



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 14 OF 2017

NDUMBERI GENERAL MERCHANTS LTD.....PLAINTIFF/APPLICANT

VERSUS

EWASO NGIRO NORTH RIVER BASIN

DEVELOPMENT AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. The Application is a Notice of Motion dated the 14/12/2017 and is premised under the provisions of Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules and all enabling provisions; the Applicant seeks to strike out the Respondent's defence; and judgment be entered in its favour and the costs be provided for;
2. The Applicant places reliance on the grounds on the face of the Application and on the Supporting Affidavit made on the same date made by **CHRISTOPHER KANAI KAMAU** who depones that he is a director of the Plaintiff company and is conversant with the facts and is duly authorized to make the affidavit.
3. A short preview of the facts is that the Defendant engaged the Plaintiff by way of three (3) separate LSO's to excavate three water pans known as **KIHARO PAN, ACKAM DAM AND KAREMENO DAM** for the total consideration of Kshs.53,331,464/-; the excavation was done and the duly appointed agents of the Defendant certified that all the three projects were satisfactorily completed and Completion Certificates issued and on that basis part payment was made in the sum of Kshs.22,612,323/-; the Applicant proceeded to institute this instance suit to enforce the payment of the balance of Kshs.25,334,118/-; the Defendant filed its defence denying the Applicants claim which; the Applicant contends that the defence raises no reasonable defence and is unsupported by documentation and is merely calculated to delay the trial and therefore seeks to have the defence struck out;
4. The court directed the parties to file written submissions and thereafter to highlight the same; hereunder is a summary of the submissions of the respective parties;

APPLICANTS SUBMISSIONS

(a) The defence filed was frivolous vexatious and raised no reasonable triable issues; there are three facts not denied; that the Respondent issued three (3) LSO's to the Applicant for excavation of three water pans; it has not denied that it contracted Messer's Professional Consultants to be the engineers from launching and completion of the project and that they issued completion certificates; and it is not denied that part payment was made on the certificate; therefore the aim of the Respondent was to purely delay the recovery of monies that is rightfully owed to the Applicant;

(b) That Article 47 (1) of the Constitution stipulates as follows;

“Every person has a right to administrative action that is expeditious efficient lawful reasonable and procedurally fair.”

(c) The provisions of Order 2 Rule 15 fulfils the threshold of the Constitution; that unlike the previous provision in the Civil Procedure Act which provided that the Plaintiff applied for summary judgment before the defence was filed; in the present provision the striking out is done after the Defendant has filed a defence; this offers the Defendant an opportunity to ventilate its case and this is done by annexing various documents to its defence;

(d) Order 7 Rule (5) allows the Defendant to annex to its defence a List of Witnesses together with their statements and a List of Documents together with copies of the documents; all these amount to evidence that the Defendant seeks to rely on during the trial;

from these documents the court can discern and make an informed finding on whether the Defendant has a good defence and case that ought to go for full hearing;

(e) In this instance the Applicant submitted that the various stages of the contracted works were inspected and duly certified as satisfactory by the Respondents own agent; the Respondent being satisfied made part payment;

(f) The Respondent has not shown the court any technical report by a professional body to prove that the Applicant did not complete its work or did a shoddy job; by filing its defence the Respondent is just seeking to delay the fair and expeditious disposal of the trial contrary to the constitution and other laws; that the submissions made by the Respondent relate to the old procedure of summary judgment and that the striking out of a pleading under Order 2 Rule 15 is not a technicality as the court is seized of all material presented by the parties;

(g) The court should not allow this breach of the law and should therefore strike out the defence and award judgment to the Applicant as prayed in the Plea;

(h) The case law relied on are **Margaret N. Mbugua vs Kirk M. Nyaga Civil No. 110 of 2012 (Nrb) and Equitorial Bank Ltd vs Jodam Engineering Works Ltd (Msa) HCCC No 13 of 2012.**

RESPONDENTS SUBMISSIONS

5. In response the Defendant opposed the Application and relied on its Replying Affidavit dated the 28/02/2018 together with the List of Authorities and the written submissions and submitted as follows;

(a) The provisions of law that need to be considered are Article 50 which provides a right to fair hearing and that disputes be done in a fair manner; Article 159(2) that justice be administered without undue technicalities; the Applicant was relying on Sections 1A and 1B which provide for the overriding objectives of the court; but under Section 3A this court can make such orders as it thinks fit to meet the ends of justice and to prevent abuse of the due process;

(b) The Respondent sought leave to file the documents based on the contentious issues and this was objected to by the Applicants and therefore the only pleading filed was the Defence;

(c) The authorities cited provide the basis when a court can strike out a defence; reference was made to the case of **Anchor Ltd vs Sports Kenya (2017) eKLR where it was held;**

“courts cannot deploy technicalities as the basis of their decisions”

(d) Every court of law must serve substantive law and where triable issues are raised the court needs to hear them at a full trial; the case-law relied on was **Gupta vs Continental Builders** where the holding was if there were triable issues raised the Defendant shall be granted unconditional leave to defend and the issues will be canvassed at a full hearing;

(e) Counsel submitted that the Applicant had tried to demonstrate that the Respondent had admitted facts in their documents; however in the case of **Guardian Bank vs Jambo Biscuits Kenya Limited (2014) eKLR** that the admission must be very clear and unequivocal;

(f) In this instance there are certain facts that are contentious; if the court were to examine the LSO's it would then make a determination whether the same were valid contracts or not; the Respondent contended that as per the attached Board minutes the Applicant never carried out the works as alleged;

(g) **In Luka Kipkorir vs National Oil Co. Ltd (2014) eKLR** the holding was that the said order does not provide for the striking out for failure to comply; and held that it can only be struck out under Order 11 Rule 3(4) and (5) of the Civil Procedure Rules; in this instance no party has failed to comply with pre-trial orders;

(h) Counsel humbly submitted that the Application filed by the Applicant was defective as the section does not provide for such an action; and prayed that the Application be dismissed and in the interest of justice the Defendant be allowed to comply with Order 7;

REJOINDER

6. The Defence was filed on the 11/08/2017 and the instant Application was brought on the 20/12/2017 and to date the court has never prevented the Respondent from filing any papers; the Respondent filed the defence with no documents; this supports the contention that the defence is a sham; and the court should not aid the indolent; the authorities cited are persuasive in nature.

7. After hearing the submissions made by both Counsel for the Applicant and Respondent, the issues framed for determination are;

(i) Whether the statement of defence is frivolous and vexatious;

(ii) Whether the statement of defence should be struck out for non-compliance with Order 7 Rule 5;

ANALYSIS

Whether the statement of defence is frivolous and vexatious;

8. The Applicants claim is that the Respondent is indebted to it as set out in the Plaintiff and that it has no valid defence to its claim; that the defence is frivolous, vexatious and has no merit at all and that the defence has been filed for the sake of delaying the fair trial of the suit and that it is in fact an abuse of the court process;

9. Counsel for the Applicant expounded that the Defendant engaged the plaintiff by way of three (3) separate LSO's to excavate three water pans known as **KIHARO PAN, ACKAM DAM AND KAREMENO DAM** for the total consideration of Kshs.53,331,464/-; the excavation was done and the duly appointed agents of the Defendant certified that all the three projects were satisfactorily completed and Completion Certificates issued and on that basis part payment was made in the sum of Kshs.22,612,323/-; leaving a balance of Kshs.25,334,118.34 which the Applicant seeks to recover;

10. The Applicant submitted that the statement of defence is set out in general terms and does not set out which works were carried out unprofessionally;

11. The principles that guide a court of law are laid out in Order 2 Rule 15 of the Civil Procedure Rules which reads as follows;

“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.”

12. In this instant it is for this court to determine whether the defence as it stands is a mere denial and a sham, or is frivolous and vexatious; a cursory look at the defence shows that the defendant in its response admitted that it had indeed contracted the Applicant; and had paid out Kshs.22,612,323/- after an assessment of the work undertaken by the Applicant was done; that the balance of monies claimed as being due under the contract was not clear as to whether it was in the sum of either Kshs.45,981,834/81 or in the sum Kshs.25,334,118/34; and at paragraphs 5 and 6 of the defence states that there is no amount due and owing as the work done was not in accordance with orders given and was sub-standard;

13. The Respondent contended that the above notwithstanding an admission must be in very clear and unequivocal terms; the contract is also contested and that there was need for the LSO's to be examined to determine whether the same were valid contracts or not; that these were the facts which were contentious and as such where triable issues are raised a court of law must serve substantive justice and that the Defendant argued that it should be granted unconditional leave to defend so that the issues can be canvassed at a full hearing

14. Having taken into account the averments in the Plaintiff, the defence, the affidavits and the documents placed before this court it is of the view that this is not a plain and obvious case and finds nothing in the defence that is frivolous and intended to vex the plaintiff; there is nothing found that amounts to an abuse of the court's process; in fact this court is satisfied that there are a number of issues raised that are not discernable from the pleadings; the following are the issues that are not discernable and are deemed to be triable issues;

(a) Whether the LSOs constitute contracts as between the Applicant and the Respondent;

(b) Whether after payment of Kshs.22,612,323/- the Applicant is indeed entitled to any outstanding balances as claimed in the Plaintiff or at all;

(c) Whether the Defendant was entitled to reduce the amount claimed based on the labour and work agreed to be supplied; and whether the works were of the highest and best workmanship and to the agreed standards;

15. There are legions of authorities that have held that striking out of a pleading to be a draconian remedy and an order of last resort; it can bring a suit to an end before it is heard on merit and therefore the rules of natural justice require a court of law to exercise due caution when exercising this discretionary power;

16. This court is satisfied that the terms of the parties dealings and the balances outstanding are arguable points which have been raised in the statement of defence; and as drawn it suffices to entitle the Defendant to interrogate the above issues as against the Plaintiff; and that this can only be done at a full hearing; therefore the defence cannot be regarded as a mere denial and a sham, frivolous nor an abuse of the court process;

Whether the statement of defence should be struck out for non-compliance with Order 7 Rule 5;

17. The applicant submitted that the Defendant also failed to file a List of Documents that it intended to rely on as required by Order 7 Rule 5 of the Civil Procedure Rules; neither was a list of witnesses or written witnesses statements filed; and therefore also seeks for the striking out

of the defence as the Respondent failed to include the accompanying documents;

18. Order 7 Rule 5 reads as follows;

“[Order 7, rule 5.] Documents to accompany defence or counter-claim.

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

b) a list of witnesses to be called at the trial;

c) written statements signed by the witnesses except expert witnesses; and

d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

19. Upon perusing the above Order it is noted that it does not render the pleading as defective so as to warrant its striking out; in fact the proviso gives the defence room to furnish the witness statements with the leave of the court at least fifteen days prior to the pre-trial conference;

20. This court is persuaded by the case of **Luka Kipkorir vs National Oil Co. Ltd (2014) eKLR** where the holding of the court was that the said order was not a good ground for the striking out of the pleading for failure to comply;

21. This court reiterates that a court of law must serve substantive justice without due regard to technicalities in accordance with Article 159(2) d of the Constitution 2010; and in any event the Respondent had sought leave of the court to comply but this was met with resistance by the Applicant;

22. This court in order to do substantive justice will overlook this failure and shall grant the Defendant unconditional leave to defend so that the issues raised by it can be canvassed at a full hearing;

FINDINGS

23. This court finds that the defence is not a mere denial and a sham, frivolous nor an abuse of the court process;

24. That failure to comply with the said order is not a good ground for the striking out of the pleading;

DETERMINATION

25. The Application is found lacking in merit and it is hereby dismissed.

26. The costs shall be in the cause.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 21st day of February, 2019.

HON.A.MSHILA

JUDGE