

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMM NO. 213 OF 2016

MACHIRI LIMITED.....PLAINTIFF

-VERSUS-

CHINA WU YI COMPANY LIMITED.....DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....THIRD PARTY

JUDGMENT

1. The plaintiff vide a plaint dated 9th May 2016 instituted this suit seeking judgment against the defendant for -

- i) Kshs.139,471,809.70;
- ii) Interest at the rate of 24% p.a from 18th June 2014 until payment in full; and
- iii) Costs of this suit.

2. The plaintiff's case is that the defendant was the main contractor for the rehabilitation and upgrading of the Nairobi - Thika Road (A2) under Contract No. RD 0530 Lot 1; Nairobi City Arterial Connectors with the Kenya National Highways Authority (KeNHA). That by a Contract Agreement dated July 2011, the defendant sub-contracted the plaintiff to relocate water and sewerage facilities and undertook to pay the plaintiff based on Engineer's certification and payments received from KeNHA. The plaintiff averred that it executed and handed over the works which were certified by the Engineer on 18th June 2014 at Kshs.326,777,632.64. It further averred that prior to the said certification, the defendant had paid the plaintiff Kshs.177,277,232.00, thus after contractual deductions of

Kshs.18,909,569.75, the balance due to it from the defendant was Kshs.130,596,830.89.

3. The plaintiff contended that during the period of the contract, the defendant delayed payments due to it, and since the contract terms between the plaintiff and the defendant provided for interest on delayed payments, the Engineer also certified Kshs.8,874,978.88 as accrued interest for delayed payments, making the total certified sum Kshs.139,472,809.77. The plaintiff's contestation is that despite certification, the defendant failed to pay on grounds that the amount demanded was not included in the main contract's payment certificate. The plaintiff asserted that it was the defendant's obligation to ensure inclusion, and that the defendant admitted the principal debt and part of the interest in a letter dated 12th October 2015, but has still failed to settle it.
4. In opposition to the plaintiff's suit, the defendant filed a statement of defence dated 4th July 2016 which was subsequently amended on 5th May 2022. The defendant denied all the averments in the plaintiff's plaint. It averred that payment to the plaintiff was expressly conditional on certification by the Project Manager Nairobi Water & Sewerage Company and Consulting Engineering Services (CES) Limited, as Resident Engineers/Agents of the third party. The defendant asserted that it is only after certification that the plaintiff's claims could be included in the main contract's payment certificate. The defendant claimed that the plaintiff failed to complete the works within the agreed timeframe, submitted a draft final statement of accounts improperly without the Project Manager's certification and did not route its claim through the required channels. The defendant faulted the final statement of 18th June 2014 for Kshs.139,471,809.77 for being procedurally irregular.

5. The defendant contended that repeated requests were made, including a letter dated 29th December 2014 for the plaintiff to comply, but no properly certified final account was ever submitted. It was stated that since the plaintiff's claim was not certified or approved by the Project Manager/Resident Engineers at the time of the defendant's final statement, it was excluded from the final payment certificate issued to the third party. The defendant averred that it wrote to the third party on 19th April 2015 requesting that its final statement be processed excluding the plaintiff's uncertified claim, which should instead be dealt with separately upon proper approval. That subsequently, the Resident Engineers confirmed that the plaintiff's claim would have to be pursued directly with the third party. The defendant admitted prior payments made to the plaintiff and correspondence acknowledging part of the interest being Kshs.2,036,680.94 and USD 15,934.76, which sums it stated have always been available for collection.
6. The defendant vide an application dated 30th January 2017 and amended on 13th May 2022 sought for leave to issue a Third Party Notice against National Highways Authority (KENHA) which application was allowed in a Ruling delivered on 28th January 2020.
7. The third party in opposition to this suit filed a statement of defence dated 17th July 2017, which was subsequently amended on 12th April 2022. The third party denied the allegations contained in the Third Party Notice and averred that the defendant is not entitled to indemnity, contribution, or costs. It contended that there was no privity of contract between it and the plaintiff since the plaintiff's claim is based on a July 2011 sub-contract between the plaintiff and the defendant, to which it was a stranger. It asserted that its only contract was with the Ministry of Roads dated 14th November 2008 for

the Nairobi - Thika Road Lot 1: Nairobi City Arterial Connectors Contract No RD 0530.

8. The third party stated that it fully performed its obligations under the 2008 contract. It further stated that pursuant to Clause 60.14, its liability to the defendant was extinguished once the defendant submitted its final statement without including the plaintiff's claim. It contended that for the said reason, the defendant has no cause of action against it. The third party asserted that even if indemnity was available, the defendant would first need to show that it actually paid the plaintiff's claim, failure to which no indemnity or contribution can arise. It averred that the defendant submitted its final statement on 19th April 2015, confirmed by the Engineer APEC Limited.
9. The third party referred to Clause 60.11 of the 2008 contract which required the defendant to include all claims in the draft and final statements, subject to the Engineer's verification and dispute resolution under Clause 67 of the contract. The third party emphasized that since the plaintiff's claim was not included in the defendant's final statement, it is barred under Clause 60.14 of the 2008 contract.
10. The above notwithstanding, the third party asserted that any claim for indemnity or contribution should have been referred to the Dispute Review Expert (DRE) and thereafter to arbitration under Clause 67 of the 2008 contract and UNCITRAL Rules. In addition, the third party stated that the defendant's claim is barred by limitation as the plaintiff's sum was certified on 18th June 2014. It further stated that under Section 67 of the Kenya Roads Act, 2007, the claim herein is also improperly before Court.
11. This matter proceeded to hearing where the plaintiff, the defendant and the third party each called one witness in support of their cases.

PLAINTIFF'S CASE.

12. Engineer James Macharia, the Managing Director of the plaintiff testified as PW1. He adopted his witness statement dated 8th March 2019 as his evidence-in-chief and produced the documents in the plaintiff's list and bundle of documents dated 8th March 2019 as plaintiff exhibits No. 1 to 16, and the supplementary list and bundle of documents dated 9th May 2022 as plaintiff exhibits No. 17 & 18. He testified that the defendant was the main contractor for the Nairobi-Thika Road Lot 1 project (Contract No. RD 0530) and that the plaintiff was a nominated sub-contractor for the relocation of water and sewerage facilities under Quotation No. KeNHA/TW&S/Pk-2/2010-2011, pursuant to a Letter of Award issued by Consulting Engineering Services (India) Private Limited in association with APEC Ltd.

13. PW1 stated that under a contract executed between the parties in 2011, and later amended by an Addendum, the defendant engaged the plaintiff to relocate water and sewerage facilities along Thika Road. He further stated that the defendant undertook to pay the plaintiff based on the Engineer's certification and funds received from the third party. PW1 testified that the plaintiff completed and handed over the works, which were certified by the Engineer at Kshs.326,777,632.64 on 18th June 2014. He indicated that by then, the defendant had paid Kshs.177,277,232.00, and the Engineer allowed a contractual deduction of Kshs.18,909,569.75. PW1 asserted that after deductions, the Engineer certified the amount due to the plaintiff at Kshs.130,596,830.89 as at 18th June 2014.

14. He testified that the contract provided for interest on delayed payments and since the defendant had delayed the payments, the Engineer computed and certified interest at Kshs.8,874,978.88, bringing the total certified sum to

Kshs.139,471,809.77. He added that interim certificates had previously been processed by the Resident Engineer, Eng. E.M. Mugo, and approved by the overall Engineer. PW1's evidence was that the final certificate was first submitted on 29th April 2014, and returned by the defendant on 28th May 2014 for lack of the Resident Engineer's signature, and it was resubmitted on 11th June 2014 after approval by the Resident Engineer, and finally approved by the overall Engineer and forwarded to the defendant on 18th June 2014.

15. Engineer Macharia testified that despite certification and repeated demands, the defendant failed to pay the sums due. He stated that the defendant's allegation that approval by the Technical Director, Nairobi Water and Sewerage Company was required, was unfounded, as all prior payments had been processed through the Resident Engineer acting on his behalf. He further testified that by a letter dated 12th October 2015, the defendant admitted owing the principal sum and part of the interest, and subsequently made a part-payment of USD 13,345.00 and Kshs.1,731,179.00 on 6th March 2017, which the plaintiff accepted. PW1 maintained that under the contract between the plaintiff and the defendant, the plaintiff was entitled to interest on delayed payments at a commercial rate of 24% p.a., as approved by the Engineer, and that this rate ought to apply to the certified sum from 18th June 2014 until full payment.

16. In cross-examination by Prof. Mumma (SC), learned Counsel for the third party, PW1 stated that Consulting Engineering Services (India) Limited supervised the Thika Superhighway project. He indicated that Clause 42.2 of the contract between the plaintiff and the defendant provided for interest, requiring the Project Manager to check the contractor's monthly statement and certify the amount payable. He confirmed that the contract defined the

Project Manager as the Technical Director, Nairobi City Water & Sewerage Company. PW1 referred to page 59 of the plaintiff's bundle of documents, and pointed out a signature at the bottom of the certificate by the said Project Manager. PW1 further explained that next to the Project Manager's signature on the certificate, it is noted "*as per the letter dated 11th June 2014.*"

17. He was referred to a letter at page 108 of the plaintiff's bundle, which addressed interest on delayed payments and indicated that matters relating to additional works were handled directly by the client through the main contractor, China Wu Yi. He stated that in computing the interest due, reference ought to be made to that letter, and maintained that the plaintiff's claim for interest runs from 14th June 2014 as reflected in the Engineer's letter dated 18th June 2014.

18. In cross-examination by Mr. Ngatia (SC), learned Counsel for the defendant, Engineer Macharia testified that the plaintiff was appointed as a sub-contractor by the third party through the Engineer, but payment was to be made by the main contractor, China Wu Yi Company Limited, for works performed for the third party. He referred to the letter at page 108 of the plaintiff's bundle of documents, which specifically addressed the plaintiff's claim on interest and deductions and confirmed that a Report had been duly evaluated for payment.

19. PW1 outlined the payment process, being that the sub-contractor would submit an application to the supervising Engineer, who would issue a certificate to the main contractor's Engineer; the main contractor would then include the sub-contractor's payment in its request for payment, and the supervising Engineer would include the plaintiff's payment.

20.PW1 referred again to the letter dated 18th June 2014 at page 56 of the plaintiff's bundle of documents, confirming that it certified Kshs.139,471,809.77 as due to the plaintiff, which sum remains unpaid. He stated that the defendant has never disputed owing the plaintiff Kshs.130,000,000/= and that Judgment has since been entered for the plaintiff in the sum of Kshs.139,471,809.71. He testified that the main contractor was to receive funds from the third party to pay the sub-contractor, as they both served the same client. He added that Nairobi Water & Sewerage Company acted as the third party's agent, and by a letter dated 24th July 2020, the defendant confirmed that the plaintiff's payment had been approved by Nairobi Water & Sewerage Company, to avoid escalation of interest as per the letter dated 18th June 2014.

21.PW1 testified that under the contract between the plaintiff and the defendant, the defendant could not pay the plaintiff until it had received funds from the third party. He maintained that the certified sum of Kshs.139,471,809.71 was a shared obligation, in that Kshs.8,874,978.88 was owed by the defendant, while Kshs.130,596,830.89 was owed by the third party. He stated that Nairobi Water & Sewerage Company and APEC Limited, and not the defendant, were to certify completeness of the plaintiff's work.

22.In re-examination, PW1 testified that Addendum No. 1 found at page 8 of the plaintiff's bundle of documents, provided under Clause 2 of the General Conditions of Contract that the plaintiff's payments were to be certified by the Engineer and received from the third party. He explained that the Engineer was APEC Limited, which prepared the letter dated 18th June 2014, and that Mr. Mugo of Nairobi Water & Sewerage Company certified the plaintiff's payment application at page 59 of the plaintiff's bundle of documents, which was also signed by the overall Engineer. He maintained

that the plaintiff had a contract with the defendant, not directly with the third party, whose involvement was by implication. He asserted that the defendant was under an obligation to pay the plaintiff upon receipt of funds from the third party.

DEFENDANT'S CASE.

23.Mr. Luo Zicheng, the defendant's Deputy General Manager testified as DW1.

His evidence was that the plaintiff was appointed by the third party to relocate water and sewerage facilities in the Nairobi - Thika Highway Project Lot 1 (Haile Selassie Avenue to Pangani Roundabout), while the defendant was the main contractor. He stated that payment to the plaintiff was the responsibility of the third party, based on certificates issued by the Engineer, Consulting Engineering Services (India) Private Limited in association with APEC Limited. He testified that once the Engineer certified satisfactory work, he would forward the certificate to the defendant, which would then prepare an interim payment certificate and resubmit it to the Engineer for evaluation and verification before it was sent to the third party. The third party would thereafter pay the defendant, who would in turn pay the plaintiff.

24.Referring to the final statement dated 18th June 2014, DW1 testified that Kshs.130,596,830.89 was payable to the plaintiff by the third party, while Kshs.8,800,000/= was payable by the defendant. He maintained that the defendant had already settled its portion, leaving the outstanding sum of Kshs.130,596,830.89, which remains unresolved. He confirmed that the Resident Engineer verified the total obligations at Kshs.139,471,809.77 as due from the third party to both the contractor and the sub-contractor. DW1 testified that the letter dated 18th June 2014 was a formal statement showing

the balance of Kshs.130,596,830.89 due from the third party to the contractor, being the plaintiff. He indicated that the letter further showed that Kshs.8,874,978.88 was owed by the defendant to the plaintiff as interest for delayed payment of earlier certificates under Clause 43.1 of the sub-contract.

25.Mr. Zicheng stated that the final value of works was Kshs.326,777,632.64, from which the Engineer deducted Kshs.177,277,232.00 already paid to the plaintiff, leaving Kshs.149,500,400.64. He testified that a further deduction of Kshs.18,903,569.75, being sums due to the employer under the sub-contract (excluding liquidated damages) was effected, leaving a balance of Kshs.130,596,830.89. DW1 added that although the letter dated 18th June 2014 was copied to the third party and the Chief Resident Engineer, Lot 1, Eng. H. Ramesh, it was never responded to. He maintained that the defendant cannot settle the sum of Kshs.130,596,830.89 and urged the Court to determine who is liable for the debt.

26.In cross-examination by Prof. Mumma (SC), learned Counsel for the third party, DW1 testified that the defendant had a contract with the third party dated 14th November 2008, which allowed for nominated sub-contractors. That pursuant to the said contract, the defendant entered into a sub-contract with the plaintiff on 25th July 2011 for relocation of sewerage works. He testified that Addendum No. 1 introduced two Clauses, sub-clause 11 on employer's risks and sub-clause 3 which provided that such risks shall be borne by Athi Water Services Board. He stated that Clause 42 required the contractor to submit monthly statements to the Project Manager, while sub-clause 42.7 (introduced by the addendum) provided that the plaintiff's payments would only be made upon certification by the Engineer and receipt of funds from the third party. DW1 testified that in order for the defendant to

be paid, it had to comply with the seven steps under Clause 42 and the additional sub-clause 42.7.

27. He referred to Clause 1.22 of the contract which defined the Project Manager as the person named in the contract data, or any replacement appointed by the employer, responsible for supervising works and administering the contract. He indicated that Clause 1.6 identified the employer as the defendant and the Project Manager as the Technical Director, Nairobi City Water & Sewerage Company. He explained that Clause 42 required the Project Manager to certify the value of the work done, while the Project Engineer's role arose only at the final stage of the process. He observed that the letter dated 18th June 2014 was authored by Engineer P.K. Sateesh of Consulting Engineering Services (India) Private Limited, the Resident Engineer, rather than the Technical Director of Nairobi City Water & Sewerage Company. He indicated that Engineer Sateesh was responsible for supervising the road works, not the relocation of water and sewerage pipes, and would therefore act only after the Project Manager had performed his role.

28. DW1 referred to a letter at page 46 of the third party's documents in which the defendant informed Consulting Engineering Services (India) Private Limited in association with APEC Limited that delays by the Project Manager, Nairobi City Water & Sewerage Company, had hindered approval of the plaintiff's final statement, thereby impeding the Main Contractor and Engineer in discharging obligations to the employer. He stated that as at 19th April 2015, the plaintiff's final account remained unapproved and was redirected to the Resident Engineer (Relocation) for scrutiny and recommendation for approval of the same by the Engineer and employer. He indicated that the said letter which also referred to the 18th June 2014 final statement, further requested that under sub-clause 60.11 of the contract, the

final account be finalized without the alleged claim amount of the sub-contractor, to be dealt with separately in accordance with the provisions of the agreement, and upon the Project Manager's recommendation. He emphasized that the Project Manager had not certified the final account.

29.DW1 also referred to a letter dated 21st April 2015 at page 48 of the third party's documents, from Consulting Engineering Services (India) Private Limited to the third party's General Manager (Design & Construction), recommending final payment. He testified that the said letter was also copied to the Team Leader and the Chief Resident Engineer, informing everyone that the final payment certificate had been issued. He explained that under Clause 57 of the sub-contract, the contractor was required to submit a detailed account of the total amount payable before expiry of the defects liability period to the Project Manager, he explained that the letter at page 53 of the third party's documents stated that the plaintiff's final account had not been properly received, as it was submitted to the defendant directly rather than through the required channel, and it included only EOT-related costs amounting to Kshs.125,633,429.02, with no work executed.

30.He testified that the letter further indicated that under sub-clause 60.11 of COPA, the defendant's final account had been settled without the plaintiff's alleged claim, which could be addressed separately in accordance with the provisions of the sub-contract and upon the Project Manager's recommendation. That consequently, the Resident Engineer recommended payment to the defendant without including the plaintiff's final account. Mr. Zicheng testified that Clause 60.10 of the main contract provided for Takeover Certificates, while Clause 60.11 required the contractor to submit a draft final statement to the Engineer within 56 days after issuance of the defects liability certificate under sub-clause 62.1. He stated that the Resident

Engineer issued a discharge confirming the final statement. Referring to Clause 60.14, DW1 noted that the employer would not be liable for any claims unless included in the final statement. He added that by a letter dated 12th June 2014, the plaintiff re-submitted its updated outstanding amount duly signed by the Resident Engineer, Relocation of Services, for the defendant's action.

31.DW1 referred to page 29 of the plaintiff's bundle where Consulting Engineering Services (India) Private Limited, in association with APEC Limited, informed the plaintiff of the Award of Contract valued at Kshs.166,576,254.87, while at page 59 the amount certified as at 30th April 2014 was Kshs.177,277,232.00. He testified that the defendant was not obliged to include the plaintiff's final account since the plaintiff had not complied with the sub-contract procedure, which remained unfulfilled at the time of his testimony. He confirmed knowledge of the consent entered into on 21st May 2019 and stated that by a letter dated 24th July 2020, the defendant informed the third party that there was no dispute on the principal amount due to the plaintiff, leading to a Judgment for Kshs.139,471,809.77. He added that delays in payment arose from delays in approvals by the Technical Director, Nairobi Water & Sewerage Services.

32.During cross-examination by Mr. Njuguna, learned Counsel for the plaintiff, DW1 stated that certification of payments was done by Consulting Engineering Services (India) Private Limited in association with APEC Limited, after which the defendant incorporated the certified payments as its own. He explained that the plaintiff applied for payment, which upon certification by the Engineer, became a payment certificate. He added that Addendum No. 1 amended Clause 43 by introducing Clause 43.7,

designating the plaintiff as the contractor and the said Engineers as certifiers, whereas before the amendment, certification was by the Project Manager.

33.He clarified that applications for payment were addressed to the appointed Project Engineer. DW1 reiterated that Clause 42.7 of the sub-contract, introduced by Addendum No. 1, provided that payments to the sub-contractor would be based on certificates issued by the Resident Engineer as the representative of the third party, and received from the third party. Mr. Zicheng confirmed that the Addendum was signed by the Resident Engineer and the defendant's Project Manager. He explained that while initially certificates were issued by the Project Manager, the Addendum transferred the said role to the Resident Engineer, therefore the letter dated 18th June 2014 was consistent with the Addendum and approved the plaintiff's final statement.

34.He maintained that the defendant remitted Kshs.8,874,978.88 due to the plaintiff on 19th September 2023. DW1 stated that under Clause 43.1 of the sub-contract, payments were due within 28 days of certification, meaning that the plaintiff's final account certified on 18th June 2014 ought to have been paid by 16th July 2014, failure to which interest would accrue at prevailing commercial rates. He confirmed that this applied to the Kshs.8,874,978.88 due from the defendant. He maintained that the Kshs.130,596,830.89 was payable to the plaintiff only upon receipt from the third party. Referring to Engineer Cherono's statement dated 16th May 2022, DW1 acknowledged the sum was payable but could not confirm if the defendant received it, adding that if paid, the defendant would have no claim against the third party.

35. In re-examination, DW1 confirmed that the letter dated 18th June 2014 specified amounts due to the plaintiff from both the defendant and the third party. He stated that the defendant did not deny its indebtedness and had paid Kshs.8,874,078.88 to the plaintiff. Referring to paragraph 17 of Engineer Cherono's statement, he noted mention of Kshs.999,123,390.00 reimbursed for relocation of utilities executed during DLP under BOQ item No. 1.15, but stated that he was unaware if the Kshs.130,596,830.89 formed part of that sum.

THIRD PARTY'S CASE

36. Mr. Daniel Sacho Cherono, the third party's Director of Maintenance testified as DW2. He adopted his witness statement dated 16th May 2022 as his evidence in chief and produced the documents on the third party's bundle of documents dated 12th May 2022 as the third party's exhibit Nos. 1 to 5. He testified that the Chief Resident Engineer nominated by the third party directly supervised the project. He added that since some utilities along the Nairobi - Thika Road required removal under the supervision of Nairobi Water & Sewerage Company, the company was requested to nominate a Project Manager to certify and supervise the relocation of those works. He explained that upon certification by the Nairobi Water & Sewerage Company, the defendant was to pay the plaintiff, and thereafter seek reimbursement from the third party, subject to certification by the third party Consulting Engineers.

37. Mr. Cherono stated that the plaintiff's claim of Kshs.125,633,429.03 in the final payment certificate lacked supporting documents and certification from the Nairobi Water & Sewerage Company Project Manager, hence payment could not be effected. He referred to the defendant's letter of 19th April 2015

to the Engineer submitting the defendant's final statement to the Consulting Engineer, excluding the plaintiff's claim of Kshs.125,633,429.02 due to lack of approval by the Nairobi Water & Sewerage Company. He testified that in the same letter, the defendant requested that the final statement be finalized without the plaintiff's claim, citing unconscionable delays and asked that the claim be dealt with separately under the sub-contract, upon recommendation of the Nairobi Water & Sewerage Company Project Manager.

38.Mr. Cherono claimed that from the foregoing, the third party understood that the defendant relinquished reimbursement rights for the plaintiff's claim and asked the third party to proceed with final payments without further claims, which was confirmed in the Engineer's letter of 21st April 2015 to the third party, which stated that the defendant's final statement had been finalized without the sub-contractor's claim, which could be dealt with separately under the sub-contract upon the Nairobi Water & Sewerage Company's recommendation. He stated that all payments under certificate No. 32 were fully made and once the final certificate was signed by the Resident Engineer, no further payments were due as the third party's liability was extinguished in accordance with Clause 60.14 of the main contract. He asserted that there was no outstanding claim in the final statement as the defendant opted to exclude the plaintiff's sums.

39.Mr. Cherono emphasized that since the third party was not a party to the sub-contract, it bore no role in settling disputes arising therefrom. He referred to the Engineer's letter of 18th June 2021 confirming that Kshs.130,596,830.89 for relocation of services was payable under BOQ 1.15. DW2 testified that the aforesaid sum was paid, yet the defendant now wrongly alleges otherwise. He cited the Engineer's letter of 21st April 2015 confirming reimbursement of Kshs.991,123,390 for relocation of utilities under BOQ

1.15. 18. He added that under Clause 60.11 of the contract, disputes over the final statement were to be referred to the Dispute Review Expert and arbitration under UNCITRAL Rules.

40. He asserted that the defendant caused the delay in settling the plaintiff's claim and should bear any interest payable under the sub-contract. He contended that there is no triable issue on the third party's liability, as the plaintiff's claim did not arise from any act or omission by the third party.

41. In cross-examination by Mr. Njuguna, learned Counsel for the plaintiff, DW2 confirmed that the third party was not a signatory to the contract between the defendant and the plaintiff. He stated that the defendant's work for the third party was satisfactorily completed, part of which had been sub-contracted to the plaintiff. He noted that the Project Manager in the plaintiff - defendant contract was jointly appointed by those parties. He acknowledged that the third party paid several certificates over time. Referring to page 95 of the plaintiff's bundle of documents, Mr. Cherono identified a letter from Engineer Ephantus Mugo of the Nairobi City Water & Sewerage Company Limited addressed to the Chief Resident Engineer. He also confirmed that the plaintiff's Interim Certificate No. 1 was forwarded for processing and payment, and that at page 98 of the plaintiff's bundle of documents, the plaintiff's quotation was signed and certified by the Resident Engineer.

42. DW2 explained that payment documents would first be submitted to the Project Manager of the Nairobi City Water & Sewerage Company, then forwarded by the defendant for processing. He explained that documents, like the one at page 98 of the plaintiff's bundle, had to be certified by APEC Limited before payment. He confirmed that all certificates submitted by the defendant for payment were duly paid. He further affirmed that the letter at

page 56 of the plaintiff's bundle of documents, written by Consulting Engineering Services (India) Private Limited in association with APEC Limited to the defendant's Project Manager, constituted a final statement. Mr. Cheronno referred to page 59 of the plaintiff's documents showing a certificate dated 11th June 2014 signed by the plaintiff, the Utility Engineer, Resident Engineer (Roads), and Resident Engineer (Water & Sewerage), and to page 60 of the said documents containing a letter of the same date stating that Kshs.15,129,881.39 should be treated as liabilities to the contractor.

43.He confirmed that certified applications for payment were forwarded by the Project Manager to APEC. He noted a pending claim of Kshs.139,000,000/= from the plaintiff which lacked supporting documents, and stated that since the final statement had not been submitted, the claim could not be paid. He emphasized that payment required certification by the Project Manager, explaining that a payment request became a certificate once signed by APEC. He added that if such a certificate existed, interest would accrue on unpaid sums after 28 days from the date of each certificate at the prevailing rate of interest for commercial borrowing.

44.In cross-examination by Mr. Ngatia (SC), learned Counsel for the defendant, Mr. Cheronno confirmed that the plaintiff was appointed two and a half years after the defendant's contract with the third party. He stated that specialized sub-contract works, including those by the plaintiff, were to be paid by the third party but only after certification by APEC, with payments being made through the main contractor. Referring to Clause 42.7 of the Agreement introduced by Addendum No. 1, he noted that sub-contractor payments depended on certification by the Engineer and receipt of funds from the third party. He cited APEC's letter dated 18th June 2014 addressed to the defendant, which certified Kshs.326,777,632.64 due under the contract, less

Kshs.177,277,232.00 already paid, less the amount that the defendant was entitled to under the contract, excluding liquidated damages, leaving Kshs.130,596,830.89 as being due from the client to the contractor, plus Kshs.8,874,978.88 in interest for delayed payments under Clause 43.1.

45.DW2 stated that interest on late payment would only accrue from the defendant to the plaintiff after funds had been remitted to the defendant. He confirmed that payment of liabilities legitimately certified has been made. He acknowledged that Nairobi Water & Sewerage Services were agents of the third party and the Consulting Engineers, noting that any failure by such agents would be addressed under the contract. He added that Nairobi Water & Sewerage Services had neither explained why the plaintiff's claim was not approved, nor had the third party sought clarification of the same from either Nairobi Water & Sewerage services or the Consulting Engineers. Referring to page 54 of the third party's documents, he maintained that the plaintiff's submission for payment lacked supporting records, hence it was not approved for payment.

46.He testified that the sub-contract value was Kshs.326,777,632.64, of which the third party had paid Kshs.177,277,232.00, leaving a balance of Kshs.130,596,830.89 identified in the letter of 18th June 2014 as being payable to the plaintiff through the defendant. Mr. Cherono stated that while the sum was reflected in the final certificate, a letter of 21st April 2015 from the Consulting Engineer noted that the plaintiff's final account had not been received from the Project Manager, Nairobi City Water & Sewerage Company, and that a nominated sub-contractor's claim would ultimately become a claim to the third party. He explained that the defendant requested its own payment and that the plaintiff's payment be dealt with later by the third party, upon certification by the Project Manager.

47. He confirmed that although Kshs.242,072,507.69 was paid to the defendant after submission of the defendant's final statement, Kshs.130,596,830.89 was withheld due to lack of certification of the plaintiff's works, which needed analysis and verification by the Nairobi City Water & Sewerage Company. DW2 testified that under Clause 42.7 introduced by Addendum No. 1, certification for payment was to be done by the Consulting Engineer, and the defendant could only pay the plaintiff upon receiving funds from the third party. He stated that there was no communication showing that the plaintiff's claim had been adjudicated by the Nairobi City Water & Sewerage Company. He further noted that Clause 24 of the sub-contract provided for a dispute resolution mechanism between the plaintiff and the Project Manager, but the third party had not invoked this process despite being aware of it.

48. In re-examination, DW2 testified that Clauses 24 and 25 of the sub-contract should have been invoked by the plaintiff and the defendant since the third party was not a party to the sub-contract. He stated that he was unaware of any adjudication between the plaintiff and the defendant. He maintained that the plaintiff's claim remained an alleged claim as it had not been certified, emphasizing that the sub-contract required measurement, verification, and clarification by the Nairobi City Water & Sewerage Company. He added that the third party could not pay without proper certification and supporting measurement sheets.

49. DW2 stated that the Nairobi City Water & Sewerage Company was not the third party's agent but was appointed to service works under the sub-contract, while the Consulting Engineer was the third party's agent. He maintained that the third party's only obligation under the plaintiff - defendant contract was to pay certified claims. He confirmed that the letter

of 18th June 2014 preceded the defendant's letter of 19th April 2015 and it was correspondence culminating in the final payment certificate. He reiterated that the said certificate was submitted on 21st April 2015, which certificate the third party used to pay for certified works. Referring to Clause 60.13, he asserted that issuance of the final certificate marked finality of payments, thus the plaintiff's claim of Kshs.130,000,000/= is not due or payable.

50. On being examined by the Court, Mr. Cherono stated that any payment not done in accordance with the final certificate would be subject to arbitration.

51. At the close of the third party's case, the Court gave directions for filing of written submissions. The plaintiff's submissions were filed on 9th January 2024 & 15th July 2024 by the law firm of Njuguna & Partners Advocates, the defendant's submissions were filed by the law firm of Ngatia & Associates Advocates on 2nd September 2024, and the third party's submissions were filed by the law firm of Prof. Albert Mumma & Company Advocates on 18th September 2024.

52. Mr. Njuguna, learned Counsel for the plaintiff relied on Clause 43.1 of the sub-contract requiring certified sums to be paid within 28 days, failure to which interest would accrue at prevailing commercial borrowing rates. He stated that the Engineer certified Kshs.139,471,809.70 on 18th June 2014 as due to the plaintiff, comprising Kshs.130,596,830.89 for relocation works and Kshs.8,874,978.88 interest on delayed payments for previous certificates, and moreover, the issue of certification is not disputed. He asserted that the said sums fell due on 16th July 2014 but was not paid, making the plaintiff entitled to interest on the aforesaid sums from that date until payment in full.

53. Counsel submitted that the plaintiff initially claimed 24% p.a., and relied on the Central Bank weighted average lending rates for the years 2014 - 2024 showing an average of 16.4% in 2014. Mr. Njuguna urged this Court to add a 6% margin being the commercial bank margin, making the applicable rate 22.4% in 2014. In the alternative, Counsel invited this Court to award interest on the sums due at the current prevailing rate of 22% p.a. Mr. Njuguna argued that the plaintiff's claim is solely against the defendant, as there is no privity of contract with the third party.

54. He submitted that the third party's contention that sums were uncertified is baseless since certification by the Engineer on 18th June 2014 is undisputed, duly signed, and confirmed by the defendant's witness. Mr. Njuguna stated that the third-party's witness admitted lack of involvement in contract administration, relied on hearsay, and gave contradictory evidence on the issue of payment of the claimed sum. He further stated that no proof was tendered that certification by the Project Manager was required under the defendant - third party contract. Mr. Njuguna maintained that it is only the defendant that is liable.

55. Mr. Ngatia (SC), learned Counsel for the defendant submitted that the third party, as a beneficiary and employer, appointed Consulting Engineering Services (India) Private Limited as Resident Engineer to certify determinations from the Project Manager. He stated that the plaintiff, a nominated sub-contractor, was bound to the tendered scope under the Services Contract and Addendum within the defendant's Construction Agreement. To this end, Senior Counsel relied on the Court of Appeal case of **Zenith Steel Fabricators Limited v Continental Builders Limited & Eltex (EPZ) Limited** [2018] KECA 215 (KLR). He submitted that the Addendum of 25th July 2011, executed by all parties, created clear privity of

contract and estate, rendering the plaintiff's denial of privity of contract with the third party misconceived.

56. He argued that the Addendum required sub-contractor payments to be based on Engineer-certified sums received from the third party, with the Nairobi Water & Sewerage Company Limited being the Project Manager, determining the value of work for certification by Consulting Engineering Services (India) Private Limited. Mr. Ngatia (SC) contended that since the plaintiff's claim was neither determined by the Project Manager nor paid to the defendant, no sum is due under the contract and Addendum. He added that paying the disputed amount would nearly double the tender sum of Kshs.166,576,254.87, reflecting inflationary trends in infrastructure projects. Counsel submitted that since the plaintiff failed to follow contractual procedure and the final certificate excluded its sums, any claim lies against the third party. Further, he submitted that as a beneficiary of the works, the third party bears the payment obligation, thus liability if any, rests on the third party, entitling the defendant to indemnity.

57. Prof. Albert Mumma (SC), learned Counsel for the third party relied on the Court of Appeal decisions in **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another** [2015] KECA 784 (KLR) and **Aineah Liluyani Njirah v Agha Khan Health Services** [2013] KECA 481 (KLR), and submitted that only contracting parties can enforce obligations. He argued that the suit arises from a sub-contract solely between the plaintiff and the defendant, with no evidence linking it to the third party. He contended that any omissions or commissions by the defendant cannot transfer liability to the third party. He maintained that the plaintiff has no claim or reliefs against the third party, and references in Addendum No. 1 to

the relationship between the defendant and the third party cannot be invoked to force the third party to indemnify the defendant.

58. Prof. Mumma (SC) submitted that the plaintiff's claim is baseless as all duly certified sums were fully paid to the defendant, therefore a claim for interest does not arise because there is no validly certified claim which can be paid. He noted that no evidence was presented to show that the third party failed to discharge its obligations under its Agreement with the defendant, and that made it impossible for the defendant to discharge its obligations to the plaintiff under their separate Agreement. He submitted that evidence had been led confirming that the defendant expressly authorized the third party to finalize the accounts excluding the plaintiff's claim. He asserted that indemnity of the defendant by the third party is untenable.

59. In a rejoinder, Mr. Njuguna submitted that the Consent Judgment of 21st May 2019, was meant to settle the principal amount, leaving only interest and costs in issue. He stated that the defendant's attempt to revisit liability is barred, as a Court cannot sit on appeal over its own Consent Judgment. He contended that the plaintiff has no claim against the third party, and that the third party was joined to the suit by the defendant via an Amended Notice, which Notice never disputed the debt but only alleged non-remittance of the same by the third party. He argued that the defendant's witness confirmed the sums claimed by the plaintiff were duly certified, including Kshs.130,596,830.89 payable by the third party to the defendant for onward transmission to the plaintiff. He asserted that the plaintiff relied on the final certificate found at page 59 of its bundle of documents, signed and forwarded by the Resident Engineer, who had signed prior settled certificates.

60. Mr. Njuguna relied on the Court of Appeal case of **Zenith Steel Fabricators Limited v Continental Builders Limited & Eltex (EPZ) Limited** (supra), and asserted that despite nomination, no privity arises between the employer and the sub-contractor, and the sub-contractor's recourse remains against the contractor, and that the plaintiff has no claim against the third party. Counsel contended that the third party's evidence on certification is hearsay and that its witness contradicted himself by admitting the sums were paid yet denying it in cross-examination, rendering him unreliable.

ANALYSIS AND DETERMINATION.

61. I have considered and analyzed the evidence adduced by the parties' witnesses in line with the pleadings filed. I have also considered the written submissions filed by Counsel for the parties. The issues that arise for determination are: -

- i) Whether the plaintiff proved entitlement to the claimed sum;**
- ii) Whether the defendant is liable to the plaintiff, or whether liability lies with the third party;**
- iii) Whether the third party bears liability to the plaintiff, directly or through indemnity to the defendant.**

Whether the plaintiff proved entitlement to the claimed sum.

62. The question of whether or not the plaintiff is entitled to the principal sum of Kshs.139,471,809.70 is no longer open for determination by this Court. This is because the plaintiff and the defendant entered into a Consent dated 21st May 2019 for Judgment to be entered in favour of the plaintiff as against the

defendant in the sum of Kshs.139,471,809.70. It is noted that the defendant has in several instances tried to challenge the validity of the aforesaid Consent but this Court on 17th October 2024 addressed itself as hereunder –

...I have gone through the said submissions which clearly indicate that the outstanding issue is on costs and interest as a consent was entered into between the plaintiff and the defendant. Mr. Githiri has stated that an attempt to set aside the said consent was dismissed vide a ruling rendered on 4th February 2022 by Judge Mabeya. As it is, the consent still stands up to now and therefore what Judge Nzioka said in regard to the consent in the year 2020 cannot be applicable since the said consent was not set aside...

63. In the premise, since there is already a Consent Judgment in place in regard to the principal sum, this Court will determine whether the plaintiff is entitled to the claim on interest. In the contract between the plaintiff and the defendant dated 25th July 2011 (*hereinafter referred to as sub-contract*), payment of interest is provided for under Clause 43.1 which states that –

Payments shall be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amounts certified by the Project Manager within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made.

64. It is not in contest and from the first paragraph of the sub-contract, the defendant is described as the employer while the plaintiff is described as the contractor. This means that pursuant to Clause 43.1 of the sub-contract reproduced hereinabove, the defendant was bound to pay the plaintiff within 28 days of the Project Manager issuing a payment certificate, failure to which the certified sum would attract interest at the prevailing commercial borrowing rate.

65. In the circumstances, in order to determine whether the plaintiff is entitled to the claim on interest, this Court has to ascertain whether or not the plaintiff's claim for Kshs.139,471,809.70 was certified by the Project Manager. The plaintiff's case is that a certificate of its payment was issued by the overall Engineer vide a letter dated 18th June 2014. The plaintiff's witness testified that the plaintiff completed its work and had its payment certified on 18th June 2014 at Kshs.326,777,632.64 by the Consulting Engineering Services (India) Private Limited in association with APEC Limited. He contended that in accordance with the sub-contract and Addendum No. 1, payment was to be made based on the Engineer's certification and funds received from the third party. He asserted that after deductions of payments already made to the plaintiff, a contractual deduction of Kshs.18,909,569.75, the amount due to the plaintiff was Kshs.130,596,830.89 and a further sum of Kshs.8,874,978.88 being interest on other delayed payments, making the total sum due to the plaintiff, Kshs.139,471,809.77.

66. The defendant on the other hand contended that the plaintiff's final account was not approved by the Project Manager Nairobi Water & Sewerage Company as required under the main contract. The defendant's witness relied on a letter dated 19th April 2015 from the defendant to the consulting Engineers which requested for the defendant's final account to be finalized without the

plaintiff's claim in line with the provisions of Clause 60.11 of the contract between the defendant and the third party, and for the plaintiff's claim to be dealt with separately in accordance with the provisions of the Agreement and upon the Project Manager's recommendation. DW1 also relied on the letter dated 21st April 2015 from the consulting Engineers to the third party, recommending final payment as per the defendant's request. The said witness maintained that the plaintiff failed to follow sub-contract procedures for submitting its final account.

67. The third party's witness testified that the third party was not a party to the contract between the plaintiff and the defendant which means that Clause 43.1 of the sub-contract did not apply to the third party.

68. Clause 42 of the sub-contract provides for payment certificates. Upon perusal of Clause 42.2, it is evident that it required the Project Manager to certify the amount to be paid to the plaintiff. Further, Clause 42.7 introduced by Addendum No. 1 provided that payment to the sub-contractor (the plaintiff herein) would be based on payments certified by the Engineer and received from the third party. The plaintiff maintains that its payment request was duly certified in accordance with the procedure provided for under the sub-contract.

69. Upon perusal of the plaintiff's bundle of documents, it is evident that there was correspondence preceding the final statement of account dated 18th June 2014.

70. The final certificate was first submitted on 29th April 2014, it was however returned to the plaintiff vide a letter dated 28th May 2014 on grounds that it was not signed by the Resident Engineer, thus it could not be taken as certified works. The defendant then recommended to the plaintiff to forward

the certificate to the Resident Engineer for the works for certification for onward transmission to the defendant. From the face of the letter, it is evident that it was copied to the Nairobi City Water & Sewerage Company Limited, to the attention of the Resident Engineer, Eng. Ephantus M. Mugo. In a letter dated 11th June 2014 by the Nairobi City Water & Sewerage Company Limited to the Consulting Engineering Services (India) Private Limited in association with APEC Limited, the Engineer referred to a Report forwarded to them via the letter dated 2nd August 2013 duly evaluated for payment. He also confirmed that the figures used for computation of the interest for the delayed payments were the certified payments for the works supervised and measured by the Resident Engineer Water & Sewerage Relocation Project.

71.The plaintiff vide a letter dated 12th June 2014 resubmitted its updated outstanding amount duly signed by the Resident Engineer relocation of services. On perusal of the summary resubmitted by the plaintiff to the defendant, it is evident that it was signed by the plaintiff, checked and recommended by the Utility Engineer Consulting Engineering Services (India) Private Limited in association with APEC Limited, certified by the Resident Engineer (Water & Sewerage Relocation Works) and approved by the Resident Engineer Roads. It is worthy of note that the Resident Engineer (Water & Sewerage Relocation Works) went ahead to indicate that the certification was as per the letter dated 11th June 2014. This was followed by the letter dated 18th June 2014 written by the Consulting Engineering Services (India) Private Limited in association with APEC Limited to the defendant, forwarding the plaintiff's final statement of account.

72.From the evidence adduced, the correspondence by the defendant vide a letter dated 19th April 2015 and that by the consulting Engineers dated 21st April

2015, came approximately a year after the plaintiff submitted a payment application that had been checked and recommended by the Utility Engineer Consulting Engineering Services (India) Private Limited in association with APEC Limited, and also as certified by the Resident Engineer (Water & Sewerage Relocation Works) and approved by the Resident Engineer Roads, which was thereafter prepared and certified by the Resident Engineer, Consulting Engineering Services (India) Private Limited in association with APEC Limited, in accordance to the provisions of Clause 42 of the sub-contract and Clause 42.7 introduced by Addendum No. 1.

73.No explanation has been offered by the third party as to why the plaintiff's final statement of account was excluded from the defendant's final account statement despite the fact that its agent, Consulting Engineering Services (India) Private Limited in association with APEC Limited prepared the plaintiff's final statement a year before the letter of 21st April 2015.

74.From the pleadings filed and the evidence adduced, the summary of the plaintiff's outstanding payment has not been challenged, and the signatures appearing on the approval documents have not been claimed or demonstrated not to belong to the persons listed thereon. The claim by the defendant that there were delays by the Project Manager Nairobi City Water & Sewerage Company to certify the plaintiff's claim have not been corroborated by evidence.

75.The letter dated 29th December 2014, from the consulting Engineers to the Resident Engineer (Services Relocation) Nairobi Water & Sewerage Company pushing for the final statement of all works done by the plaintiff does not negate the final statement issued by the same consulting Engineers dated 18th June 2014. It therefore begs the question as to what happened

between June 2014 to December 2014 in order for the consulting Engineers to change their minds and/or position on the final statement they had issued earlier on. The third party's witness confirmed that the consulting Engineers, Consulting Engineering Services (India) Private Limited in association with APEC Limited were agents of the third party, hence they were under an obligation to either offer an explanation on the contradictory position taken by its consulting Engineers and/or call them as their witnesses to assist the Court by shedding light on the said issue.

76.He who alleges must proof. This maxim is grounded in the provisions of Sections 107, 108 & 109 of the Evidence Act. In the premise, this Court is of the considered view that since the defendant and the third party heavily relied on the fact that the plaintiff's accounts were not certified by the Project Manager, they had a duty to demonstrate that fact especially in light of all the evidence adduced by the plaintiff demonstrating that its payment application was certified by the Project Manager and the Resident Engineer.

77.In addition to the foregoing, this Court notes that as correctly stated by Counsel for the plaintiff, the evidence of the third party's witness was contradictory since DW3, Mr. Cheron, at paragraphs 16 & 17 of his statement dated 16th May 2022 confirmed that the sums due to the plaintiff were indeed paid but in cross-examination he contended that the money was not paid and could not be paid as it was not certified by the Project Manager. This as correctly submitted by the plaintiff's Counsel makes him an unreliable witness.

78.It is my finding that the plaintiff complied with the provisions of Clause 42 in applying for its payment. I am persuaded that the plaintiff's claim was duly certified in accordance to the terms of the sub-contract and the final

statement duly forwarded to the defendant by the consulting Engineers in a letter dated 18th June 2014.

79. It is trite law that a Court of law cannot rewrite a contract between parties. The Court must enforce the contract as was agreed by the parties herein. See the Court of Appeal case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another** [2001] KECA 362 (KLR).

80. Clause 43.1 of the sub-contract provides that the defendant was bound to pay the plaintiff within 28 days of the Project Manager issuing a payment certificate, failure to which the certified sum would attract interest at the prevailing commercial borrowing rate. I had earlier on found that the plaintiff was issued with a payment certificate on 18th June 2014, therefore, the defendant was required to ensure that the plaintiff had been paid on or before the 16th July 2014, failure to which the said sum would attract interest at the prevailing commercial borrowing rate. Since it is not in contest that as at 16th July 2014, the plaintiff's sums as captured in the payment certificate dated 18th June 2014 prepared by the consulting Engineers had not been paid, the plaintiff is entitled to interest on the unpaid amount from 16th July 2014 until payment in full.

Whether the defendant is liable to the plaintiff, or whether liability lies with the third party.

81. In view of the Consent entered into between the plaintiff and the defendant, wherein Judgment was entered in favour of the plaintiff against the defendant for the sum of Kshs.139,471,809.70, the defendant was liable to pay the plaintiff the aforesaid principal sum.

82. On the issue of interest, it is not in contest that under Clause 43.1 of the sub-contract, the defendant is liable to pay the plaintiff the interest that accrued

on the unpaid sums. Further, the defendant's witness acknowledged that payment of interest on any late payment is the defendant's obligation by acknowledging the final statement's computation of interest due to delayed payments as captured in the letter dated 18th June 2014. The consulting Engineers in the said letter also indicated that pursuant to Clause 43.1 of the sub-contract agreement, interest on delayed payments was an obligation of the defendant. It therefore goes without saying that the defendant is liable for the interest due to the plaintiff.

Whether the Third Party bears liability to the plaintiff, directly or through indemnity to the defendant.

83. The sub-contract was between the plaintiff and the defendant, as such, the third party cannot be said to have had privity of contract with the plaintiff. On the issue of privity of contract, the Court of Appeal in the case of **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi** [1985] KECA 58 (KLR) cited the **Halsbury's Laws of England, 3rd Edition**, Volume 8 at paragraph 110 which states that -

As a general rule a contract affects only the parties to it, and 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 to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such 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. (Emphasis added).

84. It is however not disputed that the sub-contract and Addendum No.1 provides that payment of the plaintiff's sums would be made by the third party

through the defendant. It is not in contest that the sum claimed by the plaintiff has never been paid to the defendant by the third party for onward transmission to the plaintiff. The third party however relied on the defendant's letter dated 19th April 2015 and the consulting Engineer's letter of 21st April 2015 and contended that pursuant to Clause 60.14 of the main contract, its liability to the defendant was extinguished once the defendant submitted its final statement without including the plaintiff's claim. It contended that for that reason, the defendant has no cause of action against the third party.

85. In order to determine whether or not the third party is duty bound to indemnify the defendant in respect to the sums determined due to the plaintiff as a result of the works done pursuant to the sub-contract, it is important to look at the provisions of sub-clauses 60.10, 60.11 & 60.14 of the main contract, which provide as follows –

Sub-Clause 60.10 Statement at Completion

Not later than 84 days after the issue of the Taking-Over Certificate in respect of the whole of the Works, the Contractor shall submit to the Engineer a Statement at Completion in the number of copies specified in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer,

- a) the final value of all work done in accordance with the Contract up to the date stated in such Taking-Over Certificate,***
- b) any further sums which the Contractor considers to be due, and***
- c) an estimate of amounts which the Contractor considers will become due to him under the Contract.***

Estimated amounts shall be shown separately in such Statement at Completion. The Engineer shall certify payment in accordance with Sub-Clause 60.2.

Sub-Clause 60.11 Final Statement

Not later than 56 days after the issue of the Defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer for consideration a draft final statement in the number of copies stipulated in the Appendix to Bid with supporting documents showing in detail, in the form approved by the Engineer,

- a) the value of all work done in accordance with the Contract, and*
- b) any further sums which the Contractor considers to be due to him under the Contract or otherwise.*

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the "Final Statement").

If, following discussions between the Engineer and the Contractor and any changes to the draft final statement that may be agreed between them, it becomes evident that a dispute exists, the Engineer shall deliver to the Employer an Interim Payment Certificate for those parts of the draft final statement, if any, which are not in dispute. The dispute shall then be settled in accordance with Clause 67. The Final Statement shall be the agreed upon settlement of the dispute.

Sub-Clause 60.14 Cessation of Employer's Liability

The Employer shall not be liable to the Contractor for any matter or thing arising out of or in connection with the Contract or execution of the Works, unless the Contractor shall have included a claim in respect thereof in his Final Statement and (except in respect of matters or things arising after the issue of the Taking-Over Certificate in respect of the whole of the Works) in the Statement at Completion referred to in Sub-Clause 60.10."Emphasis added).

86. From the foregoing extracts, it is manifest that if at all the defendant was of the view that there were further sums due to it or had an estimate of amounts which it considered would become due to it under the contract, it had to include the said sums in its final statement. In the letter dated 19th April 2015, the defendant requested the consulting Engineers to prepare its final statement excluding the plaintiff's claim and urged the Engineers to absolve them from any claims that may arise from the sub-contract in relation to the plaintiff's claim. This letter led to the consulting Engineers letter of 21st April 2015 wherein the Engineers informed the third party that the defendant's final account was prepared without the plaintiff's claim and stated that the plaintiff's claim may be dealt with separately under the sub-contract.

87. From the foregoing, it is noteworthy that neither the defendant nor the consulting Engineers responded to the defendant's request to absolve them from any claims that may arise from the sub-contract in relation to the plaintiff's claim. Further sub-Clause 60.14 of the Agreement between the defendant and the third party is very clear that the third party's liability to the defendant can only be invoked if the claim had been expressly included

in the final statement, which is not the case herein. I am therefore inclined to find that pursuant to sub-clause 60.14 of the Agreement between the defendant and the third party, the third party is discharged from any liability notwithstanding that the plaintiff's claim is valid and the defendant was required to receive funds from the third party for onward transmission to the plaintiff.

88. The upshot is that the plaintiff's suit against the defendant is merited, whereas the defendant's Third Party Notice is not merited.

89. Section 27 of the Civil Procedure Act provides that costs follow the event, therefore, the plaintiff having succeeded in this suit is awarded costs of the suit.

90. In the end, I make the following orders -

- i) Judgment is hereby entered in favour of the plaintiff as against the defendant;**
- ii) The defendant's case against the third party is hereby dismissed;**
- iii) Costs of the defendant's case against the third party shall be borne by the defendant;**
- iv) The sum of Kshs.139,471,809.70 as per the Consent Judgment of 21st May 2019 between the plaintiff and the defendant herein shall accrue interest from 16th July 2014 until payment in full at the prevailing commercial borrowing rate in accordance with Clause 43.1 of the sub-contract; and**
- v) Costs of the suit between the plaintiff and the defendant are awarded to the plaintiff.**

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 7th day of November, 2025. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Njuguna for the plaintiff

Mr. Ngatia (SC) for the defendant

Mr. Kimathi h/b for Prof. Albert Mumma (SC) for the third party

Ms B.Wokabi – Court Assistant.