



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL CASE NO. E003 OF 2021

NATHANS BROWNE JP.....PLAINTIFF

VERSUS

MURANG'A COUNTY GOVERNMENT.....DEFENDANT

RULING

1. The plaintiff prays that the *statement of defence* be struck out; and, that judgment be entered as prayed in the pleadings.
2. The reasons are two-pronged: Firstly, that the pleading is bogus and an empty denial which does not adequately traverse the plaintiff's claim; and, secondly, that it is a scheme for delay and may embarrass the fair administration of justice.
3. Those matters are pleaded at length in the *notice of motion* dated 17th June 2021 and the plaintiff's deposition of 18th June 2021. The application is predicated upon sections 1A, 1B and 3A of the **Civil Procedure Act** and Order 2 Rule 15 of the Civil Procedure Rules.
4. The motion is contested through *grounds of opposition* dated 18th November 2021. The objections are three-fold: Firstly, that the defence is not a sham and raises triable issues; secondly, that the defendant has a right to be heard on the question of the contract or its liability; and, lastly, that the plaintiff having replied to the defence, the present motion is redundant.
5. The plaintiff filed submissions on 9th December 2021 with a list of authorities. The defendant lodged its set of submissions on 18th March 2022.
6. On 21st March 2022, I heard further arguments from learned counsel for both disputants.
7. I take the following view of the matter. Order 2 Rule 15 of the Civil Procedure Rules empowers the court-

At any stage of the proceedings, to strike out a pleading if it is scandalous, frivolous, vexatious; or, it may prejudice or delay the fair trial of the action; or, it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

8. Striking out a pleading is a *draconian* measure to be employed sparingly. **Wambua v Wathome** [1968] E.A 40, **Coast Projects Ltd v M.R. Shah Construction** [2004] KLR 119.
9. Ideally, cases should be determined on tested evidence at a full hearing. The words of Fletcher Moulton L.J. in **Dyson v Attorney General** [1911] 1 KB 410 at 418 still ring true-

To my mind, it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad

10. The dictum of Madan J.A. (as he then was) in **D T Dobie & Company (Kenya) Limited v Muchina** [1982] KLR 1 at 9 is succinct-

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

11. The court must also pay heed to the *overriding objective* to do justice to the parties. See **Article 159** of the **Constitution** and sections 1A

and 1B of the **Civil Procedure Act**. See also *Harit Sheth v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

12. When I juxtapose those principles against the pleadings here, I then find as follows. This is an action for unpaid legal fees for services rendered to the defendant. In the *Plaint* dated 30th April 2021, the plaintiff claims Kshs 195,460,000 “for policy generation and legislative drafting”. He pleaded that he tendered and was awarded the contract under tender number *MGC/029/2013-2014* dated 17th June 2012. He was to be paid Kshs 3,300,000 for every legislative bill he drafted plus a further Kshs 20,000,000 as mobilization fees.

13. It is the plaintiff’s case that he drafted 42 pieces of legislation or thereabouts which were enacted by the County Assembly. They are listed at paragraph 14 of the *plaint*. He also organized various training courses in the year 2014 and prepared materials on policy formulation and legislative drafting. He thereafter submitted the bills by email for consideration by the County Officers and the Assembly.

14. He avers that on 14th July 2017, he forwarded his invoices to the defendant in terms of the schedule to the special conditions of the contract. The defendant acknowledged receipt on 16th August 2017 and stated that it was verifying the invoices.

15. The plaintiff refers to internal memos of the defendant dated 22nd September 2017 and 6th April 2018 confirming that he had performed his duties under the contract and that he should be paid. However, only two installments of Kshs 3,000,000 were paid in December 2019 and December 2020 respectively leaving the balance now claimed in the *plaint*.

16. I must add that the memo dated 5th September 2017 by the defendant’s legal advisor and that by CECM Finance of 22nd September 2017 only recommended payment for 12 bills which were in conformity with the contract. The plaintiff claims that a written undertaking by the defendant on 22nd December 2017 to pay his bankers Kshs 8,000,000 was not honoured.

17. I have then studied the statement of defence dated 28th May 2021. While the statement contains broad and general denials, it specifically answers part of the plaintiff’s claims. For instance, the defendant acknowledges that there was an agreement between the parties, but pleads that the agreement was *limited* to policy generation and legislative drafting for which it has fully remunerated the plaintiff. It also denies instructing the plaintiff to draft the bills aforesaid or that they were in fact drafted.

18. The defendant’s position is that prequalification to provide services did not amount to a *contract* to render the services; and, that being a public entity, it could only pay for services in accordance with procurement laws and other applicable regulations and schedules.

19. Some of the denials by the defendant are evasive and fly in the face of its own internal memos and the part-payment to the plaintiff. An example is paragraph 14 where it feigns complete ignorance of receipt of the invoices from the plaintiff.

20. The plaintiff answered the defendant by a *Reply to Defence* dated 22nd June 2021 in which it reiterated that the defendant truly and justly owed him the sums claimed in the *plaint* together with costs and interests.

21. I have looked at the contract between the parties executed on 9th July 2014 (exhibit NB-4). It is titled “*Contract*” and executed by the plaintiff and the defendant’s County Secretary and CECM Finance. It is attested to by the defendant’s legal officer. As stated earlier, the defendant has also partly paid for the services in the sum of Kshs 6,000,000. It is thus evasive for the defendant to deny the agreement.

22. The plaintiff refers to a meeting held on 9th July 2014 in which it was agreed that his fees would be Kshs 3,300,000 for *every bill* he drafted. However, the appointment letter (exhibit NB-3) and the written contract (exhibit NB-4) state that the “*negotiated legal fees*” were Kshs 3,300,000 for policy generation and legal drafting.

23. In a synopsis, the court requires to step outside the *written contract* to determine the full terms of the undertaking. For instance, the *Minutes of Negotiation for Policy Generation and Legislative Drafting* of 9th July 2014 resolved to pay Kshs 3,300,000 per bill but the contract refers to a global sum. So much so that while some terms may be inferred, others may call for detailed evidence. I say that guardedly and without a final finding.

24. I thus readily find that there are at least three triable issues: Firstly, what were the terms of the contract between the parties and whether the defendant is in breach? Secondly, whether the plaintiff fully performed his duties under the contract; and, thirdly, whether he is entitled to the sum of Kshs 3,300,000 for *each* legislative bill he drafted plus a further Kshs 20,000,000 leading up to the *arrears* and *interest* now claimed.

25. From my analysis of the pleadings, the law and the precedents I referred to in paragraphs 7 to 11 of this ruling, I am unable to say that the *statement of defence* is completely hollow or frivolous; or, that there is no single triable issue.

26. It follows as a corollary that the plaintiff’s *notice of motion* dated 17th June 2021 is devoid of merit and is hereby *dismissed*.

27. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 28TH DAY OF APRIL 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Wangui for the plaintiff instructed by Ahmednasir Abdullahi, LLP.

Mr. Gitonga holding brief for Mr. Njenga for the defendant instructed by Muchoki Irungu Kangata & Company Advocates.

Ms. Susan Waiganjo, Court Assistant.