REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 10 OF 2014

BUBBLE ENGINEERING COMPANY LTD.....PLAINTIFF

VERSUS

MASENO UNIVERSITY.....DEFENDANT

R U L I N G

1). The plaintiff/applicant's application dated 9-7-2014 prays that judgment be entered against the defendant in favour of the plaintiff for the sum of Kshs. 11,339,151/= pursuant to an admission by the defendant. The applicant further prays for costs.

2). The genesis of the issue between the parties is the tender to construct a library which was advertised and won by the plaintiff. A contract was signed by the parties but due to some reasons the parties mutually agreed to terminate the contract. The parties seemed to have agreed to pay the plaintiff the value of the work done and the latter was to vacate the site. The sworn affidavit of William O. Owuor the plaintiff's director, sworn on 9-7-2014 says as much.

3). The suit was thereafter filed after the defendant paid about Kshs. 12 million leaving a balance of about Kshs. 11 million as per the plaint. The defendant did file a written statement of defence denying the alleged indebtedness.

4). The question that needs to be answered is whether there is an express admission by the defendant of the alleged indebtedness. According to the applicant the documents in support of the application clearly supports its assertion. On the other hand the defendant/respondent did not file any affidavit in opposition but chose to rely on the grounds of opposition filed on 25-9-2014.

5). Order 13 Rule 2 of the Civil Procedure Code in which the application is premised is worth reproducing herein, the same states:

> **"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties and the court may upon such application make such order, or give such judgment, as the court may think fit".**

6). My understanding of the above portion of the order clearly means that the facts and issues must be

such evidently clear that no other doubt should be entertained such that there is no need for the suit to proceed to the usual long haul. In other words in the event that there is any iota of reason or doubt that benefit should be granted to the parties to proceed and prove their case by way of oral evidence.

7). The contract between the parties herein is not in dispute. It is equally not in dispute that they agreed to mutually terminate the same.

The letter dated 6-11-2012 from the defendant to the plaintiff state as follows:

> **"With reference to the meeting held on Monday 5th November 2012 between officials from the Ministry of Public Works, yourself and us, we hereby formally inform you of the agreement to mutually terminate the content for the contract of the New Library. This is based on the observation that it will be in the best interest of both parties to terminate".**

8). Subsequently, a series of meetings were held to effect the said understanding.

On the 24th January 2013 the County Works Officer under the banner of Ministry of Public Works, a key player in the project, after assessing the work done, advised the defendant to pay the plaintiff the sum of Kshs. 24,053,624.29/=.

9). On 24-6-2013 the plaintiff wrote to the defendant acknowledging the receipt of Kshs. 12,714,473.29/= leaving a balance of Kshs. 11,339,151/=.

All the above facts and in particular the details in the annextures to the supporting affidavit have not been controverted by the defendant. It is not also denied that the aforementioned sum of money were to be paid within 60 days from the date of the agreement.

10). I have perused the defendant's defence and part from the general denial of the averments in the plaint there is absolutely nothing to suggest that there is any dispute over the figures. The said defence does not suggest in any way that a valuation was undertaken by the Ministry of Public Works and its report was objected to or not.

11). The grounds of opposition does not in any way assist the defendant. The argument that the plaintiff has not pleaded special damage is not plausible. The figure demanded by the plaintiff was all along within the knowledge of the defendant. The defendant has not demonstrated in anyway that it never agreed with the figure given by the Public Works.

In any event the plaintiff proceeded to partially settle the same and if there was any dispute or doubt then it would not perhaps have paid the amount it had already done. Moreover, as observed above there is nothing to show that the defendant opposes the amount reached.

12). Even if the defendant has not admitted in writing, as contended in its grounds, I do find from its conduct and the overwhelming documentary evidence that the defendant is indebted to the plaintiff.

13). As earlier indicated, the defence is actually a mere denial. In **Magunga General Stores -VS-People Distributors Ltd [1988-1992]2 KAR 89** the Court of Appeal had this to say:

> **"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without reason given".**

14). In the case at hand, there was a valid contract entered by the parties. For whatever reasons they agreed to mutually terminate. A valuation was undertaken by a party which was essentially approved by both parties. A figure of over 24 million was arrived at. The defendant settled a sum of over 12 million leaving the balance. Does it therefore have any reasons for failing to pay? The defence as earlier observed

is respectfully mere denial. The issue of moving or not moving from site is too weak a reason to persuade this court to think otherwise.

15). I think I have said much to allow the application. Before signing off, there was a claim of Kshs. 239.500/= tucked somewhere in the pleadings. This was for some items allegedly destroyed or disappeared when the defendant took over the site. This has not been proved in any way and I shall not allow.

Consequently, the plaintiff's application is allowed. Judgment is entered for the plaintiff and against the defendant for the sum of Kshs. 11,339,151/= together with costs and interest. The plaintiff shall also have the cost of this application.

Dated, signed and delivered at Kisumu this 18th day of February, 2015.

H.K.CHEMITEI

JUDGE