15 allows a third party to be joined into the proceedings and is to contribute or indemnify the defendant (appellant) where the suit against the defendant succeeds. Where there is default of appearance, rule 17 provides for the consequences. Further rule 21 provides what the trial court should do where the third party has failed to take part in the proceedings, though served.
9. The appellant takes issue with the adjudicator's failure to apportion liability to the third party instead of dismissing the suit against the third party. The appellant also blames the adjudicator for relying on the privity of contract principle to dismiss the suit against the third party.
10. The appellant relies on *Ocean freight (EA) Limited v Technologies & another* [2010] eKLR; *Hass Petroleum Limited v Iota Engineering and Construction Limited* (formerly Iota Excavations and Rental Ltd); *White Lotus Projects Limited (Third Party (civil suit 226 of 2019) [2021] KEHC 361 (KLR)* to argue that there was a triable issue between the defendant. The appellant further relies on *Gachago v Attorney General* [1981] KLR 232, that third party proceedings are not dependent on there being a binding contract on the third party.



11. The appellant again relies on *James Kimani Maina v Athi Water Services Board: Bird Civil Engineering Limited (Third Party)* [2019] citing *Stephen Psiwa Cheprot v Mary Mutheu Muia & another* [2018] eKLR, that third party proceedings relate to the apportionment of liability between the defendant and the third party and has nothing to do with the plaintiff.
12. On its part, the respondent argues that the appeal has no merit. According to the respondent, the appellant admitted that goods were received but were not paid for. The respondent contends that during the transaction, the appellant did not indicate that the third party was the beneficiary of the goods and would pay for them. According to the respondent, it was the appellant who ordered for the goods and signed invoices and delivery notes.
13. The respondent relies on *Savings and Loan (K) Limited v Kavenje Karangita Gakombe & another* [2015] eKLR, that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Such a contract cannot be enforced either by or against a third party.
14. The respondent further relies on *Agricultural Finance Corporation v Lendetla Ltd & Jack Mwangi* [1985] eKLR, that a contract only affects parties to it and cannot be enforced by or against a person who is not a party, even where the contract is made for his benefit and purports to give him the right to sue or to make him liable on it.
15. The respondent argues that in Small Claims courts, third party proceedings are governed by the Small Claims Rules, 2019. Rule 9(1)(e) provides that a third party may be joined through an application but the third party notice was served without leave of court and service was not proved. Rule 16(5) is to the effect that where service of third party notice has not been done, the claim against the third party is deemed to have been abandoned. The appellant asserts that since service on the third party was not proved, the claim was deemed to have been abandoned.
16. I note that the adjudicator initially found that service on the third party had not been proved and ordered fresh service and a certificate of service be filed. This was done and the adjudicator was satisfied.
17. The respondent maintains that there was no nexus between it and the third party. reliance is placed on *Kenya Commercial Bank Limited v Suntra Investment Bank Limited* [2015] eKLR that a third party is joined in a suit at the instance of the defendant and through the procedure set out under Order 1 rule 15-22 of the Civil Procedure Rules. After the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant the court issues directions on determination of the issues between the defendant and the third party.
18. It is the respondent's case, that the evidence before the adjudicator failed to satisfy that there was a proper question for trial as to the third party's liability. As a result, apportionment of liability could not arise automatically. The appellant urges that the appeal be dismissed with costs.
19. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should, however, bear in mind that it did not see witnesses testify and make due allowance for that. (See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123; *Peters v Sunday Post Ltd* [1958] EA 424).
20. From the memorandum of appeal and arguments by parties, the single issue for determination is whether the adjudicator should have apportioned liability between the appellant and the third party. Put differently, did the adjudicator fall into error in dismissing the appellant's claim against the third party?



21. Before the adjudicator, the appellant did not deny that the respondent supplied goods to it. The appellant did not also deny that the goods were not paid for but passed the blame to the third party. According to the appellant, goods were used in the third party's premises and the third party was responsible for paying subcontractors. This would ensure that suppliers were.
22. The adjudicator found as a fact that the respondent had proved its claim to the required standard and allowed it. The adjudicator however dismissed the claim against Manjinder Singh Sondh, since the claim against him had not been proved.
23. Regarding the third party, the adjudicator held that there was no privity of contract between the appellant and the third party and dismissed the appellant's claim against the third party.
24. I have gone through the record and, in particular, proceedings for 16<sup>th</sup> August 2022. On that day, counsel for the appellant informed the adjudicator that they had filed and served a third party notice but without leave of court. After arguments by counsel for the parties, the adjudicator observed that issues would better be determined during the hearing and after the third party had been joined and allowed to respond. The adjudicator allowed the third party notice as having been filed. The adjudicator was, however, not satisfied with the service of the notice on the third party. The adjudicator directed that the third party be served afresh and a certificate of service be filed.
25. On 31<sup>st</sup> August 2022 when the matter resumed, the appellant's counsel informed the adjudicator that the third party had been served and certificate of service filed as directed. The adjudicator noted that the third party had indeed been served. The third party having failed to enter appearance or file a defence interlocutory judgment was entered against the third party. the adjudicator directed that the matter proceeds to formal proof against the third party.
26. During the hearing, the respondent's witness told the adjudicator that goods had been supplied to the appellant but no payment was made. The appellant also called a witness who admitted that the goods were received from the respondent but were not paid for. The appellant's witness stated that they had issued a certificate to the third party and that the third party should pay. In the end, the adjudicator dismissed the appellant's claim against the third party. The claim against the appellant was allowed.
27. The appellant has taken issue with the dismissal of the claim against the third party. the appellant argues that it was not necessary that there exist privity of contract between the respondent (claimant) and the third party. it is the appellant's view that the issue was between it and the third party and not the respondent and the third party. The appellant faults the adjudicator for wrongly applying the law with regard to third party proceedings and, as a result, arrived at a wrong conclusion.
28. It is true that the third party was not mentioned in the transaction between the appellant and the respondent. It also true that in third party proceedings, the issue is usually between the defendant and the named third party and not the plaintiff and the third party. That notwithstanding, the defendant has the onus to establish and prove its case against the third party if the defendant is to succeed against the third party. That is why directions are issued on how the issue between the defendant and third party is to be determined and, in this case, the adjudicator directed that the matter would proceed for formal proof against the third party.
29. During the hearing, the appellant's witness told the adjudicator that they had issued a certificate to the third party and that it was the third party to pay. The witness did not state the date of the certificate; how much it was for and whether the third party was asked to pay the respondent. This was important because the claim against the appellant was specific and that was the claim the appellant was passing to the third party. The appellant was thus required to prove the claim against the third party. It is not



enough to join a third party into the proceedings. The defendant was to prove the case against the third party on a balance of probability in order to succeed against the third party.

30. Even where a default interlocutory judgment had been entered against the third party, this did not lessen the burden of proof on the appellant to prove its claim against the third party. The appellant was required to adduce evidence which satisfied the adjudicator as to the truth of the fact namely; that the third party owed the appellant the amount claimed by the respondent. This was so because the burden of proof is on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. (Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR.) on this, the appellant fell short and cannot blame the adjudicator for its failure.
31. There is one more reason why the appellant could not succeed against the third party. Third party proceedings are intended to avoid a multiplicity of suits. That is, instead of the defendant filing its own suit against the third party to claim what is already claimed in the suit against him, the defendant takes out a third party proceedings instead.
32. The appellant stated that because Rama Homes Ltd failed to pay despite the appellant having done its work, this forced the appellant to file a suit against the third, namely; CMCCC No. 341 of 2019 claiming Kshs. 90,612,920. The appellant having instituted a separate suit against the third party, claiming the money due to it for the work done, which must have included the cost of electrical goods, the subject of the claim before the adjudicator, could not take out third party proceedings against the third party as that claim was the subject matter before another court of competent jurisdiction. The third party proceedings would amount to duplicate proceedings against the third party which is against the reason why third party proceedings are initiated in the first place.
33. For the above reasons, having considered the appeal, submissions by parties, reevaluated and reanalyzed the evidence afresh, the conclusion I come to, is that this appeal has no merit. It is declined and dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL 2023**

**E C MWITA**

**JUDGE**

