



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 784 OF 1998

NACITI ENGINEERS LIMITED.....PLAINTIFF

VERSUS

MOI UNIVERSITY.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. **NACITI ENGINEERS LIMITED** is the plaintiff in this case. Initially the plaintiff filed this action against MOI UNIVERSITY. In that claim the plaintiff pleaded that it entered into a building contract with the University whereby the plaintiff undertook to construct three lecture theaters, seminar rooms and offices at the University's premises. The contract sum was Ksh 45,854,784/-. The plaintiff pleaded that the University breached that contract by failing to honour certificate number 12. Accordingly, the plaintiff prayed for Judgement in special damages of Ksh 17,506,974.10, being the value of that certificate. The plaintiff therefore prayed for judgment for that amount plus interest.

2. The plaintiff sought and was granted leave on 3rd June 1999 to amend its plaint and in the amended plaint joined the ATTORNEY GENERAL (AG) to this action as the 2nd defendant.

3. The AG was sued on behalf of the Ministry of Public Works & Housing of the Republic of Kenya. Although the plaintiff, in the Amended plaint, pleaded that the payment of the amount of the certificate No 12, the plaint in its final prayer in the amended plaint, prayed that judgment be entered jointly and severally against the University and AG for Ksh 17,506,944.10 with interest.

4. The record shows that AG filed a memorandum of appearance on 2nd July 1999, after being served with the amended plaint. The plaintiff filed an application dated 7th September 1999 for leave to enter judgment against the AG in default of a defence which application was allowed by court on 18th October 1999. The Deputy Registrar entered judgment, as prayed in the amended plaint, against AG on 15th February 2000.

5. The plaintiff filed a Notice of Motion dated 18th September 2017 which is under consideration in this Ruling. The plaintiff by that application seeks orders:

a. That the firm of Gikera & Vadgama Advocates be allowed to come on record for the plaintiff/Applicant.

b. That a certificate of order be issued following the decree issued on 23rd May 2003.

c. That a separate certificate of costs be issued with respect to costs ordered to be paid to the plaintiff/applicant in the decree.

6. Prayer (a) above, where the plaintiff seeks leave of the court for the firm of Gikera & Vadgama Advocates to be on record for the plaintiff was granted by Justice F. Ochieng on 19th October 2017. The only other prayers therefore that are before me are prayers (b) and (c) above.

7. To reiterate prayer (b) seeks an order be issued following the decree issued on 23rd May 2003. The certificate referred to in that prayer is the one set out in Section 21 of the Government Proceedings Act. That section provides:

Satisfaction of orders against the Government

21.(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which

the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:(Emphasis mine)

8. As it will be noted under Section 21 above a party who obtains from a court an order, including an order for costs, against the government shall have issued a certificate containing particulars of the order. In this case the plaintiff seeks for certificate for the amount of judgement of KSh 17,506,944.10 plus interest. This is the judgment entered in favour of the plaintiff against the AG in default of defence.

9. By prayer (c), in the application the plaintiff seeks for a separate certificate of costs be issued, which are costs awarded against AG.

ANALYSIS AND DETERMINATION

10. I began by stating in this Ruling that the plaintiff in the first instance began by filing this action against the University. Subsequently on amending the plaint the plaintiff brought into this action the AG as the 2nd defendant.

11. The action against the University was dismissed on 30th September 2003, on the University's application for dismissal for want of prosecution. The court by its Ruling of 30th September 2003 stated that although this suit had been filed against the University in November 1998 and that even though the University filed its defence on 10th February 1999 by the time the University filed its application dated 3rd May 2002, for dismissal of the suit against it for want of prosecution, that the plaintiff had taken no step to prosecute the suit against the University. Further that the plaintiff had failed to explain its delay of 2 ½ years in prosecuting the suit against the University.

12. Judgement was entered on 15th February 2000 for the plaintiff against AG in default of a defence. The plaintiff erred to state that judgment was entered on 23rd May 2003. Rather it is the decree that was issued on 23rd May 2003 but the judgment itself was entered on 15th February 2000. It would follow, in my view that the plaintiff's prayer for certificate as per section 21 Government proceedings Act is barred by Limitation of Section 4 (4) of the Limitation of Actions Act Cap 22. That section is in the following terms:

4.(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

13. Judgment in this case was entered for the plaintiff against the AG on 15th February 2000. The plaintiff in bring the present application dated 18th September 2017 brought the same 17 years after judgment was entered. The plaintiff is statutorily barred from executing a judgment after 12 years, as stated in section 4(4) of Cap 22.

14. The plaintiff sought to argue that the delay in presenting the application presently under consideration was due to the "inordinate delay of our justice system". The plaintiff submitted further that this court has discretion to allow the execution of the judgment hereof even after the 12 years period. The record is clear. It is the plaintiff that slept on its rights and failed to prosecute this case. This court by its Ruling of 30th September 2003, when the case against the university was dismissed for want of prosecution stated thus:

"It would appear that either the plaintiff is in no hurry to prosecute the suit or is still not recovered from the elation of obtaining default judgment against 2nd defendant."

15. The submission by the plaintiff is patently contrary to the law. The court of appeal in the case **M'IKIARA M'RINKANYA & ANOTHER V GILBERT KABEERE M'MBIJIWE (2007) eKLR** made it clear on the position of the law on the provision of section 4(4) of Cap 22. The court stated thus:

"The construction given to the corresponding section 4 (4) of the Act by the courts in this country is much wider. All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute – barred after 12 years....."

Firstly, as regards recovery of judgment debts,, the construction of section 4 (4) of the Act by local courts barring recover after 12

years, is as shown in *Lowsley v Forbes*, consistent with the construction given by English courts to **section 2 (4)** of the Limitation Act 1939 and its predecessors for over 100 years – that a judgment debt becomes statute – barred after 12 years.”

16. It is therefore abundantly clear that the plaintiff is barred, under the provisions of section 4(4) of Cap 22, from seeking the certificate of the order (as per section 21 of Government Proceedings Act) because such action is time/statutorily barred under Section 4(4) of Cap 22.

17. Further the prayer (c) of the plaintiff’s application, where the plaintiff sought “a separate certificate be issued with respect to costs ordered to be paid to the plaintiff” is redundant. This is because the plaintiff was required under paragraph 68A of the Advocates (Remuneration) Order to apply for costs awarded to it to be paid by AG to be certified. Paragraph 68A of the Advocates (Remuneration) Order provides:

*68A (1) Notwithstanding anything to the contrary in this Order, when the Registrar of the High Court enters final judgment under Order XLVIII, rule 2 of the Civil Procedure Rules, he may, **on application** in writing and without the filing or taxation of a bill of costs or of notice to any party, sign a certificate of the costs of the suit calculated in accordance with item 15 of Schedule VI.*

(2) An advocate may, in any case in lieu of taxation, apply in writing for a certificate under this paragraph.

(3) If the Registrar refuses an application under this paragraph he shall on request certify his refusal in writing to the applicant and the applicant may within fourteen days of receipt of the certificate give notice of objection, whereupon paragraph 11 shall apply. (Emphasis mine)

18. The plaintiff having failed to make an application as required under paragraph 68A cannot now seek from this court for costs (which are non-existent) to have a certificate issued.

19. Even if the plaintiff had applied as required under paragraph 68A and costs had been certified by the Deputy Registrar this court would not have ordered for a certificate to be issued under section 21 of the Government Proceedings Act in respect of costs because it would be time/statutorily barred under section 4(4) of Cap 22.

20. On the whole the application by Notice of Motion dated 18th September 2017, in respect to prayers 3 and 4 are without merit, they are misconceived and are dismissed with no orders as to costs since the AG did not oppose the application.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 30th day of September 2020.

MARY KASANGO

JUDGE