



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 1 OF 2015

MLANDUNI BUILDING AND

CONSTRUCTIONS LTD.....PLAINTIFF/APPLICANT

EDWARD MASHA TSOFA.....PLAINTIFF/APPLICANT

VERSUS

MERRY BEACH LTD.....1ST DEFENDANT/RESPONDENT

WALTER KILONZI.....2ND DEFENDANT/RESPONDENT

Coram: Hon. Justice R. Nyakundi

A. N. Atancha advocate for the plaintiffs/applicants

Richard Otara advocate for the defendants/respondents

RULING

Background

On 5.1.2015, the plaintiffs **Mlanduni Building and Constructions Ltd and Edward Masha Tsofa** filed a claim against the defendants **Merry Beach Ltd and Walter Kilonzi** grounded on breach of contract. The plaintiffs seek declarations on the following reliefs:

- (1). Judgment for Kshs.67,823,222/= being the balance of the contract price plus interest therein at commercial rates prevailing in January 2015.***
- (2). Liquidated damages calculated at the rate of 1% of the contract price of Kshs.104,128,00/= per day for 640 days from 14th April to 16th January 2015 and damages for breach of contract.***
- (3). Costs of this suit together with interest therein.***

Needless to point out that the claim has never been prosecuted by the plaintiffs five years down the line. However, on 22.10.2020 a notice of motion was filed seeking summary Judgment in terms of Order 36 Rule (1) (1) of the Civil Procedure Rules for orders:

- (1). That summary Judgment be entered against the defendants/respondents for an amount of Kshs.67,823,222/=.***
- (2). That in the alternative to prayer (a) the Court be pleased to enter summary Judgment against the defendants/respondents for such other suits as the Court may deem fit due and owing to the plaintiffs.***

The applicants/plaintiffs have pleaded their case by relying on the averments contained in the affidavit deposed by **Edward Masha Tsofa**. The contention raised by the claimant is that the defence filed does not stand a realistic prospect of success. Consequently, the summary Judgment ought to carry the day. It is now my singular duty to comb through the pleadings, annexures and the instant notice of motion to establish whether there is a meritorious case for the relief of summary Judgment.

Determination

First and foremost, what the Court is asked to do is to strike out the defence as a pleading which is scandalous, vexatious, offence, prejudicial, containing matters that are immaterial to the claim filed by the applicants. In the **Dawkins v Prince Edward of Save Webber {1976} 1QBD 499** – The Court in considering whether a matter is vexatious held as follows:

“That a matter is said to be vexatious when;

(a). It has no foundation or

(b). It has no chance of succeeding or

(c). The defence (pleading) is brought for purpose of annoyance or

(d). Where it is brought so that the party’s pleading should have some fanciful advantage or where it can really to no possible good.”

Where the Court is asked to exercise statutory power, of striking out pleadings that power and discretion has to be exercised judiciously and not whimsically. The Court in **D. T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Macharia Civil Appeal No. 37 of 1988** held inter alia:

“Striking out of a party’s case is the most severe sanction that may be imposed, under the Court’s coercive powers. It is draconian and so the power to do so must not be hurriedly exercised as it has the effect of depriving a person access to the Courts which could result in a denial of justice. If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it. A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.”

In **Baxi v Bank of India {1966} EA 130** the Court observed that:

“As the pleading stand, facts and issues have been raised which are in dispute. The defence pleaded if it succeeds, is a valid one which would defeat the plaintiffs claim. It is only by accepting the facts stated in the affidavits as true, that one can reach the conclusion that the defence has no merit.” (See also Odunga’s Digest on Civil Case Law and Procedure 3rd Edition Vol. 9 at Page 7473 – paragraph (b)).

The question, as I see it in this notice of motion is whether the applicant has presented a strong case for striking out the defence. In my view, I do not think so, being inspired by the principle in **Kensan Insurance Brokers Ltd v Keninda Assurance Co. Ltd CA No. 94 of 1994** where the Court stated:

“Striking out is a strong summary remedy that must be granted in clearest cases with extreme caution.”

It is not disputed that the applications through their motion are asking this Court to strike out part of the defence as it relates to the amount of Kshs.67,823,222/= and in those circumstances grant summary Judgment of particular importance is Rule 36 (1) of the Civil Procedure Rules

“which sets out the ground on which summary Judgment may be granted by the Court against the defendant. The predominant principle in summary Judgment motions is where the defendant has no real prospect of successfully defending the claim or the issues.”

In the case of **Winlock v Maloney & others {1965} (1WLR) 1238** as further stated by Odunga J in his Digest on Civil Case Law and Procedure Vol. 9 3rd Edition at page 7480, para 4:

“This summary Jurisdiction of the Court was never intended to be exercised a minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge, and to produce the trial of the case in chambers only without discovery and without oral evidence tested by cross-examination in the ordinary way. This is an abuse of the inherent power of the Court and not a proper exercise of that power.”

The claim by the applicant/plaintiff as deduced from the plaint raises a number of issues on the basis of the building contract with the defendants. For example, in respect of other prayers the quantum is raised to a value of 10%, 20% and 30% as payable to the plaintiffs. This issue requires the Court to have a glimpse at the contract documents and all its terms and conditions as agreed between the parties. In **Rev Peter Ma Kuac v Kenya Commercial Bank HCC Suit No. 436 of 2006 Koome J** held thus:

“Summary Judgment should only be entered where the amount claimed has been specified, is due and payable or has been ascertained or is capable of being ascertained as a mere matter of arithmetic. A liquidated claim is one that needs no further inquiry as to how much ought to be claimed. A sum does not become liquidated just because it is claimed but only if it is agreed or events on which it is based reveal it can be calculated independently of the sum claimed.” (See also **Gunbaksh Singh & Sons v Njiru Emporium {1985} KLR**)

In the opinion of the Court in **Marralyn Taylor –Wright v Sagicor Baun Jamaica Ltd {2016} JMCA Philip JA** observed on this issue of granting or refusing summary Judgment.

“It is evident that to succeed on an application for summary Judgment, the prospects of success must be realistic as opposed to fanciful and in making an order on this assessment, regard must be had to the overriding objective and the interest of justice. The overall burden proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success.”

Granting summary Judgment is an intrinsically judicial matter, so exercised judiciously on the particular facts of the case rather than on general principles. I associate myself with the dictum in **S v Gloxester Shire County Council v Tower Hamlets London Borough Council & another {2003} 3 ALL ER** where the Court rightly pointed out that:

“On an application for summary Judgment the claimant must satisfy the Court of the following:

(a). All substantial facts relevant to the claimant’s case which are reasonably capable of being before the Court must be before the Court.

(b). Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(c). There must be no real prospect of oral evidence affecting the Court’s assessment of facts.”

The claim and the affidavit in support of the motion on summary Judgment, without the benefit of full arguments and oral evidence on the dispute, I am not prepared to invoke Order 36 (1) of the Civil Procedure Rules on the subject matter to grant summary Judgment.

The summary Judgment being sought by the applicant is underpinned in the building contract between the parties and subsequent conduct which had a direct correlation to accord full implementation of the agreement.

Regrettably, for reasons not very clear from the record the applicants/plaintiffs have never prosecuted the claim since 2015. The respondent counsel at one time on 1.9.2016 filed a notice of motion seeking leave of the Court for the suit to be dismissed for want of prosecution. The application was heard and determined by the Court with an order of dismissal demanding the parties to schedule the matter for hearing on a priority basis.

Further, to that order no positive step has been taken by the plaintiffs to prosecute the claim against the defendant/respondents. Therefore, I take it that summary Judgment motion against the defendants/respondents is meant to cover the indolence and act of laches on the part of the plaintiffs/applicant. The proper approach was for the plaintiffs/applicants to comply with case management directions of the Court to set down the suit down for hearing and final disposal.

This Court cannot fathom the length of delay, lack of reasons for the delay and the degree of prejudice on the part of the defendants of having a stale claim hanging over their head for five years. In the instant case, it’s the duty of both counsels to assist the Court by virtue of Section 1A and 1B of the Civil Procedure act on overriding objective in having the claim heard fairly and expeditiously. Fair hearing includes giving an opportunity to each party to present their side of the story to the dispute.

It follows from the above arguments that the motion for summary Judgment was not properly prayed for based on the facts of the entire suit and in particular on the issue of Kshs.67,823,222 as against the defendants/respondents.

The upshot is that the notice of motion dated 13.10.2020 on the claim for summary Judgment is denied with costs to the defendants/respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.