



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 637 OF 2012

**DRILLING SPARES & SERVICES LIMITED.....
.....PLAINTIFF**

VERSUS

**NATIONAL WATER CONSERVATION AND
PIPELINE CORPORATION.....
.....DEFENDANT**

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 25th July 2013 and filed on 26th July 2013 was brought under the provisions of Section 3A of the Civil Procedure Act and Order 2 Rule 15 (1) (a) of the Civil Procedure Rules and all enabling provisions of the law. It sought the following orders **THAT:-**
 - a. **The Plaintiff dated 28th September, 2012 filed herein be struck out and the suit be dismissed.**
 - b. **The costs of this application and the suit be borne by the Plaintiff/Respondent.**

THE DEFENDANT'S CASE

2. The application was not supported by any Affidavit but was based on the several grounds stated therein. The Defendant's List of Authorities dated 19th September 2014 was filed on 23rd September 2014. Its Written Submissions dated 14th February 2014 were filed on 17th February 2014. Its Supplementary Written Submissions were dated 23rd October 2014 and filed on 28th October 2014.
3. The Plaintiff filed suit on 4th October 2012 and sought judgment against the Defendant for a sum of Kshs 10,008,468/=. It was the Defendant's contention that the alleged contracts upon which the Plaintiff based its claim were non-existent and there was therefore no basis for the claim to warrant a trial. Its case was that the alleged contracts constituted illegalities as they were in contravention of the provisions of the Public Procurement and Disposal Act, 2005 and the Exchequer and Audit (Public Procurement) Regulations 2001.
4. It was also its case that a perusal of the Plaintiff and the particulars supplied following its Request for Particulars dated 24th May 2013 indicated that there was no reasonable cause of action and adequate particulars to support the Plaintiff's claim to merit a trial. Hence, its position was that the

- Plaint herein was frivolous, vexatious and an abuse of the process of the court.
5. It therefore urged the court to strike out Plaintiff and the suit be accordingly dismissed.

THE PLAINTIFF'S CASE

6. In opposition to the application herein, the Plaintiff filed the Grounds of Opposition dated 8th August 2013 on 14th August 2013. Its List of Authorities dated 4th September 2013 was filed on even date. It also filed its Written Submissions dated 3rd March 2014 on even date. Its Supplementary Written Submissions dated 13th November 2014 were filed on even date.
7. The Plaintiff averred that its case was not hopeless but that it had disclosed a reasonable cause of action that ought to be heard and determined on merit. It further averred that the Defendant's defence raised triable issues that could only be determined at a full trial and not summarily.
8. On the issue of the contracts upon which the Plaintiff based its claim, it was its position that the alleged illegalities and irregularities could only be established from evidence of the parties at the trial.
9. It was its case that it was in the interest of justice and its constitutional right that it be heard for a just determination to be made and therefore urged the court to dismiss the Defendant's present application for lacking in merit and being vexatious and frivolous.

LEGAL ANALYSIS

10. Order 2 Rule 15 (1) (a) of the Civil Procedure Rules, 2010 under which the Plaintiff's application was brought provides that :-

“At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

- a. **it discloses no reasonable cause of action or defence in law; or**
- b. ...
- c. ...
- d. ...”

11. The Defendant submitted that whereas the Plaintiff claimed for the sum of Kshs. 10,008,468/=, it did not disclose the basis upon which the amount was arrived at or the contract for the alleged supplies. It contended that in the absence of a contract, it would be an exercise in futility if the matter was to be subjected to trial.
12. In the event that there was a contract, the Defendant's argument was that the same was an illegality that the court could not uphold. It submitted that the Defendant was a public institution whose operations were governed by various statutes, amongst them the Public Procurement and Disposal Act. It submitted that, any orders made contrary to the provisions of the said Act would amount to an illegality. It referred the court to section 26 (3) of the said Act which, in part, provides as follows:-

“...that all procurement by a public body such as the Defendant must be-

- a. ...
- b. ...
- c. **Handled by different offices in respect of procurement initiation, processing and receipt of goods works and services;**
- d. **Be procured through either an open tender, a restricted tender or with the approval of the tender committee, be singled sourced.**

13. Its contention was that the Plaintiff's allegation that it had received request for orders through telephone calls made by one (1) individual in the corporation did not meet the threshold of section 26 (3) of the Public Procurement and Disposal Act. On its part, the Plaintiff submitted that the said

- Public Procurement and Disposal Act commenced on 1st January, 2007 while its engagement with the Defendant was from the year 2001, when the Act had not enacted. Its submission was that it was a well settled principle that laws did not operate retrospectively and therefore it had acted well within the law at the time it engaged in business with the Defendant herein.
14. To this end, in its Supplementary Submissions, the Defendant submitted that between the year 2001 and 2009, all procurement by State Corporations were governed by the Exchequer and Audit (Public Procurement), Regulations 2001 until 31st December 2006. It referred to various provisions in the said Regulations, some of which provided that the procurement decisions of any procuring entity were to be undertaken in a corporate manner, that showed that the procuring entities were to establish a tender committee and that open tendering was the preferred procedure of procurement.
 15. It acknowledged that the only case in which direct procurement could be used, was when there was national emergency and disaster. The Plaintiff's response was that it made the supply due to an emergency, a fact that could only be ascertained at a hearing.
 16. This court was of the view that the issue of whether or not there was a valid contract was a matter of evidence that ought to be subjected to trial. There are no hard and fast rules that a contract has to be strictly in writing as envisaged in Section 3(1) of the Contract Act Cap 23 (Laws of Kenya) as cited by the Plaintiff. There have been several court decisions that a contract can be deduced in several other ways and not necessarily through one (1) written document. Besides, the issue of illegality in the tendering process can only be canvassed at the trial by way of evidence, oral and documentary.
 17. The Defendant was keen on dismissing the Plaintiff's claim on the ground that the tendering process was illegal. This only goes to show that there were indeed triable issues in the matter that need to go for trial. If indeed there was an illegality, then the Defendant would be held culpable for the same. The court cannot therefore summarily determine that the tendering process by the Defendant leading to the supply of goods by the Plaintiff was illegal and that the Plaintiff had no case.
 18. In the circumstances, the several authorities cited by the Defendant to the effect that this court cannot uphold an illegal contract will only apply after a full hearing of this suit to enable the court reach a just determination of the same.
 19. In respect of the limitation of the Plaintiff's cause herein, the Defendant's submitted that the present suit was time barred and that no leave had been sought by the Plaintiff to file the suit out of time. It relied on the provisions of Section 4 of the Limitations of Actions Act Cap 22 (Laws of Kenya) which provided that actions founded on contracts could not be brought after the end of six (6) years. According to the Defendant, the Plaintiff had alleged at Paragraph 3 of its Complaint that the purported cause of action accrued in 2001 and that at the time of filing the suit herein it had been well over twelve (12) years since the purported cause of action accrued.
 20. Having looked at the said Paragraph 3 of the Complaint, what was clear to the court was that the Plaintiff merely gave the duration within which it was engaged by the Defendant to supply it with various materials. This was between the years 2001 to 2009. The said Paragraph did not in any way state that the cause of action arose in the year 2001 or that any dispute arose between the parties in the year 2001. In any event, the question of whether or not the Plaintiff's cause of action was time-barred was best left for determination at trial.
 21. The case put forth by the Defendant for the striking out of this suit is such that this court would be invited into the realm of hearing and determining the matter based on affidavit evidence without considering the evidence of both parties. Appreciably, the Complaint filed herein and the Bundles of Documents attached to it were sufficient to disclose a reasonable cause of action against the Defendant. In essence, the Complaint and generally the pleadings in this matter raised issues that can only be determined at a full trial.
 22. In the cases of **Mpaka Road Development Limited vs Kana [2004] EA 160** and **DT Dobie vs Muchina [1982] KLR 1**, it was also held that a pleading would only be struck out if it was manifestly hopeless that it amounted to an abuse of the court process. Indeed, the Complaint herein does not appear to have been so hopeless that it would plainly and obviously disclose no reasonable cause of action as had been contended by the Defendant.
 23. In the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR** in which the Court of Appeal quoted the case of **Jevaj Shariff & Co vs Chotail Pharmacy Stores (1960) EA**

374, it stated thus:

“...the question whether a Plaintiff discloses a cause of action must be determined upon a perusal of the Plaintiff alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”

24. This court was also alive to the rules of natural justice which require that a court must not drive away any litigant from the seat of justice. The objective of a court of justice should always be aimed at sustaining a suit rather than terminating it by summary dismissal and that **“it is better to allow a weak case to go to trial than to invoke the guillotine process”** - **See Kisii Farmers Co-operative Union Limited vs Sanjay Natwarlalchaunhan t/a oriental Motors [2006] eKLR.**
25. Notably, an application brought under the provisions of Order 2 Rule 15(1) (a) of Civil Procedure Rule only required this court to look at the Plaintiff and determine that it had not disclosed any reasonable cause of action. However, this was not the case herein as there were indeed triable issues for determination at the full trial. The Plaintiff’s case had not reached the threshold of being deemed as being hopeless and a waste of judicial time.
26. Accordingly, having considered the pleadings, affidavit evidence, written submissions and the case law in support of the Plaintiff’s case, the court was not satisfied that the Plaintiff’s case had reached the threshold of being deemed as being hopeless and a waste of judicial time. There were clearly issues for determination at the trial.

DISPOSITION

27. For the foregoing reasons, the court found the Defendant’s Notice of Motion application dated 25th July 2013 and filed on 26th July 2013 not to have been merited and the same is hereby dismissed with costs to the Plaintiff.
28. It is so ordered.

DATED and DELIVERED at NAIROBI this 30TH day of JULY 2015

J. KAMAU

JUDGE