



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 305 OF 2017

BETWEEN

**SMEC INTERNATIONAL PTY LIMITED.....PLAINTIFF**

**AND**

**MINISTRY OF WATER, ENVIRONMENT**

**AND NATIONAL RESOURCES.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING NO. 2**

1. The plaintiff has moved the court by an application dated 16<sup>th</sup> November 2017 invoking, inter alia, **Order 2 rule 15** of the **Civil Procedure Rules** (“the **Rules**”) seeking the following reliefs:

*[1] THAT the Defendants’ Statement of Defence dated and filed herein on 6<sup>th</sup> September 2017 be and is hereby struck out.*

*[2] THAT judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Australian Dollars 378, 176 together with interest at the agreed rate of LIBOR +2.0% per annum from 16<sup>th</sup> August 2012 when the said amounts became due and payable until payment in full.*

*[3] THAT costs of this application and generally for this suit be awarded to the Plaintiff/Applicant.*

2. The application is supported by the affidavit of Saeed Soltani sworn on 16<sup>th</sup> November 2017. The thrust of the plaintiff’s case as set out in the plaint and the supporting affidavit is that the plaintiff entered into a contract being contract No. MRD/18/2009 – 10 dated 31<sup>st</sup> May 2019 with the 1<sup>st</sup> defendant for, “*Feasibility Study and Detailed Design of the Magwagwa Multipurpose Dam Development Project on River Sondu.*” The contract provided for scheduled payments which were dependent on the delivery of service and invoicing by the plaintiff at different stages of the project. The plaintiff contends that in June 2012, it completed the work and issued an invoice for the outstanding amount of AUS\$ 295,133.00 to the 1<sup>st</sup> defendant which was to be settled within 70 days. It avers that the 1<sup>st</sup> defendant has failed to pay the said sum despite various demands and notice of intention to sue. As the 1<sup>st</sup> defendant failed to pay the said sum together with interest in accordance with the agreement, the plaintiff filed this suit and now seeks to strike out the statement of defence on the ground that it does not raise any triable issue, is scandalous, frivolous, vexatious and an abuse of the process of the court.

3. In response to the motion to strike out its statement of defence, the defendant relied on the replying affidavit of Kanini K. Nthigah, Senior State Counsel at the Attorney General’s Chamber sworn on 29<sup>th</sup> March 2018. The gist of the affidavit is that amended defence raises triable issues and should not be struck out. After setting out denials, the amended defence dated 17<sup>th</sup> July 2019 states, at the material parts, as follows:

*[3A] The Defendants vehemently deny the averments in Paragraph 5 of the Plaint and puts the Plaintiff to strict proof thereof. In the alternative and without prejudice to the denials herein, the Defendants aver that if at all there was a contract that the Plaintiff*

entered into with the Government on whose behalf the 2<sup>nd</sup> Defendant has been sued, which is denied, then the same was not with the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant has been wrongly sued in the present suit. As such, the 1<sup>st</sup> Defendant shall at the earliest opportune moment pray that the suit against it be dismissed with costs.

[3B] The Defendant vehemently deny the averments in Paragraph 6 of the Plaintiff and put the Plaintiff to strict proof thereof. In the alternative and without prejudice to the denials herein, the Defendant aver that the Plaintiff never met the conditions for payment any averments to the contrary invite strict proof thereof.

4. From the plaintiff's written submissions and the parties' advocates brief oral arguments, both sides agree on the general principles governing the exercise of discretion to strike out pleadings under **Order 2 rule 15** of the **Rules**. Our courts have over the years held that striking out a pleading is a draconian measure that should only be resorted to in the clearest of circumstances and in particular where the pleading does not raise any triable issue. For example, in **Co-operative Merchant Bank Ltd v George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal summarized these principles as follows:

*The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong ..... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases ... Whether or not a case is plain is a matter of fact .... A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.*

5. It is against those principles that I will consider the facts of this case. Even though the defendants generally denied the contract between the plaintiff and the 1<sup>st</sup> defendant, the deposition in support of the motion for striking out laid out the agreement, the fact that it was performed and the demand for payment. Apart from asserting that there were triable issues, the defendant did not controvert these factual matters or in any way contest them by setting forth other facts that would support an affirmative defence.

6. The question then is whether the amended defence as it stands and whose contents I have set out elsewhere in this judgment raises triable issues. In paragraph 3A, the issue raised by the defendant is that the 1<sup>st</sup> defendant is wrongly sued. This is an issue that is easily disposed of as it is matter of law. I understand the defendant to be referring to the **Government Proceedings Act (Chapter 40 of the Laws of Kenya)** which, inter alia, governs civil proceedings by or against government. In particular **section 12(1)** thereof provides as follows:

*12. (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.*

I do not read this provision to mean that the suit is incompetent if it includes the State ministry or department concerned as a party since **Order 2 Rule 1(1)** of the **Rules** requires the plaintiff to identify the department or officers concerned with the matter and is to the effect that:

*1(1) Every pleading in civil pleadings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and the officers concerned.*

7. From the foregoing provisions, the Attorney General is the proper party and the result is that the inclusion of the Ministry of Water, Environment and Natural Resources is a misjoinder and mere surplusage. Misjoinder of a party cannot defeat the suit as **Order 1 Rule 9** of the **Rules** stipulates that:

*9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

8. Apart from the denial, the second part of the defence is that that, "the Plaintiff never met the conditions for payment and any averments to the contrary invite strict proof." The replying affidavit does not state the conditions for payment and how the plaintiff did not comply. I find this kind of pleading embarrassing and evasive and does not respond to the clear averments and factual deposition of the plaintiff that the parties executed the contract which was performed and payment demanded. The plaintiff has placed before the court demand notices and a notice to the Attorney General outlining its claim yet they have not elicited any responses particularizing the reasons for failing to settle the invoices.

9. This is a case where there the plaintiff has affirmatively put before the court the necessary documents to establish its case. The defendants have not put before the court any material that the court would conclude that the defence raises a triable issue. In short, the defendants have not given any answer to the plaintiff's case apart from a bare denial. I therefore find and hold that the amended defence does not raise any triable issues. In coming to this conclusion, I am fortified by the decision of the Court of Appeal in **Ragbir Singh Chatte v National Bank of Kenya KSM CA Civil Appeal No. 50 of 1996 [1996] eKLR** where it quoted with approval the words of Jessel MR., in **Thorn v Holdsworth [1876] 3 Ch. 637 at 640** that:

*When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.*

10. For the reasons I have set out above, I allow the Notice of Motion dated 16<sup>th</sup> November 2017 and order as follows:

(a) The Defendants' amended statement of defence duly amended on 17<sup>th</sup> July 2019 is hereby struck out.

(b) Judgement be and is hereby entered for the plaintiff against the 2<sup>nd</sup> defendant for the AU\$ 378,176.00 together with interest thereon at the LIBOR + 2% per annum from 16<sup>th</sup> August 2012 until payment in full.

(c) The 2<sup>nd</sup> defendant shall pay costs of this application and the entire suit.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of NOVEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

Mr Nyakundi instructed by Kaplan and Stratton Advocates for the plaintiff.

Ms Nthiga, Senior State Counsel instructed by the Office of the Attorney General for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.