



REPUBLIC OF KENYA



KENYA LAW
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**Geoflex Consultants Ltd & another v Mbirikani Group Ranch & 10 others
(Civil Suit E12 of 2020) [2022] KEHC 15169 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E12 OF 2020
SN MUTUKU, J
JUNE 21, 2022**

BETWEEN

GEOFLEX CONSULTANTS LTD 1ST PLAINTIFF

OKOTH CHARLES AMESO ANGIRA 2ND PLAINTIFF

AND

MBIRIKANI GROUP RANCH 1ST DEFENDANT

DANIEL METOE 2ND DEFENDANT

TURERE LOORIMIRIM 3RD DEFENDANT

DANIEL MAPI MBARNOTI 4TH DEFENDANT

SUYIANKA LEPARAU 5TH DEFENDANT

JOSEPH OLE SHANGUA 6TH DEFENDANT

SOINKEI KEREMPU 7TH DEFENDANT

NYENGE'ENA SALONIK 8TH DEFENDANT

MESOBOBU MARIAS 9TH DEFENDANT

MARTINE BAXSON 10TH DEFENDANT

MARIKA SEMETEI 11TH DEFENDANT

RULING

1. The applicants filed suit on July 6, 2020 seeking orders for liquidated amount of money, among other prayers as set out in the plaint. The entire claim is based on a survey and title registration agreement dated February 29, 2020.



2. The defendants filed their defence on October 9, 2020. This is the defence the applicant seeks orders of this court to strike out on the grounds that it is scandalous, frivolous and vexatious. The applicant claims that the defence is meant to prejudice, embarrass or delay the fair trial. To that end, the applicant filed Notice of Motion dated February 11, 2021.

Notice of Motion

3. The applicant filed this notice of motion dated February 11, 2021 under order 2 rule 15 and order 36 rule 1 of the *Civil procedure Rules* for orders that:
 - i. This honourable court be pleased to strike out the defendant's statement of defence dated October 5, 2020 with costs and interests on the ground that it is scandalous, frivolous and vexatious pleading and it is meant to prejudice, embarrass or delay the fair trial of this suit and is an abuse of the court process.
 - ii. This honourable court be pleased to enter judgement for the plaintiff against the defendants for the sum of Kshs. 81,880,000/-
 - iii. This honourable court be pleased to set the rest of the claim down for assessment of the work done and performed by the plaintiff concerning Land Parcel No. Kajiado/Mbirikani/733 in order to determine the amount of services rendered by the plaintiff and determined on the basis of Quantum meruit. The court do determine the quantum of damages.
 - iv. Cost of this application and of the whole suit be awarded to the plaintiffs.
4. The application was supported by an affidavit dated February 10, 2021 sworn by the 2nd applicant. His case, as can be discerned from his averments, is that his company entered into a survey and registration of title agreement with the 1st defendant, which agreement was signed by all its officials, to provide professional services of surveying and registration of individual parcels of land in Kajiado/Mbirikani/733 comprising 124,522.94 hectares to its 4600 members.
5. He deposed that it was the term of the said agreement that 20% of the total cost amounting to Kshs. 81,880,000/- was to be paid upon execution of the agreement as the 1st instalment; that the 2nd instalment, amounting to 40% of the total cost, was to be paid upon Plaintiffs' ground picking the external boundary, picking the existing settlements within the Ranch and preparation of subdivision scheme; that the 3rd instalment of the total cost was to be paid upon erecting and placing beacons, registration of the mutations with the District surveyor, preparation of the registry index map, submissions of area list, approved mutations, duly amended RIM map and executed transfers to the County Adjudication officer and processing individual titles and that the 4th Instalment of 10% of the total cost was to be made upon delivering the duly registered title deeds to the defendants.
6. It is his case that he submitted the invoice dated March 9, 2020, for Kshs. 81,880,000/- to the defendants but this was not settled; that when he moved to the land to commence the work, he was stopped by the defendants from continuing with the scheduled work; that he had not been served with a written notice of termination of the contract as stated under paragraph 10 of the agreement and that he later learned that the Defendants had repudiated his agreement and engaged another surveyor to do the same works.
7. The defendants filed their replying affidavit dated March 15, 2021 sworn by Daniel Metoe, the 2nd defendant. It is the defendants, case that their statement of defence raises fundamental and triable legal questions and issues which need to be addressed at a full hearing; that their defence specifically denies that the defendants agreed to pay to the plaintiffs the sum of Kshs. 81,880,000/- as there was no basis



for such payment since the contract dated February 29, 2020 was frustrated by acts beyond the control of the defendants which acts constitute force majeure under the said contract.

8. They have averred that their defence raises fundamental issues listed therein and that this application is an outright abuse of the court process, the plaintiffs having filed and withdrawn a similar application dated June 26, 2020.
9. The plaintiffs filed a supplementary affidavit dated May 25, 2021 in which it is stated that the 2nd applicant believes that a letter alleged to have originated from the County Government of Kajiado dated 16th March, 2020 is simply a collusion between the County Government and the defendant to assist in breaching the contract; that though it is true that he was the County Surveyor from year 2008 to 2015 the same cannot be good reason for deny private duties; that the letters dated 16th March, 2020 and March 17, 2020 are meant as a plot to deny him professional business opportunities; that the Defendants, in an attempt to escape liability, reported to the CID alleging that the stamp on the invoice is not from them and neither was the signature theirs and further that the Civil Suit being mentioned being Misc. No. E677 of 2020 has no relevance to these proceedings.

Submissions

10. The matter was canvassed by way of written submissions. The applicants filed their submissions dated July 12, 2021. They have reiterated the grounds in support of the application and cited Civil Appeal No. 110 of 2012 *Margaret Njeri Mbugua -vs- Kirk Mweya Nyaga* to the effect that a mere denial is not sufficient defence and that the defendant has to show either by affidavit or otherwise that there is a good defence.
11. They argued that as much as the court is under a duty to protect the defendant's rights to be heard, on the same vain, the court equally has a duty to see to it that the plaintiff is not kept away from his money by a defence which is a complete sham. They argued that there was a survey and title registration agreement dated February 29, 2020 which was executed by all parties to this suit and which the defendants have not denied in their defence and that the defendants did not deny that after breach of the agreement they engaged another surveyor to do the same job.
12. The applicants submitted that the defendants alleged that the contract was frustrated by force majeure but it is not clear from the defence what the defendants alleged constituted the force majeure to prevent them from performing the contract; that the mere letter from Kajiado County Government is not sufficient and cannot be said to be unforeseen; that bringing up the issue of approval of Kajiado County Government after the execution of the agreement is an excuse and an afterthought.
13. The applicants argue that they have shown in the supplementary agreement that prior and after the agreement was signed they obtained approvals from other jobs from Kajiado County Government; that there is no possible defence to this claim and that the defendants have not raised any defence.
14. The defendants filed their submissions dated February 9, 2022. They submitted that the legal issue is whether the defendants' defence is scandalous, frivolous, vexatious and meant to prejudice the trial of this suit. They argued that a party to a civil trial ought not to be deprived lightly of his/her claim to be heard on the merits of their case as was held in *Co-operative Merchant Bank Ltd -vs- George Fredrick Wekesa*, Civil Appeal No. 54 of 1999 cited by the court of Appeal in *Maureen Waitibera Mwenje & another -vs- David Kinyanjui Njenga & 2 others* [2021] eKLR.
15. They argued that their statement of defence raises arguable issues and is not scandalous, frivolous and vexatious; that on the face of it the defence raises over 20 grounds that will be argued at full trial; that



they have raised triable issues and that a single bona fide triable issue is sufficient for the defendant to be given leave to defend his case.

16. The defendants relied on *Postal Corporation of Kenya –vs- I.T Inadmar & 2 others* [2004] 1KLR to the effect that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend and further submitted that the defence is not an abuse of process as it raises fundamental issues of law for determination. They submitted that the suit before this court is neither hopeless nor a plain one that raises no reasonable cause of action. They therefore contended that summary judgement should not be entered. On this point, they relied on *Alna Enterprises –vs- Kenya Methodist University* [2012] eKLR.

Determination

17. Order 2 rule 15 on striking out of pleadings provides that:
- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
18. I have considered the rival arguments and the issues raised by the defendants. Without having to repeat myself on the arguments of each party, it is my view that there are issues being raised in the defence that require evidence to resolve. There are, in my considered view, triable issues raised by the defence filed herein that can only be resolved at a full trial. It would be, in my view, prejudicial to strike out the defence at this stage without giving the defendants an opportunity to ventilate the issues they are raising.
19. Besides, striking out pleadings has been shown to be a draconian act which may only be resorted to when the pleading discloses no semblance of a cause of action or defence and are incurable by an amendment (see *Co-operative Merchant Bank Ltd vs George Frederick Wekesa*, Civil Appeal No. 54 of 1999).
20. Further, it is my considered view that the Applicant will not suffer prejudice, other than waiting a bit longer for his claim to be considered. I am persuaded that even one triable issue is a reason not to strike out pleadings.
21. My conclusion of this matter. Therefore, is that it is not prudent to strike out the defence at this stage of these proceedings. Let the matter proceed to full trial and let each party present before this court the evidence they wish to rely on to convince this court to rule in their favour.
22. Consequently, I decline to grant the prayers sought in the Notice of Motion dated February 11, 2021, which Notice of Motion I hereby dismiss with costs to the Defendants.
23. Parties shall proceed to comply with order 11 as well as filing agreed issues for determination. The matter shall be mentioned on November 28, 2022 for compliance and further directions.
24. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 21ST JUNE 2022.



S. N. MUTUKU
JUDGE

