



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E 140 OF 2020

HARDI ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....DEFENDANT

RULING

PLAINT

1. The Plaintiff (herein “**Hardi Enterprises Limited**”) instituted a suit against the Defendant (herein “**Nairobi City County Government**”) by Plaintiff filed on 11th May 2020. The Plaintiff’s claim is that in or about July 2018, the Plaintiff and the Defendant entered into a written contract wherein the Plaintiff contracted to provide services to the Defendant vide contract Nos. **NCC/WEFE** and **NR/DP/276/2017-2018 HIRE OF HEAVY EQUIPMENT AND VEHICLES (SERVICES)**.

2. The Plaintiff stated that pursuant to the aforesaid contract the Plaintiff provided among other heavy equipment and Vehicles: a Back hoe, an Excavator, a Tipper and Double cabin motor vehicles which were used to provide various services to the Defendant at a consideration calculated at different rates per hour and/or per tonne as agreed by the parties.

3. It was in the terms of the contract that:

i) In consideration of payments to be made by the Defendant to the Plaintiff, the Plaintiff undertook to execute and complete the works and remedy any defect as provided by contract between the parties.

ii) The Defendant agreed to pay the Plaintiff, in consideration of the execution and completion of the works and the remedying of defects therein the contract price or such other sums as may become payable under the contract between the Plaintiff and the Defendant.

4. The Plaintiff provided the Defendant contractual services valued at Kshs 948,986,892.13. The Defendant paid the Plaintiff Kshs 590,141,916.55 leaving an outstanding balance of Kshs 358,844,975.58.

5. The Plaintiff prayed for judgment against the Defendant for;

a) The sum of Kshs 358,844,975.58

b) Interest at commercial rates on the said sum of Kshs 358,844,975.58 with effect from 4th July 2018 until payment in full.

c) Costs of this suit together with interest thereon at such rate and for such period of time as this Court may deem fit to grant.

d) Any such other or further relief as this court may deem appropriate.

STATEMENT OF DEFENCE

6. The Defendant vide its statement of defence dated 21st July 2020, deposed as follows;

a) In response to paragraph 10 of the Plaintiff the Defendant refuted the contents therein and further denied the particulars of breach of

contract attributed to it and puts the Plaintiff to strict proof of all the allegations set forth therein.

b) In response to paragraph 11, the Defendant averred that it is a stranger to the contents therein and puts the Plaintiff to strict proof of the same

c) The Defendant denied being issued with demand and notice to sue as alleged in paragraph 12 of the Plaintiff.

d) The Defendant admitted the contents of paragraph 13 of the Plaintiff in so far as the same attest to there being no other previous proceedings in court between the parties herein and touching on the same subject matter and the jurisdiction of this Court.

NOTICE OF MOTION APPLICATION

7. The Plaintiff/Applicant by application, Notice of Motion dated 23rd September 2020 sought that the Defendant's defense dated 21st July 2020 and filed on 22nd July 2020 be struck out and that judgment be entered against the Defendant for liquidated sum of Kshs. 358,844,975.58/- with interest at Court rates and costs.

8. The Application is grounded on the Plaintiff's claim particularized in the Plaintiff dated 11th May 2020 filed on 27th May 2020.

9. The Defendant entered appearance through advocates on record on 22nd July 2020 and filed Statement of Defense on the same date. The Defense consists of mere general denials to the Plaintiff's claim without a reasonable Defense and therefore a sham. The Plaintiff's claim arose as a result of the Defendant's breach of contract. The Defense was filed outside statutory timelines (without leave of Court). The Plaintiff/Applicant annexed documents to augment its claim and are also filed with the Plaintiff on record.

GROUNDINGS OF OPPOSITION

10. The Respondent filed grounds of Opposition on 7th December 2020 and deposed as follows;

a) The Application is fatally incompetent, vexatious, hopeless, *mala fides*, devoid of any merit, abuse of the Court process only fit for dismissal as it does not meet grounds for granting the orders sought.

b) The Court should uphold rights of both Applicant and Respondent.

c) The Defense raises *bona fide* triable issue(s) for hearing and determination.

SUBMISSIONS

11. The Applicant submitted that the Defense ought to be struck out as it has no reasonable defense or triable issue for determination. The Defense is full of denials and a sham.

12. Relying on the case of ***Delphis Bank Limited vs Caneland Limited [2014] eKLR*** where the Court of Appeal held that the Defenses were scandalous, frivolous and an abuse of Court process. The Court stated that where there is no plausible Defence and it is plain that the Defence is a sham or cannot be sustained, it is pointless to put parties through trial to inflate costs to the disadvantage of the debtor and delay justice to the prejudice of the Claimant.

13. The Applicant submitted that the Defence is frivolous as it lacks value in the face of the documents executed by both parties and the conduct of the Defendant in making part payment. The Defense is vexatious as it is meant to frustrate and deny the Plaintiff/Applicant hard-earned contractual fruits. The Defendant is truly indebted to the Plaintiff. The plaintiff/Applicant rendered services to the Defendant under the contract executed by parties and thereafter the Defendant paid for work done Kshs 590, 141, 916.55 and left a balance of Kshs 358,844,975.58/-

14. The Applicant relied on the case of ***C.A. 217 of 2015 Kivanga Estates Ltd vs National Bank of Kenya Ltd [2017] eKLR*** where the Court observed that the several suits filed were being used to deny payment of a just debt. Similarly, the Applicant alluded to the Defense which raises no triable issue as one delaying the payment of a just debt.

15. The Respondent submitted that the Defense raises *bona fide* triable issue(s) to be determined at the hearing and determination of the matter and ought not to be struck out.

16. The Respondent relied on the case of ***Kivanga Estates Ltd vs National Bank of Kenya Ltd supra*** where the Court held that striking out of pleadings is draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. Yet, a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial.

17. The Defendant also relied on the case of ***Saudi Arabian Airlines Corporation vs Premium Petroleum Co Ltd [2014] eKLR*** where the Court held that;

“I need not re-invent the wheel on the subject of striking out a defense. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or

defense should be used sparingly and only on the clearest of cases where the impugned pleading is “demurer of something worse than a demurer” beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced that upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHEDRIDAN J. test in PATEL V E. A CARGO HANDLING SERVICES LTD. [1974] E. A 75 at p.76 (Duffus P.) that “...a triable issue....is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

DETERMINATION

18. The Court considered pleadings and submissions of parties through Counsel and the issue for determination is whether the Defendant's defense raises *bona fide* triable issue(s) for hearing and determination or the Defense ought to be struck out?

Order 2 Rule 15 CPR 2010 outlines grounds for pleadings to be struck out;

(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.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

19. The Plaintiff's claim against the Defendant is as follows;

By a contract executed between the Plaintiff and Defendant, The Plaintiff provided among other heavy equipment and Vehicles: A Back hoe, an Excavator, a Tipper and Double cabin motor vehicles which were used to provide various services (for collection of garbage in the City) to the Defendant at a consideration calculated at different rates per hour and/or per tonne as agreed by the parties. Upon issuance of Invoices Kshs 948,986,892.13, the Defendant made part payment of Kshs 590,141,916.55 to the Plaintiff leaving an outstanding balance of Kshs 358,844,975.58.

20. The Plaintiff/Applicant in support of its case annexed to the Plaintiff;

a) Witness Statement

b) Certificate of Incorporation of the Plaintiff Company

c) Letters of Notification of Intention to enter Contract of

d) 21st May 2018 & 8th June 2018

e) LPO from the Defendant dated 25th June 2018

f) Plaintiffs Invoices to the Defendant Nos 28,30,33,35,36,38,39, 40,42,44 & 45

g) Plaintiff's Demand Letter and Notice to sue.

21. By the Defense, the Defendant denied any breach of contract as outlined in paragraph 10 of the Plaintiff. The Plaintiff annexed the duly executed contract between the Plaintiff and Defendant on 5th July 2018 to the Plaintiff.

22. The Defendant also denied that the Plaintiff presented Invoices demanding full payment for contractual services which the Defendant refused to pay as deposed at paragraph 11 of the Plaintiff. The copies of Invoices have summaries from the Plaintiff's Garbage Collection Department showing work with Backhoe Reg. No. KBK 179T, the area, date of operation, whether Day or Night Shift hours as shown by Odometer and Officer in Charge, are annexed to the Plaintiff.

23. The Defendant denied demand from the Plaintiff and notice of Intention to sue as outlined in Paragraph 12 of the Plaintiff. There is a letter of 12th March 2020 addressed to the Defendant from the Plaintiff's advocates on record which makes demand of outstanding debt and Legal

fees in default notice of institution of suit was spelt out in the said letter annexed to the Plaintiff.

24. **Digest On Civil Case-Law & Procedure by Hon GV Odunga J** at Pg 790 provides;

(f) In an action for a debt or liquidated demand a mere denial or general traverse will not do for all purpose.

(g) Every allegation made in the Plaintiff which is not intended to be admitted shall be specifically traversed and a general denial shall not be a sufficient denial of them and demonstrates not only a reprehensible lack of candidness but also that the Defense discloses no reasonable Defense.

See also: *Kassam vs Bank of Baroda (KY) Ltd [2002] eKLR on striking out the Defense.*

25. The Plaintiff served the Defendant the Plaintiff and Summons on 27th May 2020 through the Office of Director of Legal Affairs and the same documents were stamped as received and evidenced by Affidavit of Service filed on 22nd June 2021. Thereafter, the request for Interlocutory judgment to be entered in default of appearance and Defense was filed.

26. As at 22nd June 2021, the Defendant's advocate on record had filed Notice of Appointment but there was no defense by the Defendant filed, on record.

27. The statutory timelines are Memorandum of Appearance or Notice of Appointment ought to be filed after 14 days of service of Plaintiff and Summons. Thereafter, another 14 days is allowed for the Defendant to file Defense. From 27th May 2020 to 21st July 2020 when the instant defense was filed, the statutory period expired. The Defense is not a proper, legal and valid defense to sustain the hearing and determination of this Suit. It is expunged and dismissed from the Court record and the Plaintiff's claim remains unopposed and is hereby granted.

DISPOSITION

28. **The Plaintiff/Applicant's application of 23rd September 2020, seeking striking out of Defense filed on 22nd July 2020 is granted with Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH JUNE 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS WANYAMA H/B MR. WALUBENGO FOR APPLICANT /PLAINTIFF

MS KATANA H/B MR. KITHI FOR DEFENDANT/RESPONDENT

COURT ASSISTANT – TUPET

MS KATANA: I am seeking leave to appeal

COURT: The Applicant shall obtain Certified copies of proceedings and Ruling upon payment of requisite fees. Stay of execution granted for 30 days.

M.W. MUIGAI

JUDGE