



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 60 OF 2016

PATRICK SAGWA KISIA T/A STEG CONSULTANTS.....PLAINTIFF

- VERSUS -

KAY CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

1. This Ruling is in relation to 2 applications. The first application dated 17th March 2016 is for summary judgement, whilst the other application dated 31st March 2016 seeks to strike out the plaint for not disclosing any cause of action against the defendant.
2. The application for summary judgement was filed in court on 21st March 2016.
3. Meanwhile the Defence was filed on 21st March 2016, but was served upon the plaintiff on the following day. Thereafter, the defendant filed an Amended Defence on 1st April 2016.
4. I have set out these dates solely for the purposes of pointing out that by the time the plaintiff filed the application for summary judgement, he had not yet been served with the Defence.
5. The plaintiff contends that the *onus* vests on the defendant to show, *prima facie*, that it should have leave to defend the suit. The plaintiff further stated that the defendant had to demonstrate that its Defence raised *bona fide* triable issues.
6. It is common ground that on 4th August 2008, the defendant appointed the plaintiff to carry out some work, during an arbitral proceedings which pitted the defendant against the Government of Kenya.
7. Whilst the plaintiff states that he was contracted to;

“handle, guide and represent the Defendant in the above matter on all legal and technical issues in liaison with the advocates or any other party retained by the Defendant for that purpose?;

the defendant insists that the plaintiff was only retained for his services as a Quantity Surveyor.
8. Therefore, although there is an admission that there was a contract, the nature and scope of the services to be rendered by the plaintiff is not agreed upon.
9. The plaintiff’s claim was that his Professional Fees was to be equivalent to 15% of the amount awarded

in the arbitration, upon receipt of payment from the Government.

10. In response, the defendant denies the existence of the alleged agreement on the plaintiff's fees.

11. Indeed, the defendant completely disowned the letter which contains the alleged agreement on fees.

12. The defendant further stated even if the alleged agreement on fees was found to be valid, it would still be null and void *ab initio*, because it amounted to a Contingency Arrangement, which is prohibited by the Architects and Quantity Surveyors Act.

13. To my mind, that line of reasoning cannot be simply dismissed. Indeed, the plaintiff may have to justify how, as a non-lawyer, he could have been called upon to provide legal services.

14. Secondly, the plaintiff may also be called upon to explain how the alleged contingency arrangement did not violate the provisions of law.

15. In any event, the plaintiff has conceded that the fee payable to him was to have been 15% of the amount which the defendant was paid by the Government. Assuming that that was a term of the contract, that would imply that until the defendant received payment from the Government, the plaintiff would be incapable of ascertaining the exact amount of money which the defendant owed him.

16. In effect, there is a serious question concerning the foundation upon which the plaintiff based his claim.

It therefore follows that this is not a case in which the court could grant summary judgement against the defendant.

18. Meanwhile, as regards the request for the striking out of the plaint, I note that the defendant admitted having entered into a contract with the plaintiff.

19. The plaintiff appears to have rendered services, and the defendant says that it paid the plaintiff for the said services.

20. The total amount allegedly paid to the plaintiff was Kshs. 15,255,000/-.

21. According to the defendant, it had settled in full, the money owed to the plaintiff.

22. In order to satisfy the court that the sums paid to the plaintiff constituted the payment in full, the defendant would have to explain the contractual basis upon which the payment was calculated.

23. Secondly, the defendant would have to explain why the plaintiff should have been expected to verify that the Defendant's Director who he was dealing with, did not have actual authority from the company, to enable him bind the company.

24. Thirdly, the defendant did make payment to the plaintiff on the basis of a contractual relationship. If the terms of the contract were illegal, it would have been expected that the defendant should have lodged a counter-claim in respect of the money it had paid to the plaintiff.

25. The defendant's conduct, by choosing not to reclaim money allegedly paid out on the basis of a contract which was null and void, is suggestive of a lack of confidence by the defendant on some of its own contentions.

26. The bottom line is that both parties admit that there was a contract between them. As to whether or not the plaintiff carried out the tasks assigned to him, is a matter of fact, which has to be established through evidence.

27. The plaintiff admitted that the document marked “A?;

“was void for uncertainty, and that was why Letter B was made. There is no confusion as to what terms apply?.

28. Apart from the fact that the defendant denied the authenticity of the Letter marked “B?, the plaintiff asserted that on 16th November 2009, there was a substantive amendment to the terms of the contract.

29. Instead of earning 15% of the sum awarded by the arbitrator, and received by the defendant, the plaintiff was now to earn 15%, plus Kshs. 70,000,000 “*awarded in the arbitration?.*

30. The alleged variation is dated 16th November 2009, which date was well before the 22nd of February 2011 when the Arbitrator published his award.

31. In the event, the court would need to be satisfied about how the sums claimed by the plaintiff was actually calculated.

32. In conclusion, both parties have raised arguable matters of both fact and law. Therefore, this is a case which can only be determined conclusively after a full trial.

33. Accordingly, the court rejects both applications, and each party shall pay his own costs of the said applications.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

E.L. Lubulelah for the Plaintiff

Miss Fundi for the Defendant

Collins Odhiambo – Court clerk