



Karuri Civil Engineers (K) Ltd v Utumishi Investment Ltd & another (Commercial Case 349 of 2010) [2023] KEHC 17667 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 349 OF 2010
DO CHEPKWONY, J
MAY 12, 2023**

BETWEEN

KARURI CIVIL ENGINEERS (K) LTD PLAINTIFF

AND

UTUMISHI INVESTMENT LTD 1ST DEFENDANT

G. ARREDA LIMITED 2ND DEFENDANT

JUDGMENT

1. By the Amended Plaintiff dated 17th October 2011, the Plaintiff a Limited Liability Company has sued the Defendants jointly and severally seeking for:-
 - a. Kshs.24,341,300/=;
 - b. Interest on the sum in (a) hereinabove at court's rate from the date of filing the suit until payment in full;
 - c. Any other relief(s) that this Honourable Court may deem fit to grant;
 - d. Costs of this suit.
2. The brief facts pleaded herein are that the Plaintiff, a subcontractor for civil works for the main contractor successfully applied for a tender for the construction works for the main contractors the 2nd Defendant herein for a project belonging to the 1st Defendant. Pursuant to the tender, the Plaintiff entered into a subcontract with the 2nd Defendant which was supplemental to the main contract between the 1st Defendant and the 2nd Defendant.
3. The Plaintiff states that it was a term of the contract that payments for the works done would be made after monthly submissions of application for payment certificates and that the 1st Defendant would



- provide payment to the 2nd Defendant for onward transmission to the Plaintiff. The Plaintiff then submitted the first certificate for payment but the Defendants failed to make the payments prompting the filing of the suit for payment of Kshs.24,341,300/= together with interest on the sum.
4. The 2nd Defendant entered appearance and filed its Defence dated 9th December, 2011 in which it denied every claim in the Plaintiff. However, he admitted and confirmed that the Plaintiff was a sub-contractor for civil works and was retained by the 1st Defendant to carry out stated civil works in conformity with the building agreement dated 1st December, 2005 between it and the 2nd Defendant, so that the Plaintiff was to be paid by the 1st Defendant and there was no express agreement that was the 1st Defendant who would forward payment to the 2nd Defendant for onward transmission to the Plaintiff, as sub-contractors. The 2nd Defendant further pleads that despite the issuance of the Certificate, the 1st Defendant refused and neglected to pay the Plaintiff as per the contractual terms and that it is not liable for payments claimed. It holds that the Plaintiff has no claim against it and that it has been wrongly sued and its name should be struck out.
 5. In its amended defence dated 19th August, 2019, the 1st Defendant on its part denied the contents of the amended Plaintiff. In particular, it denies any dealings with the Plaintiff, whether contractual or otherwise and states that it is not aware of any works done by the Plaintiff, as such denies owing the Plaintiff Kshs.24,341,200 or any other sum. It claims that even if such instructions on possession and commencement were given by the 2nd Defendant by the Plaintiff, the project could not have commenced as the 2nd Defendant had not provided the necessary funds or given the performance bond as required under Clause 11.1 of the Building Agreement dated 1st December, 2005.
 6. The parties confirmed compliance with pre-trial directions and the hearing commenced whereby the Plaintiff called one witness Peter Kariuki Mirangu as PW1, while the 1st Defendant called its Director, Alloys Mugendi Musijire as DW2. They both adopted their witness statements as their evidence in-chief and thereafter filed their submissions in support of their respective positions.

The Submissions

7. In its submissions, the Plaintiff has raised three issues for determination;
 - i. Whether there was a binding contract between the Plaintiff and the Defendants for the construction of 839 Bungalow Houses on the parcel of land known as Kajiado/Kaputiei-North/1840 and whether the same is enforceable;
 - ii. The Plaintiff executed the civil works on the parcel of land known as Kajiado/Kaputiei 1840 as per the subcontract agreement dated 28th November, 2005?
 - iii. Whether the plaintiff is entitled to the prayers sought in the Amended Plaintiff dated 17th October, 2011.
8. On the part of the 1st Defendant, Counsel raised two issues for determination:
 - a. Whether there was a valid contract, written or otherwise between the parties.
 - b. Whether the 1st Defendant is bound to pay the sum of Kshs.24,341,300 and if the Plaintiff is entitled to the reliefs sought.
9. The Plaintiff argues that the main contract between the 1st Defendant and the 2nd Defendant arose from the offer letter dated 10th November, 2004 for the construction and financing of Kitengela Phase 1 Housing project. The 2nd Defendant by virtue of this offer letter advertised for tender for Civil Engineering Works which the Plaintiff Company bided for and was successful as the lowest bidder.



10. The Plaintiff contends that the 1st and 2nd Defendants entered into the main contract on 26th November, 2005 but it was executed on 1st December, 2005. The Plaintiff then entered into the supplementary contract with the 2nd Defendant on 28th November, 2005 and on 4th January, 2006, the 2nd Defendant sent it a commencement letter through which the Plaintiff commenced the works. The Plaintiff states that it commenced the works by erecting a bill board of professionals, carried out the works and then sent out the 1st Certificate of payment dated 7th July, 2006 which has not been settled to date.
11. The Plaintiff argues that the contentious Clause in the main contract between the 1st and 2nd Defendant is Clause C6 which states as follows:

“The parties herein have agreed that this Agreement is subject to the Client securing a Guarantee from a reputable bank in Kenya for the repayment of the loan to be advanced to it by the Contractor to finance the construction works.”
12. It is the Plaintiff’s averment that the requirement to provide the bank guarantee was on the 2nd Defendant and not on itself. That through the letter 4th January, 2006, the 1st Defendant authorised for the commencement of the project pending the perfection of the guarantee. This letter was in response to the 2nd Defendant’s letter dated 30th December, 2005 addressed to the 1st Defendant. The Plaintiff therefore argues that the 1st Defendant cannot breach the contract by virtue of lack of a bank guarantee since it allowed the project to commence in exclusion of the said bank guarantee.
13. According to the Plaintiff, the letter dated 4th January, 2006 varied the terms of the contract for the commencement of the project without the guarantee which variation was not made through any coercion. It was lawful and binding to all the parties, hence the 1st Defendant is required to comply to the terms of the contract and issue payments owing for the works done by the Plaintiff.
14. On its part, the 1st Defendant argues that the amounts claimed by the Plaintiff was not payable since it did not undertake any works and that a Bank guarantee was not furnished in accordance to the terms of the contract. The 1st Defendant also that the main contract was executed on 1st December, 2005 whereas that of the subcontract was done on 28th November, 2005 thus it cannot be supplemental to the main contract as alleged since it was done after.
15. The 1st Defendant contends that the performance of the main contract was subject to the provision of the bank guarantee by the 2nd Defendant which was not provided, therefore the contract was conditional, and until that condition is fulfilled, a contract is neither binding nor enforceable.
16. The 1st Defendant argues that its letter dated 4th January, 2006 did not in any way waive the condition for the provision of the bank guarantee since the letter stated in part, ‘immediately pending the perfection of the guarantee’. It argues that the letter was just an authorization to commence the works.
17. The 1st Defendant also states that the 2nd Defendant was not only required to provide the bank guarantee but also the loan to finance the works done and since the 2nd Defendant did not avail the said funds, the performance of the works could not have commenced as the payments of the professionals was dependent on the amount lent out by the 2nd Defendant.
18. It is the 1st Defendant’s argument that it was not a party to the subcontract between the Plaintiff and the 2nd Defendant and that it did not sign it. It states that the Certificate of payments and the demand letters were issued by the Plaintiff to the 2nd Defendant which were never copied to it and therefore it was not liable to make any payments and therefore it does not owe the Plaintiff any money.



19. Further, the 1st Defendant argues that since it was not a party to the suit it cannot be compelled to make the payments. It contends that pursuant to the main contract, it was the obligation of the 2nd Defendant to organize for labour and workmen for the civil works, as it did not participate in the appointment of the Plaintiff as subcontractors for the project.
20. On the issue of the amount claimed, it is the 1st Defendant's averment that it was a term of the main contract that the Certificate of payment should be prepared by the Architect upon receiving a Valuation Report prepared by the Quantity Surveyor under Clause 30.2 Part XXX of the main contract. It states that during the hearing, PW1 confirmed that it is the Plaintiff who prepared the Certificate of payment and not the Architect, which was not in compliance with the main contract.
21. The 1st Defendant goes on to state that during hearing, PW1 did not substantiate the amount claimed either through receipts, labour charges, insurance taken out for the workers but that the figure was just picked from the Bill of Quantities which was never filed to form part of the evidence. It is the 1st Defendant's contention that once the amount claimed has not been substantiated through the evidence, the same should be rejected, it be found that it is not liable to pay the same and the Plaintiff's suit is dismissed.

Analysis and determination.

22. Having listened to the evidence adduced before court by the parties here, I have carefully read through the pleadings, the said evidence and submissions filed and find the main issue for determination is whether the Plaintiff is entitled to the payment of Kshs.24,341,300 claimed.
23. During the hearing, PW1 testified that the Plaintiff commenced the works and erected the billboard showing it had started the works. However, having read through the evidence and pleadings filed, this Court agrees with the 1st Defendant that the Plaintiff has not substantiated how it arrived at the figure claimed as it neither presented nor produced any receipts, invoices or vouchers to this effect. Similarly, the Plaintiff has not shown when and how these works were conducted if at all. It is not enough to state that it erected the billboard indicating the professionals in the works and to show commencement of the said works on the site.
24. It is incumbent that one who pleads any fact bears the burden of proving the existence of the fact(s). At Paragraphs 13 and 14 of The *Halsbury's Laws of England, 4th Edition, Volume 17*, this is described as thus:-

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case.....”
24. Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides:-

[107].

 - (1) 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.
24. In view of the above provisions and description, the Burden of proof lay upon the Plaintiff to show that it is entitled to payment of the amount claimed which burden in its Plaintiff, it has not discharged.
24. On the issue of performance bond, Clause 11.1 of the main contract required provision of a performance bond of 10% of the contract price for the due performance of the contract. It was also a term of the subcontract that the performance bond ought to have been provided. It is common ground



that the performance bond was not provided in this case. The Plaintiff submits that it commenced the works following the letter dated 4th January, 2006 which authorized the commencement of works pending the perfection of the bank guarantee. The contents of the said letter from the 1st Defendant to the 2nd Defendant are as follows;-

“ We acknowledge receipt of your letter dated 30th Dec 2005 in regard to the above referenced subject.

We hereby authorise you to commence Construction work at our above Site as per terms and conditions of the Contractual Agreement dated 0112.2005 immediately pending the perfection of the guarantee.

Please sign on the duplicate copy of this letter your acceptance of the above instructions.”

24. A plain reading of this letter does not show that the requirement of a bank guarantee was completely done away with but rather it was simply an authorization to commence the works pending the provision of the bank guarantee. Therefore, the Court does not see how this letter varied the terms of the main contract with respect to the bank guarantee.
24. In this Court’s view, the performance bond or bank guarantee was a mandatory and unconditional requirement, in that it had to be provided for the due performance of the contract. The fact that it was not provided means that there was non- compliance of both the main contract and the subcontract.
24. In view of the above analysis of the evidence before court, the court finds that the Plaintiff has not discharged its burden of proof by failing to provide evidence of works done and or substantiate or justify its claim for the amount of Kshs.24,341,300/= as demanded. In the circumstances, this Court find the Plaintiff has failed to prove its case against the Defendants on a balance of probability and proceeds to dismiss its suit with costs to the Defendants.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS, 12TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Mungai counsel for Plaintiff

Mrs. Khayesi counsel for 1st Defendant

Court Assistant – Sakina/Mwenda

