REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 84 OF 2014

BETWEEN

ELDODRILL HOLDINGS LIMITED …….……..…..…..……..…… APPELLANT

AND

TIMOTHY ODHIAMBO ……..…….…….…….. RESPONDENT

(Being an appeal from the Ruling and Order of Hon. C.N.Sindani, PM dated 13th June 2013 at the Principal Magistrates Court at Winam in Civil Case No. 249 of 2012)

JUDGMENT

1. The subordinate court found the appellant's defence to be, *"more of denials and sham and disclosing no triable issues and …..… will only prejudice [the respondent] by delaying the case hence lead to an abuse of the court process."* As a result of judgment entered against it, the appellant has now lodged this appeal contained in the memorandum of appeal dated 1st August 2014.

2. The thrust of the appellant's appeal is that the trial magistrate erred in law and in fact in holding that its was a mere denial and a sham, did not raise any triable issues and was calculated to delay the fair hearing of the matter and as such erred in striking out the claim. It asserted that the trial magistrate erred in failing to consider whether there was a legally binding contract between the appellant and respondent and the terms thereof. Counsel for the appellant reiterated these points in its submissions. In summary, counsel for the respondent supported the decision of the trial court. He pointed to the fact that there was an agreement between the parties and the fact that part payment had been made left no doubt that the appellant owed the respondent money hence there were no triable issues.

3. The parties are agreed and it is well established the power to strike out a defence, under **Order 2 rule 15(1),(b), (c)** and **(d)** of the ***Civil Procedure Rules***, is draconian and must be exercised with circumspection. This principle was outlined in ***DT Dobie & Company (Kenya)Ltd v Muchina*** **[1982]KLR** by Madan JA., who stated:

> *No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.*

4. Before I delve into the issues raised in this appeal, I will set out the background facts as they emerged in the pleadings, notice of motion dated 14th January 2013 and the parties depositions. For ease of

reference, I shall refer to the parties in their respective capacities before trial court unless the context other admits.

5. The respondent, who was the plaintiff before the trial court, sued the Albert Ogoma t/a Bon Borehole Drillers, Isaiah O. Mawinda, Eldodrill Holdings Limited and Wycliffe Omondi as the 1st, 2nd, 3rd and 4th defendants in the suit respectively. The plaintiff's case was that sometime in March 2012, he wanted to drill a borehole at his home in Nyawara, Gem District. He contacted the 1st defendant who gave him a quotation for Kshs. 1,170,000/- and agreed to commence works upon receiving a hydro geological report confirming the presence of water on the site. The 1st defendant engaged the 2nd defendant to prepare a hydrogeological survey for which the plaintiff paid Kshs. 25,000/-.

6. On or about 5th April 2012, the plaintiff, 1st and 3rd defendant negotiated a contract where the defendant jointly prepared a quotation for Kshs. 847,500/- and a service contract for Kshs. 847,500/- for a 100m borehole was drawn and executed by the plaintiff and 3rd defendant. Thereafter, on 5th April 2012, upon the direction of the 1st and 3rd defendant, the plaintiff deposited Kshs. 662,500/- in an account at Kenya Commercial Bank, Eldoret West Branch. The plaintiff further paid a sum of Kshs. 18,000/- for supervision services to the 4th defendant. On 15th April 2012, the defendant stopped the work as they claimed that the drills were broken and the well was dry. The plaintiff contended that on 14th June 2012 he received a call from one Stephen Karanja who claimed to be an agent of the 3rd defendant informing him that the company was ready to continue the work if he paid Kshs. 90,000/-. The plaintiff paid Kshs. 50,000/- but the instead of continuing the work, the 3rd defendant came and removed its equipment from the site. The plaintiff was therefore forced to contract another company to complete the drilling.

7. The plaintiff prayed for judgment against the defendants jointly and severally for Kshs. 755,500/- together with costs and interest. He summarised his claim at paragraph 17 of the plaint as follows;

> *The plaintiff therefore claims against the Defendants jointly and/or severally the sums of Kshs. 25,000/- paid to the 1st Defendant for the Hydrological survey conducted by the 2nd defendant, Kshs. 662,500/- deposited with the 1st and 3rd defendants in respect of the drilling services that were to be performed by the 3rd defendant, Kshs. 18,000/- paid to the 4th Defendant for his services as a supervisor of the drilling process and the further sum of Kshs. 50,000/- advanced to the 3rd defendant at its instance and request totalling Kshs. 755,500/-. Full particulars whereof are well within the Defendants knowledge.*

8. The 1st, 2nd and 4th defendant filed a joint defence in which the denied all the plaintiff's claim. The 3rd defendant filed a defence in which it denied the plaintiff's claim but averred in the alternative and without prejudice to its denials that, *"the 3rd defendant avers that if any amount was paid into its accounts or its agents as alleged in the plaint (which is denied) then the same was for work done as provided in section 7 of the agreement dated 5.4.2012."*

9. The trial magistrate considered the parties' submissions and held that joint defence of the 1st, 2nd and 4th Defendants was a bare denial. In relation to the 3rd defendant, he held that the defence as framed was bad, in light of the clear case put forward by the plaintiff and supported by the documents. In particular, the trial magistrate, relied on the Court of Appeal decision in ***Raghbir Singh Chatte v National Bank of Kenya Limited*** **KSM CA Civil Appeal No. 50 of 1996 [1996]eKLR**. In that case the defendant pleaded that, *"In the alternative and without prejudice to the foregoing, the Defendant avers that if any overdraft facilities were extended by the plaintiff to the defendant (which is denied) the same has been fully repaid up and discharged."* The Court of Appeal held that;

> *The defence as framed as such is a bad defence. Defendant (sic) if he indeed received the overdraft should admit so in his defence and then put forward a positive defence that he had fully repaid the same the overdraft. The defence as framed is evasive and does not put forward any positive defence on which issues can be framed for trial. So, even if affidavit evidence is excluded, there is no*

reasonable defence pleaded on that ground the plaintiff's application would succeed.

10. I agree with the learned trial magistrate the appellant's defence was evasive but ***Raghbir Singh Chatte*** **(Supra)** may be distinguished because that case concerned a liquidated claim. In this case, the claim was for services rendered and in its alternative defence, the appellant suggested that it received the money paid to it which for work already done in terms of the agreement dated 5th April 2013.

11. I have evaluated the material before the court and I agree with counsel for the respondent that there is no doubt that the plaintiff and the 3rd defendant entered in to an agreement. Although the sum of Kshs. 662,500/- paid to the account of *"Tiji Poultry Farm"*, it was equivalent to the the 80% mobilisation deposit required by Part B of the said agreement and it was paid on the direction of appellant on the same day the agreement was executed. The only triable issue I find is what is the value of services rendered to the plaintiff by the 3rd defendant and whether the 3rd defendant was liable for the sums paid by the plaintiff to the other defendants. Since I have found that there are triable issues, the appeal is allowed.

12. I have reflected on the issue of costs and ordinarily costs follow the event save in exceptional circumstances. In my view, I found the defence to be evasive considering the decision in ***Raghbir Chatte*** **(Supra)** but I distinguished it in light of the facts of this case. However, the overriding objective is undermined by evasive pleading and a lot of time would have been saved had the appellant pleaded its defence with clarity. It is underserving costs both before this court and before the trial court.

13. I allow the appeal, set aside the judgment and substitute it with an order dismissing the Notice of Motion dated 14th January 2012. I make no order as to costs both before this court and the subordinate court. I direct the trial court to hear and determine this case within 6 months from the date hereof.

DATED and **DELIVERED** at **KISUMU** this **24th day of April 2017.**

D.S. MAJANJA

JUDGE

Mr Momanyi instructed by Anassi Momanyi and Company Advocates for the appellant.

Mr K'Ouko instructed by Odhiambo Owiti and Company Advocates for the respondent.