



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 416 OF 2015**

**PINDORIA HOLDINGS LIMITED.....PLAINTIFF**

**-VERSUS-**

**TYL LIMITED.....DEFENDANT**

**RULING**

1. The application before the Court is the Plaintiff's Notice of Motion dated **22<sup>nd</sup> October, 2015** and filed in Court on **23<sup>rd</sup> October, 2015**. It is expressed to be brought under the provisions of **Sections 3A** of the **Civil Procedure Act** as well as **Order 2 Rule 15 (1) (a) and (c), Order 51 rule 1(d) and Order 7 rule 5** of the **Civil Procedure Rules, 2010**. The Plaintiff sought for the following orders:-

- 1) THAT the Defence dated 23<sup>rd</sup> September, 2015 and filed on the same date be struck out with costs.**
- 2) THAT Judgment be entered for the Plaintiff against the Defendant in terms of the prayers set out in the Plaintiff.**
- 3) THAT costs of this application be provided for.**

2. The application is based on the grounds set out therein and is supported by the Affidavit of one of the Plaintiff's directors, **PREMJI V PINDORIA** and sworn on **22<sup>nd</sup> October, 2015**.

3. The Plaintiff instituted the present suit against the Defendant vide its Plaintiff dated **27<sup>th</sup> August, 2015**. The brief facts are that the Plaintiff and the Defendant entered into an agreement dated **10<sup>th</sup> May, 2010** whereby the Plaintiff, at the Defendant's own request, agreed to carry out the construction of a residential house at the Defendant's premises at Muthaiga for a consideration of **Kshs. 96,214,669/=**. The Plaintiff avers that it carried out, completed and maintained the works in accordance with the contract and to the satisfaction of the Defendant, but that, in breach of the terms of the agreement, the Defendant defaulted in payment of part of the contract price certified by the project Architect and which sum stood at **Kshs. 52,629,527.78** as at **2<sup>nd</sup> June, 2015**. The Plaintiff therefore filed this suit praying for judgment against the Defendant for the said sum of **Kshs. 52,629,527.78** together with interest thereon at 18% per annum till payment in full.

4. In response to the Plaintiff's Claim the Defendant filed its Defence dated **23<sup>rd</sup> September, 2015** on even date. It essentially denied the existence of the agreement between the parties and the claim by the Plaintiff. This is the Defence that the Plaintiff seeks to have struck out on the ground that it is a mere denial and does not sufficiently rebut and/or answer to the Plaintiff's pleadings and documents filed in support of the claim. The Plaintiff further avers that the said Defence is frivolous and vexatious and that it is merely intended to delay the fair determination of its claim.

5. It is also the Plaintiff's case that the Defendant has failed to file its witness statements and bundle of documents in support of its defence.

6. The Defendant opposed the application vide its Grounds of Opposition dated **11<sup>th</sup> November, 2015** and filed on even date as well as the Replying affidavit of one of its employee, **BONIFACE NGINYO MWAURA** and sworn on **11<sup>th</sup> November, 2015**.

7. The Defendant avers that its Defence raises triable issues among them being whether this Court has jurisdiction to hear and determine the suit in view of Clause 40 of the alleged contract dated **10<sup>th</sup> May, 2010**. The Defendant also raised the issue as to whether the alleged contract was indeed signed and executed by the Defendant and whether the same is valid and binding on the Defendant.

8. The application was prosecuted by way of written submissions. The Plaintiff filed its submissions dated **23<sup>rd</sup> November, 2015** on **25<sup>th</sup> November, 2015**, while the Defendant filed its response dated **27<sup>th</sup> November, 2015** on **1<sup>st</sup> December, 2015**. The submissions were highlighted before the Court on **19<sup>th</sup> July, 2016**.

9. I have considered the Pleadings herein as well as the written submissions filed herein by Counsel for the respective parties. The application is brought under **Order 2 Rule 15 (1) (a) (b) (c) & (d)** of the **Civil Procedure Rules**. However, in its submission the Plaintiff narrowed down to **Order 2 Rule 15 (1) (a)** and **(c)** which provide as follows:-

*“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

**(a) It discloses no reasonable cause of action or defence in law; or**

**(b) ...**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or...”**

10. The Plaintiff's claim is for **Kshs.52, 629, 527.78** arising from the works it undertook under the Contract between the parties dated **10<sup>th</sup> May, 2010**. The Defendant in its Defence essentially denied every claim made by the Plaintiff and averred that this Court does not have jurisdiction to hear and determine the matter. The Defendant has denied the existence of the alleged agreement dated **10<sup>th</sup> May, 2010** or the validity of the same. It is the Defendant's assertion that it never signed or executed the said contract. The Defendant has further denied the allegations by the Plaintiff that it carried out works on the Defendant's premises to its satisfaction and that the Defendant owes the Plaintiff **Kshs. 52,629,527.78**.

11. Granted the foregoing, it cannot be said that the Defence is a sham, to the contrary, it does raise several triable issues. Needless to say that a triable issue is not necessary one that will succeed but simply one which is worth going to trial for adjudication. (See **Patel Vs E.A Cargo Handling Services Ltd [1974] E.A 75 at p. 76**). It is noteworthy too that the application was hinged in part on **Order 2 Rule 15 (1) (a) of the Civil Procedure Rules, in respect of which no evidence is admissible by dint of Order 2 Rule 15(2) of the Civil Procedure Rules**.

12. This Court will not delve into the issue of whether or not the present suit was filed prematurely or whether this Court has jurisdiction to hear the suit. These are preliminary issues that the Defendant has

the option to raise by way of a preliminary objection.

13. With regard to the filing of Witness Statements and Bundles of Documents, **Order 7 rule 5** of the **Civil Procedure Rules** allows a party to file witness statements even after filing of the Defence with the leave of the Court. It is for the Court to determine at the Case Management Conference whether the Parties have exchanged the requisite documents and are ready to proceed. In addition, in the administration of justice and to ensure a fair trial, the Court reserves the jurisdiction to determine which documents are to be accepted from the parties and at what time without prejudice to either party.

14. It cannot be gainsaid therefore that the power of the Courts to strike out pleadings should be exercised sparingly and can only be invoked in the clearest of cases. The present suit cannot, in my view, be said to be a plain and clear case for striking out, granted that the Defendant has disputed the execution of the agreement and the claim by the Plaintiff of **Kshs. 52,629,527.78**. Without saying more, this Court is of the view that the Defendant's Defence is not one that is suitable for striking out.

15. In view of the foregoing, it is the Court's finding that the Plaintiff's Notice of Motion dated **22<sup>nd</sup> October, 2015** and filed in Court on **23<sup>rd</sup> October, 2015** lacks merit and is hereby dismissed, with an order that the costs thereof shall be in the cause.

Orders accordingly

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2016**

**OLGA SEWE**

**JUDGE**