Fahari Building & Civil Engineering Ltd v Attorney General (Sued on behalf of the Ministry of Interior & Co-ordination of National Government & Director of Kenya School of Government) (Civil Suit E005 of 2020) [2023] KEHC 383 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E005 OF 2020

OA SEWE, J

JANUARY 27, 2023

BETWEEN

FAHARI BUILDING & CIVIL ENGINEERING LTD ..... PLAINTIFF

AND

ATTORNEY GENERAL (SUED ON BEHALF OF THE MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT & DIRECTOR OF KENYA SCHOOL OF GOVERNMENT) ..... RESPONDENT

RULING

1. The Notice of Motion dated September 3, 2019was brought by the plaintiff under sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 2 Rule 15(1)(b), (c) and (d) of the *Civil Procedure Rules* for the following orders:

   (a) That the defendant's Defence be struck out;

   (b) That judgment be entered for the plaintiff as prayed in the Plaint;

   (c) That the costs of the application be provided for.

2. The application was predicated on the grounds that the defence on record does not have the necessary accompanying witness statements and is therefore an abuse of the process of the court; and that the defence is a sham and is merely calculated to embarrass and delay the fair determination of this suit.

3. The foregoing grounds were explicated in the Supporting Affidavit sworn by one of the directors of the plaintiff, Mr. Thiong'o Kariri, in which he averred that the defendant, though required by law to file and serve witness statements and the documents it wishes to rely on in this suit, did not do so. At paragraphs 5 and 6, Mr. Thiong'o deposed that since the defence confirms the existence of the contract the subject matter of the suit and the fact that the works were completed as contracted, there can be

no proper defence when it is silent on the issue of payment. He exhibited a set of documents to prove the handing over of the project, the issuance of a certificate to show that the defects were rectified to the defendant's satisfaction and a copy of the tabulation of the Final Account as admitted by the Ministry of Land Housing and Urban Development after re-measurement. He therefore concluded his deposition by asserting that the defendant's defence is nothing but a sham, calculated to delay payment of the plaintiff's claim and the just conclusion of this suit.

4. The defendant did not file a response to the application but complied with the directions given herein on March 9, 2022as to the filing of written submissions. In his written submissions dated March 21, 2022, Mr. Masore for the plaintiff provided a summary of the facts of the suit, namely, that vide an agreement dated 5th June 2008, the plaintiff was awarded a tender to construct conference facilities at Matuga Government Training Institute at an initial cost of Kshs. 59,666,650/=. That the works were done to satisfaction and the site handed over to the defendant. In his submission, the defence is merely intended to further delay the payment of the sums due to the plaintiff in so far as it merely alleged premature filing of the suit before arbitration as well as shoddy work.

5. Mr. Masore relied on *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR and *Lofty v Bedouin Enterprises Ltd* [2005] 2 EA 122 for the proposition that the allegation about the arbitration clause is not a bona fide triable issue worth reserving for trial; and that, if anything, such an issue ought to have been raised by the defendant at the time of entering an appearance. It was further the submission of Mr. Masore that the argument is only profitable if raised in respect of an application under section 6(1) of the *Arbitration Act*.

6. Thus, it was the submission of Mr. Masore that, where there is partial payment, as in this case, there is a clear admission of indebtedness and a Defence denying such indebtedness and alleging shoddy work can only be a sham. He relied on *Spin Knit Limited v Subsahara Supplies Limited* [2012 eKLR in urging the Court to allow the plaintiff's application and strike out the Defence, which in his view befits the description of "an assembly of Mere Denials".

7. On behalf of the defendant, Ms Njau filed written submissions on May 20, 2022reiterating the defendant's averments in the Defence dated August 22, 2016. She therefore contended that the defendant raised pertinent issues to do with jurisdiction and the quality of work undertaken by the plaintiff in respect of the subject project. In her view, the plaintiff ought to have exhausted the dispute resolution process of arbitration before filing this suit. She relied on *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009]eKLR to support her posturing that the Court has no jurisdiction to intervene in an arbitral process except in the manner provided for in the *Arbitration Act*.

8. It was further the submission of Ms. Njau that the discretion to strike out pleadings ought to be sparingly exercised. The case of *D.T. Dobie & Co. (K) Ltd v Joseph Mbaria Muchina & another* [1980]eKLR was cited for the proposition that if the Defence filed by a defendant raises even one bona fide triable issue, then leave to defend ought to be given.

9. In response to the assertion by the plaintiff that the defendant did not attach a list or statements of witnesses, Ms Njau urged the court to find that such are matters that can be canvassed at the pre-trial conference. She therefore prayed for the dismissal of the plaintiff's application with costs.

10. I have given due consideration to the application dated September 3, 2019 in the light of the pleadings and the written submissions filed herein by the parties. The issues arising for determination can be summarised as hereunder: -

    (a) Whether the failure by the defendant to file witness statements with the Defence is fatal; and,

(b) Whether, in the circumstances, the defence filed herein should be struck out and judgment entered for the plaintiff as prayed in the Plaint.

a. Whether failure to file witness statements with the Defence is fatal:

11. A perusal of the court record confirms that the defendant's Statement of Defence dated August 22, 2016 was not accompanied by witness statements. Hence, the question to pose is whether that omission is fatal. In this regard, Order 7 Rule 5 of the *Civil Procedure Rules* states: -

    The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

    a. the affidavit referred to under Order 4 rule1(2);

    b. a list of witnesses to be called at the trial;

    c. written statements signed by the witnesses excluding expert witnesses; and

    (d) copies of documents to be relied on at the trial including a demand letter before action:

    Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

12. Clearly therefore, failure to file witness statements along with the Defence is not necessarily fatal, in the light of the proviso to Rule 5 of Order 7, *Civil Procedure Rules* as it is permissible to file the same, with the leave of court, before the pre-trial conference. Since the pre-trial conference is yet to be held herein, it is plain that the argument is untenable.

b. Whether the Defence should be struck out and judgment entered for the Plaintiff as prayed in the Plaint:

13. The second limb of the plaintiff's application is hinged on two basic grounds. The first is that the defendant's reliance on the doctrine of exhaustion, as pleaded at paragraph 7 of the Defence, is belated and that the same ought to have been raised at the time of entering appearance. I entirely agree; granted the provisions ofsection 6 of the *Arbitration Act*, which stipulates that:

    (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

        (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

        (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

        (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

    (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

14. Hence, unless a party takes the initiative to promptly seek referral, the parties would be presumed to have submitted themselves to the jurisdiction of the Court. In this instance, the defendant went ahead

and submitted themselves to the jurisdiction of the court by filing pleadings, including the Statement of Defence datedAugust 22, 2016. In the circumstances, to the extent that the defendants did not promptly seek stay of these proceedings within the strictures ofsection 6(1) of the *Arbitration Act*, they are presumed to have waived their rights to have the dispute resolved by way of arbitration. Indeed, in *Astro Exito Navegacion SA (The Messiniaki Tolmi)* (1984) 1 Lloyd's Rep 266 it was held that:

> " ...a person voluntarily submits to the jurisdiction of the court if he voluntarily recognizes or has voluntarily recognized that the court has jurisdiction to hear and determine the claim which is the subject matter of the relevant proceedings. In particular he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the court's jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party's submission to the jurisdiction is that he is precluded thereafter from objecting to the court exercising its jurisdiction in respect of the claim."

15. Similarly, *Lofty v Bedouin Enterprises Limited* [2005] 2 EA 123 the Court of Appeal held that:

> " ...section 6(1) of the *Arbitration Act* of 1995 which the Court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time the applicant enters appearance. It seems that the object of Section 6(1) of the *Arbitration Act* of 1995, was inter alia, to ensure that applications for stay of proceedings are made at the earliest stage of the proceedings ... Section 6(1) has changed the law as it does not permit an application for stay of proceedings to be made after entering an appearance."

16. In the premises, the issue of arbitration cannot qualify as a triable issue for consideration at the main hearing. That notwithstanding, the plaintiff also seeks the striking out of the Defence contending that it is a sham and is merely calculated to embarrass and delay the fair determination of the suit. In this regard, reliance was placed on Order 2 Rule 15(1) (b), (c) & (d) of the *Civil Procedure Rules*, which provides: -

> 1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> (b) .....
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court

17. Thus, the plaintiff argued that, in so far as the defendant confirms that that there was a contract between the parties there is no issue to go for trial for. Its counsel further submitted that the only issue raised thereby the computation of the amount owed under the said contract. To augment its averments, the plaintiff annexed copies of Handing Over Certificate dated June 11, 2012; Certificate of Making Good Defects, duly executed by the County Works Officer, Kwale County, and a Payment Voucher for last moiety payment dated May 21, 2014 as well as the computation of the final account as admitted by the Ministry of Land Housing and Urban Developments after re-measurement.

18. However, having perused the Defence I am convinced that triable issues have been raised thereby, especially at paragraphs 5, 6 and 7 and that the documents annexed to the plaintiff's Supporting

Affidavit would comprise the body of evidence for consideration at the hearing. It is now settled that striking out a pleading, being such a draconian measure that has the effect of sending a party away from the seat of justice, ought to be done sparingly. Accordingly, in *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No 54 of 1999 the Court of Appeal held as follows: -

> " ...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did..."

19. Similarly, in *Crescent Construction Co Ltd v Delphis Bank Limited* [2007]eKLR, the Court of Appeal underscored the principle thus:

> " ...one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle..."

20. It is in the light of the foregoing that I find no merit in the defendant's application dated September 3, 2019. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF JANUARY 2023

OLGA SEWE

JUDGE