REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 173 OF 2016

BON-ARCH ASSOCIATES LIMITED……………………………………..PLAINTIFF

VERSUS

NINETY FOUR EASTCHURCH PROPERTIES LIMITED……….…….DEFENDANT

RULING

1. The application dated 27th May 2016 is for summary judgement.

2. The plaintiff's application also seeks an injunction to restrain the defendant from disposing of, charging, dealing with or alienating the suit property **L.R. No. 1870/VI/94,** East Church Road, Nairobi.

3. The application for the injunction was premised upon the fact that the defendant does not have any attachable assets within the jurisdiction of the court.

4. Secondly, the plaintiff sad that the 2 directors of the defendant were both foreigners, and that therefore there was a real risk that they could dispose of the suit property, and then flee the country.

5. It is common ground that the plaintiff, **BON-ARCH ASSOCIATES LIMITED** entered into a contract with the defendant, **NENETY FOUR EAST CHURCH PROPERTIES LIMITED,** on 12th June 2014. The said contract was for the provision of Architectural Consultancy Services to the defendant, when it was developing 41 Luxury Apartments on the suit property.

6. The duration of the contract was agreed upon, to be 24 months.

7. It was a term of the contract that the plaintiff would, as the Architect and Lead Consultant, incorporate other consultants, namely;

a) Quantity Surveyor;

b) Structural & Civil Engineer; and

c) Mechanical & Electrical Engineer.

8. The contract stipulated that the plaintiff would be paid a Consolidated Fee of Kshs. 45,000,000/-, exclusive of Value Added Tax **(VAT).** Indeed, the contract specified the actual dates when each fee instalment was payable, as follows;

Instalment Number	**Percentage of total fees**	**Amount in Kshs.**	**Due Date**
1.	15.55%	7,000,000	PAID-September, 2013

2.	9.53%	4,288,288	PAID-June, 2014
3.	30.47%	13,711,712	PAID-November, 2014
4.	24.45%	11,000,000	PAID-February, 2015
5.	6.67%	3,000,000	PAID-June, 2015
6.	6.67%	3,000,000	PAID-December, 2015
Final	6.67%	3,000,000	PAID-June, 2016
TOTAL	**100%**	**45,000,000**	**June, 2107**

9. The defendant conceded that it was supposed to make payment via transfer to the designated account, within 7 calendar days of receipt of a fee-note and advice from the plaintiff.

10. The defendant also conceded that it was supposed to settle the plaintiff's Traveling Costs and Hotel Expenses, during Overseas Trips and Trips outside Nairobi.

11. It I s the plaintiff's case that it rendered services diligently, and that the defendant was obliged to meet its entire bargain as provided for in the contract.

12. However, the defendant had only paid the first 2 instalments, totalling Kshs. 11,288,288/-, thus leaving an outstanding balance of Kshs. 32,145,586/-.

13. On the other hand, the defendant insists that the plaintiff had not performed its obligations fully, and that therefore, the plaintiff had not become entitled to receive the full contract payment.

14. The defendant pointed out that the work on the project was stopped in September 2014, which was just 4 months from when the said work had commenced.

15. By the time the project was suspended, the defendant says that only some nominal construction work had been undertaken. It was said that a few column basis had been cast at the lower end of the property.

16. The plaintiff also confirmed that the work was suspended in September 2014.

17. Nonetheless, the plaintiff insisted that its entire team of consultants had delivered their ends of the bargain, professionally and in time.

18. The plaintiff's position was that the evidence in court is so clear that there was no controversy that would need to be resolved only after a trial.

19. Secondly, the plaintiff pointed out that its claim is for a liquidated sum.

20. By the time when the plaintiff filed its submissions, *(on 12th April 2017)*, the defendant had not yet filed its Defence. In those circumstances, the plaintiff contended that it had been denied an opportunity to objectively weigh in on whether or not there was a Defence which raised triable issues.

21. The Defence was filed in Court on 24th April 2017, and was then served upon the plaintiff on 25th

April 2017.

22. In my considered view, if the plaintiff felt the need to make further submissions, after the Defence had been served upon it, there was no reason why it did not seek the said opportunity.

23. Instead, on both 19th and 25th of May 2017, the plaintiff's advocates informed the Court that both parties had filed their submissions. The plaintiff then asked the Court to deliver its Ruling.

24. In the circumstances, I hold the view that the plaintiff felt that it did not need to make any further or other submissions. Therefore, the plaintiff cannot be heard to complain about an alleged denial of an opportunity to comment on the Defence.

25. In any event, even when a Defence had not been lodged in Court, provided that the Court and the plaintiff had been provided with material from which the line of defence could be discerned, the said material would be taken into account when determining whether or not summary judgement should be granted.

26. In this case, it is common ground that the construction works was to be undertaken over a period of 24 months.

27. It is also common ground that the works was suspended after only 4 months.

28. Considering that the consideration amounting to Kshs. 45,000,000/- was to be earned by the 24 month, a real serious question arises, concerning how the plaintiff could have conceivably earned the full consideration within only 4 months.

29. It does appear to me that the plaintiff was putting emphasis on only the dates when payments were scheduled to be made.

30. That would imply, in my view, that regardless of the word actually carried out on the project, the plaintiff would have become entitled to payment, provided that the time specified in the payment schedule, had been reached.

31. It is my considered view that the defendant cannot be said to have simply made a mere denial. The defendant actually said that apart from the initial columns which had been cast, the plaintiff had not yet carried out the rest of the work which would then have entitled the plaintiff to demand payment.

32. In those circumstances, I would have expected the plaintiff to provide the details of the work which had been done at every state. Through such detailed information, it would have been possible for the Court to determine whether or not the payment of the Final Instalment coincided with the completion of the work.

33. On the issue of the defendant's liquidity challenges, I note that the contract was not made conditional upon the ability of the defendant to procure financing for the project.

34. If that had been the only line of Defence, the court would probably have told the defendant that there is a clear distinction in law, between liability and the ability to discharge the said liability.

35. In instances where a Defence raises no triable issue, the court would grant summary judgement, thus rendering the defendant liable. Such liability attaches upon the defendant regardless of whether or not the defendant did not have the financial or other ability to meet his obligations arising from the judgement.

36. The plaintiff submitted that the defendant was merely being mischievous when it said that the plaintiff had not delivered its mandate pursuant to the contract.

37. The only way that the plaintiff could have persuaded the court about the defendant's alleged mischief,

would have been through the provision of proof that the plaintiff had actually discharged its mandate.

38. Did the plaintiff's mandate extend only upto the stage when the Designs for the 41 Luxury Apartments had been completed, as the plaintiff has asserted?

39. Considering that the Architectural Consultancy Services were to run for a period of 24 months, I find that the plaintiff's contention is most improbable. I say so because the process of designing the apartments cannot have been going on for the 24 months, during which period the construction work was also supposed to have been carried out.

40. As regards the cheques issued by the defendant, and which were dishonoured upon being presented, the Court's only comment was that the application before me is for summary judgement. It is not an application for judgement on Admission.

41. Similarly, if the defendant had acknowledged its indebtedness to the plaintiff, that could only form a basis for Judgement on Admission.

42. The plaintiff has submitted that parties are bound by the terms of the contract, unless coercion, fraud or undue influence are pleaded and proved. That is the correct legal position, as was reiterated in **NATIONAL BANK of KENYA LIMITED Vs PIPEPLASTIC SAMKOLIT (K) LTD [2002] 2 E.A. 503.**

43. In this case, the contract specified the Architect's Duties and Responsibilities. Clearly, the said duties and responsibilities were not limited to the preparation of the design drawings, as the plaintiff has now suggested.

44. Clause 5.18 of the contract provides as follows;

> **"Overseas the implementation of the terms of the building contract during construction until final completion".**

The plaintiff also undertook the responsibilities for;

> **"i) Visiting the site periodically to inspect and monitor the progress and quality of the construction work, and ensure adherence to specification**
>
> **- clause 5.19**
>
> **ii) Together with other design Consultants, give general guidance on maintenance upon final completion...**
>
> **- clause 5.23?.**

46. On a *prima facie* basis therefore, I find that the defendant's contention, that the plaintiff had an obligation which extended well beyond the design work, has merit. It is definitely an issue which is arguable.

47. Accordingly, the application for summary judgement is unsuccessful. It is dismissed, with costs to the defendant.

48. I now move on to the application for interlocutory injunction. If granted, the order would stop the defendant from disposing of, charging, dealing with or alienating the suit property, until the case was heard and determining.

49. Pursuant to Order 40 rule 1 of the Civil Procedure Rules, the court may grant a temporary injunction where;

“…..it is proved by affidavit or otherwise that –

a) any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit”.

50. The applicant for an injunction, under this Rule, is under a duty to prove that the property in dispute is in danger of being wasted, damaged or alienated by the defendant, or that the property was about to be wrongfully sold in execution of a decree.

51. In this case, the plaintiff has not provide proof that any property in dispute in the case was in any danger of being wasted, damaged, alienated or sold wrongfully in execution of a decree.

52. The applicant also had the option of proving that the defendant threatened or intended to remove or dispose of its property, in such a manner as would lead to the conclusion that the plaintiff would be obstructed or delayed in the execution of the decree which may be passed against the defendant.

53. Once again, there is no evidence of the defendant’s threat or intention to remove or to dispose of the suit property.

54. Meanwhile, as regards the question whether or not the plaintiff had proved a prima facie case with a probability of success, the answer is in the negative. I so hold on the strength of the analysis which I made above, on the application for summary judgement.

55. In this case, the plaintiff is asserting that the defendant was in breach of the contract. There is no suggestion that the alleged breach of contract also constituted the flouting of the law.

56. In **AIKMAN Vs MUCHOKI [1984] KLR 353,** at page 359, Madan J.A *(as he then was)* held as follows;

“…the Court ought never to condone and allow to continue the flouting of the law. Those who flout the law by infringing the rightful titles of others and brazenly admit it, ought to be restrained by injunction…. equity will not assist law breakers……

I will not subscribe to the theory that a wrong doer can keep what he has taken because he can pay for it”.

57. In circumstances in which the defendant was acting illegally and in breach of express provisions of the law, the court would issue an injunction against him, even if such a defendant had the ability and means to compensate the plaintiff by an award of damages.

58. The defendant in this case does not actually have any financial muscle, which it utilize in paying compensation. It cannot therefore be said to have acquired a position of advantage by breaching any law, and then bragging that it was able to compensate the plaintiff.

59. If anything, the defendant is blaming its financial woes on matters which were beyond its control. First, it is said that the original owner of the suit property had registered a caveat against the title. It is because of that development that the defendant was unable to secure financial facilities from banks, because the security which it could have offered was not currently available for that purpose.

60. If this court were to also grant an injunction which would, inter alia, bar the defendant from offering the suit property as a security, that would simply imply that the defendant could not use the title to procure financial facilities.

61. I have not found the defendant to be either highhanded or oppressive in its dealings with the plaintiff.

62. If the suit property were to be attached, in the process of execution of a lawfully obtained Decree, that could not be termed as a wrongful alienation of the said property.

63. I also find no evidence that the defendant was deliberately colluding with other persons who have sued it, with a view to frustrating the plaintiff from recovering what may ultimately be found to be payable to the plaintiff.

64. In my considered view, the plaintiff has not made out a case to warrant the award of an interlocutory injunction. Therefore, the application for an injunction is dismissed with costs to the defendant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **September** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

……………………………………………….for the Plaintiff

……………………………………………….for the Defendant

Collins Odhiambo – Court clerk.