



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL CASE NO. 14 OF 2017**

**NDUMBERI GENERAL MERCHANTS LTD.....PLAINTIFF**

**VERSUS**

**EWASO NGIRO NORTH RIVER BASIN**

**DEVELOPMENT AUTHORITY.....DEFENDANT**

**RULING**

1. The application is a Notice of Motion dated the 14/12/2017 and is brought 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 respondents defence; and judgment be entered in its favour and the costs be in the cause;
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 fulfil 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 during the various stages of the contracted works it was 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 Plaintiff;

(h) The case law relied on is **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**

(i) 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;

(j) Counsel submitted that 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; that 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;

(k) 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;

(l) 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 it was held:**

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

(m) 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;

(n) 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** that the admission must be very clear and unequivocal;

(o) In this instance there are certain facts that are contentious; if the court were to examine the LSO's it could 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;

(p) In **Luka Kipkorir vs National Oil Co. Ltd** the Hon. Judge held that the said order does not provide for the striking out for failure to comply; and held that it can only be struck out when a party fails to comply with t

(q) he pre-trial orders as set out under Order 11 Rule 3(4) and (5)

(r) That the application filed by the applicant was defective as the Order does not provide for such an action; and the respondent prayed that the application be dismissed and it be allowed to comply with Order 7;

## **REJOINDER**

(s) 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 contention that the defence is a sham; and the court should not aid the indolent; the authorities cited are persuasive in nature.

5. After perusing the court file and hearing and reading the submissions made by both Counsel for the applicant and respondent, the only issue framed for determination is;

(i) Whether the defence is frivolous and vexatious and should be struck out;

## **ANALYSIS**

**Whether the defence is frivolous and vexatious and should be struck out;**

6. This court framed the issues and when embarking on the writing of the ruling it noted that the Defence was missing from the court record; this document is very central to the applicants case and the court record being incomplete this court has no documents to peruse so as to enable it make a judicial determination on the merits of the case;

7. This courts presumption is that the documents may have been misfiled as there is a Memorandum of Appearance and a Reply to the Defence; and not that the documents have been removed so as to derail the application;

8. All in all in the interest of justice the interest of both parties must be considered; it would therefore be in order for this court to accord the respondent an opportunity to avail the documents to this court; after all this pleading could be to its benefit as it may demonstrate that there are triable issues and that the suit should be allowed to proceed to a full trial;

**DETERMINATION**

9. The deputy registrar and/or the respondent are directed to expedite the process of availing the missing Defence;

10. Mention on the day of 5/12/2018 for purposes of fixing a Ruling date.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of October, 2018.**

**HON.A.MSHILA**

**JUDGE**