



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO.246 OF 2016**

**X-TREME ELECTRONICS LTD.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. **X – TREME ELECTRONICS LIMITED**, the plaintiff, has sued **THE CO-OPERATIVE BANK OF KENYA LIMITED**, the defendant, for judgement for **Ksh.12,660,128.60**. The claim is for services rendered by the plaintiff to the defendant, for which the plaintiff pleads that the defendant has failed to pay the amount of **Ksh.12,660,128.60**.

2. The defendant filed its defence on **12<sup>th</sup> August 2016** whereby the defendant denied that a contract was entered with plaintiff by its agent to supply such services. Contrary to that previous pleading the defendant pleaded that there were inconsistencies in Fluke Test Results submitted to it by the plaintiff.

3. Before me, is two applications. One is dated **5<sup>th</sup> October 2016** (the plaintiff's application) and the other is dated **11<sup>th</sup> May 2017** (the defendant's application). I am considering both applications in this Ruling.

**PLAINTIFF'S APPLICATION**

4. This application is brought under order 2 Rule 15 (1) and order 13 Rule 2 of the Civil Procedure Rules (the Rules). The plaintiff by that application seeks that the defendant's defence be struck out and/or dismissed and judgement be entered for the plaintiff as prayed in the plaint. In the alternative it seeks the striking out of paragraph 3,4,15,6,7,8 and 9 of the defence and judgement on admission be entered for the plaintiff.

5. The plaintiffs supporting affidavit to their application is sworn by the two directors of the plaintiff. They deposed that the defence filed herein is a sham, scandalous, frivolous and vexatious which is calculated to embarrass or delay fair trial.

6. The deponent proceeded to refer to a letter dated **10<sup>th</sup> November 2011** written by the defendant to an entity called Synchro-consult Associates Ltd informing them that the defendant had awarded the plaintiff service works of structured cabling works at the Co-operative House Building. Synchro-consult Associates by their letter dated **29<sup>th</sup> November 2011** awarded the plaintiff the said works.

7. The plaintiff's directors deposed that in the light of those two letters of admission the defendant's

defence must fail.

8. The said directors deponed that a certificate of practical completion was issued to the plaintiff by the defendant's agent on **20<sup>th</sup> November 2014**. That agent is Synchro-consultant Associates Ltd.

9. An Affidavit is sworn by **David Manasses Mutonga** the Managing Director of Synchro-consultant Associates Ltd. What he stated in that affidavit is so pertinent and I will therefore reproduce some parts of his said affidavit as follows:

*"I, DAVID MANASSES MUTONGA of P.O. Box 79626 – 00202, Nairobi in the Republic of Kenya do hereby make oath and say as follows:*

1. **THAT** *I am an adult male person of sound mind resident in Nairobi in the Republic aforesaid.*

2. **That** *I am an Electrical and Mechanical Engineer by profession and the Managing Director of Synchroconsult Associates Limited, which at all material times was and has been the duly appointed sole Consulting Engineer Supervisor and/or Overseer for and on behalf of the Defendant in connection with or with regard to the Contract of Structural Cabling Installation Works for proposed Co-operative House LAN Upgrade between the Plaintiff and the Defendant in the above case. I am well acquainted with the issues as the Engineer in-charge throughout the said contractual period and with full authority to make this affidavit on behalf of the appointed Engineer.*

*I, refer to and annex hereto a true copy of the Defendant's exhibit produced in the Defendant's application herein and marked "LK 1" and further annexed hereto are true copies of Defendant's letter dated 10<sup>th</sup> November, 2011 instructing us to award the Contract to the Plaintiff and the Engineer's Letter dated 29<sup>th</sup> November, 2011 awarding the Tender Contract to the Plaintiff all produced and marked "DMM 1".*

3. **That** *it was a term of the said Contract that the Engineer would be the sole Engineer/Supervisor/Overseer and/or Consultant in all works and services and materials to be supplied in execution of the said contract as provided under paragraph 6 of the said contract inter alia:-*

*"Execution on the contract works:-*

*The contractor shall execute and complete the contract works subject to and in accordance with this contract in all respects to the reasonable satisfaction of the Employer and of the Engineer and in conformity with all the reasonable directions and requirements of the Engineer including written instructions of the Engineer."*

4. **That** *it was a further term of the said Contract that I had authority of the Defendant to issue both:-*

a) *Interim Certificate of Completion of Contract for completed works and supplies to enable final payments to be made and,*

b) *Final Certificate of Practical Completion Certificate when final payments may be made within 14 days from the date of issue thereof.*

5. **That** *once a Certificate of Practical Completion is issued, the said certificate shall be and is conclusive evidence in any proceedings arising out of the said Contract that the said Contract was and/or has been successfully and practically completed and any contractual monies outstanding becomes due and payable fully within 14 days from the date of the said Certificate.*

6. **That** during the said contractual period, the Engineer issued several Interim payment Certificates together with several progress Reports on the contractual project. I annex hereto true copies of such Certificates and Reports in consultation with and approval of the Defendant produced and marked “DMM 2”.

7. **That** upon practical completion of the said contract and upon inspection by both parties thereof and upon being satisfied with the said execution and completion of the same, the Engineer issued a Certificate of Practical Completion as at 2<sup>nd</sup> August, 2013 signed by me therein providing for Defects Liability period expiring on 2<sup>nd</sup> February, 2014. I annex hereto a true copy of the said Certificate of Practical Completion issued to the Plaintiff with a copy to the Defendant produced and Marked “DMM 3”.

8. **That** upon the said completion of the said Contract, I duly reminded the Defendant of the same by the Engineer’s Letter dated 20<sup>th</sup> November, 2014. I annex hereto a true copy of the said letter enclosing the final accounts produced and marked “DMM 4”.

9. **That** I similarly issued Practical Completion Certificate for M/s Sawan Singh & Sons Ltd who were the other Contractors for Electrical Installation as at 2<sup>nd</sup> August, 2013. I annex hereto a true copy of the Engineers Letter dated 9<sup>th</sup> February, 2015 produced and marked “DMM 5”.

10. **That** consequent upon the issuance of the said Certificates, our (Engineer’s) contractual costs therefore were fully settled by the Defendant after sometime.

11. **That** I verily believe that if the Defendant had any genuine complaint or claim, the same should have been lodged within the Defect Liability Claim Period which expired on 2<sup>nd</sup> February, 2014 and which claim, if any, was covered by Insurance which must have closed their file as a result of no claim.

12. **That** all the contractual Fluke Test Results and as installed record Drawings for Structured Cable Works were duly delivered by us (me in particular) vide our letter Ref:SCA/DMM/COOP HSE LAN /2015/07/01 dated 1<sup>st</sup> July 2015 to the Defendant who never raised any complaints. The said delivery was submitted after verification, inspection and approval of the works and materials supplied as per Contract.

13. **That** it was an express term of the said contract that inter alia:-

“provided always that no person subsequently appointed “by the Employer” (in this case the Defendant) to be the Engineer under this Contract shall be entitled to disregard or overrule any certificate or opinion or decision or approval or instruction given or expressed by the Engineer (meaning Synchroconsult Associates Ltd) for the time being.”

14. **That** there may be mischief on the part of the Defendant, so I verily believe, by our (Engineer’s) letter dated 1<sup>st</sup> July, 2015 we sent to the Defendant the Fluke Tests and as installed record drawings (both the hard copy and the soft copy thereof-2 copies each). I annex hereto a true copy of the said letter produced and marked “DMM 6 (a)”.

10. The application is opposed by the defendant through written submissions with no affidavit in reply. The defendant relied on various authorities one of them being the case **SAUDI ARABIA AIRLINES CORPORATION – V – PREMIUM PETROLEUM COMPANY LIMITED** (the defendant did not give the citation of this case) where defendant relied on the following excerpt:

***“I need not re-invest the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these***

*principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgement seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court.”*

11. Defendant highlighted the following as the triable issues raised in its defence:

*a) Whether there is a principal – agent relationship between the defendant and Synchro-consult Associates Ltd.*

*c) Whether or not the works in question were successful completed to the satisfaction of the engineer as per the terms of the contract.*

*c) Whether the plaintiff submitted incomplete or inconsistent fluke results and unsatisfactory works.*

12. Defendant in its submissions relied on the case HARIT SHETH ADVOCATES – V SHAMAS CHARANIA CIVIL APPEAL NO. 252 of 2008 (2014) eKLR Viz

*“To justify summary judgement, the matter must be plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.”*

### **ANALYSIS AND DETERMINATION**

13. It is not denied by the defendant that it accepted to award service work of structured cabling to the plaintiff. This was communicated by the defendant in writing to Synchro-consult Associates Ltd on **10<sup>th</sup> November 2011**. The defendant does however deny that the said Synchro-consult Associates Ltd were its agent, but it fails to explain the many correspondences between it and the said Synchro-consult Associates Ltd.

14. The defendant by its defence filed on **12<sup>th</sup> August 2016** merely denied the plaintiff’s claim and as stated also denied agency with Synchro-consult. Other than merely denying the plaintiff’s claim the defendant in paragraph 6 of that defence pleaded:

*“In further response to paragraph 4 the defendant avers that there were inconsistencies in the Fluke Test Results as submitted by the plaintiff hence incomplete and unsatisfactory works contrary to what was required of the plaintiff.”*

15. The above paragraph 6 of the defence is the only substantive pleading in the defendant’s defence. It will be noted that that paragraph is not supported by any particulars of the failed test or unsatisfactory work.

16. The plaintiff on the other hand has by its plaint pleaded in detail of the contract awarded to it by the defendant; the fact that Synchro-consult were agents of the defendant; that the said Synchro-consult inspected and approved the plaintiff’s work and issued a practical completion of the work; and

consequently the Sychro-consult issued a no objection certificate for plaintiff to be paid for the total contracted sum.

17. I have examined the pleadings, the affidavit evidence and the submissions and I am satisfied that the defendant's defence raises no triable issue to the plaintiff's claim. In this regard I will cite part of the decision in **HARIT SHETH T/A HARIT SHETH** (*Supra*) as follows:

*“The principle which guide our courts in determining applications for summary judgement are not in dispute.....this court stated that the purpose of the proceedings in an application for summary judgement is to enable a plaintiff to obtain a quick plainly no defence to the claim.”*

18. A similar sentiment was expressed by the court of appeal in the case **NAIROBI GOLF HOTEL (KENYA) Ltd VS LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS[1997] eKRL** viz:

*“On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV, is shadowy or a sham is entitled to summary judgment. This court so held in the case of Continental butchery Ltd vs Samson Musila Nthiwa, civil Appeal no. 35 of 1977(CA) in which Madan JA(as he then was) stated the principle thus:*

*“with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by O.35subject to there being no triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case which the court feels justified in thinking that the defences raised area sham.” The learned Judge of Appeal was restating the words of Lord Halsbury in the English case of Jacob Vs Booths Distillery co. 85 TR at Page 262, in which he said: “There are some things too plain for argument and where there were pleas put in simply for the purpose of delay, which only added to the expense and where it was not in aid of justice that such things should continue O.XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights.”*

19. The clear evidence that comes out of the pleadings and affidavit evidence is that the plaintiff was awarded the contract, the plaintiff completed the contractual work; and the practical completion certificate was issued by the defendant's appointed engineer. The defendant has not raised any triable issue to that clear evidence. For that reason, therefore, the plaintiff's Notice of motion dated **5<sup>th</sup> October 2016** succeeds.

### **DEFENDANT'S APPLICATION**

20. The defendant Notice of motion is dated **11<sup>th</sup> May 2017**. It is brought under the provisions of Order 8 rule 3 and 5 (i) of the Rules. The defendant seeks to amend its defence dated **12<sup>th</sup> August 2016** by adding a counter claim.

21. I will reproduce the new paragraphs that the defendant wishes to have in its defence if leave is granted as follows:

*“6A. In further response to paragraph 4, the Defendant avers that the Plaintiff did not submit the Fluke Test Results and AS Build Drawings but the same were instead forwarded by SychroconsultAssociates limited through a letter dated 1<sup>st</sup> July, 2015.*

**6B. By a letter dated 17<sup>th</sup> June, 2016 the Defendant informed Sychroconsult Associates Limited, the Engineers, that the Fluke Test results as submitted are not comprehensive and details of some floor are missing. The Defendant as such requested for a submission of the fluke test for the floors that were left out to enable the Bank to review the project conclusively and close the final account. The details of the floor requested were:-**

- a) Fourteen Floor, Wing B;
- b) Sixth Floor, Wing B;
- c) Mezzanine 2;
- d) Co-op House Branch floors.

**6C. Further the Bank wrote a letter dated 19<sup>th</sup> July, 2016 to the Engineers highlighting the discrepancies in the Fluke Test results.**

**6D. It accordingly follows that the plaintiff failed to observe the provisions of the agreement dated 7<sup>th</sup> February, 2012 entered between the Bank and the plaintiff and advanced the letter of offer dated 29<sup>th</sup> November, 2011.**

#### **ANALYSIS AND DETERMINATION**

22. The defendant does not explain, in seeking leave to amend its defence, why material that seems to inform the proposed amendment, which was in its possession since **June 2016** was not incorporated in its defence filed on **12<sup>th</sup> August 2016**. What is also not explained is why it was only after the plaintiff filed its application for striking defence and entering of judgment that it 'woke up' to the realization that it needed to amend its defence. I am aware that an amendment ought to be allowed any time before judgment. As stated in the case **ELIJAH KIPNGENO ARAP BII –V- KENYA COMMERCIAL BANK LIMITED[2013] eKLR**, the power of the court in allowing amendment is to determine the true and substantive merit of the case.

23. In my view even if the amendment as sought is allowed the defendant needed to explain why it instructed sychro-consult that it awarded the plaintiff to carry out work of structured cabling, if the said sychro-consult was not its agent. If sychro-consult was its agent then the matters stated in the affidavit of its managing director, reproduced above, rings true.

24. In my view the defendants in seeking to amend their defence were responding to the plaintiff's application and in so doing were hoping the amendment would stop the plaintiff's application in its tracks. That in my view is an abuse of the court process.

25. There being clear evidence that the plaintiff concluded the work to the satisfaction of the defendant agent the amendment will do nothing but to delay the conclusion of this suit. For that reason the defendant's Notice of Motion dated **11<sup>th</sup> May 2017** fails.

26. In the end the orders of the court are as follows:

- A) *The defendant's defence filed in court on 12<sup>th</sup> August 2016 is hereby struck out.*
- B) *Judgment is hereby entered for the plaintiff as prayed in the plaint.*
- c) *The plaintiff is awarded costs of the Notice of Motions dated 5<sup>th</sup> October 2016.*
- d) *The Notice of Motion dated 11<sup>th</sup> May 2017 is dismissed with costs to the plaintiff*

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

**MARY KASANGO**

**JUDGE**