



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 158 OF 2003

BHUPINDER SINGH DOGRA.....PLAINTIFF

VERSUS

COAST DEVELOPMENT AUTHORITY.....DEFENDANT

RULING

1. B.S. DOGRA, the Plaintiff, sued COAST DEVELOPMENT AUTHORITY, the defendant, for Kshs. 117,017,070. That amount, as pleaded in the plaintiff's pleadings, was in respect to professional fees due and payable to the plaintiff for his architectural services provided to the defendant in the defendant project of housing scheme at Tudor Housing Project Mombasa. In providing those services the plaintiff pleaded that it obtained the services of quantity surveyor, namely Costcare consultants, whose fees the plaintiff was obliged to meet. That the defendant said project was to cost in total Kshs. 4,831,076,000. That accordingly plaintiff's professional fees based on 1% of the total project costs as per the provisions of cap 525 was Kshs. 117,017,070.
2. The defendant by its Defence denied the plaintiff's claim and pleaded further that the project costs were to be met by Mombasa Municipal Council and in alternative defendant pleaded that if any payment was due to the plaintiff by the defendant it had been agreed that such payment be made once the defendant received funds from its finances and or donors. The defendant further pleaded that the plaintiff's claim is time barred.
3. The Plaintiff has brought a Notice of Motion application dated 19th March 2015. It is brought under Order 13 rule 2 of the Civil Procedure Rules and under Sections 1A and 1B, of the Civil Procedure Act Cap 2). The plaintiff seeks two alternative prayers by that application. These are:
 - a. ***That the defendant's Defence dated 14th October 2003 be amended to include an admission of Kshs. 21,974,035/-.***
 - b. ***That judgment be entered for the plaintiff against the defendant for the sum of Kshs. 21,974,035/= plus interest, and the rest of the claim to proceed to full hearing.***
4. The application is supported by the plaintiff's affidavit sworn on 19th March 2015. By that affidavit the plaintiff referred to various correspondence notably is the defendant's letter dated 30th October 1994 by which the defendant appointed the plaintiff as consulting architect. That letter is reproduced as follows:

Dear Sir,

RE: APPOINTMENT AS CONSULTING ARCHITECT

I am happy to inform you that following your application and subsequent registration in our list of consultants and under minute BM 18/94 of the Board of meeting held on 14th October, 1994 the /coast Development Authority Board of Directors recommended that your firm be and are hereby duly appointed as a CONSULTING ARCHITECT for our TUDOR HOUSING RE-DEVELOPMENT project in Mombasa in accordance with Architects and Quantity Surveyors Act (Cap 525).

Please signify your acceptance of this offer by signing and returning within seven days from the date hereof a copy of this letter of offer that is hereby attached. Looking forward in working with you.

Kind regards.

Yours faithfully.

Prof. J.A.Lugogo,

MANAGING DIRECTOR

5. Although the plaintiff's total claim for professional fees is Ksh 117,017,070 he seeks judgment for Ksh 21,974,035 based on the amount that was found as due in the verification report of the ministry of finance dated 31st August 1998, which report related to the subject project. The plaintiff stated that he was unaware of that report until recently. By that report under the heading "verification and analysis of pending Bills by government appointed auditors as at 31st August 1998-KPMG Peat Marwick" the plaintiff's fees were found to be Ksh 21,974,035. It is on the basis of that report that the plaintiff seeks judgment for Ksh 21,974,035.
6. The defendant although served with the application failed to attend the hearing and also failed to file any documents in opposition. It follows that the application was unopposed.

7 I have examined the defendant's Defence and the plaintiff's present application. In view of the documents the plaintiff relies upon by his application it is clear that the defendant's Defence in as far as the claim of Ksh 21,974,035 is concerned, is a sham Defence in this regard I rely on the holding in **JACOB –V- BOOTHS DISTILLERY COMPANY (1901) 85 LTD** where the court stated:

“There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay, which only added to expenses, and where it was not in aid of justice that such things should continue”

8 In my view, in as far as the amount found as due by the verifying report is concerned, the defendant's Defence is intended to delay the fair trial of the Suit. I do therefore find that there is merit in the Plaintiff's application.

9 Further the Plaintiff's Claim is not time barred as claimed by defendant having regard to the provisions of cap 2 of the Laws of Kenya.

CONCLUSION

10 The Orders of the Court therefore are:-

- a. Judgment is hereby entered for the Plaintiff for Kshs. 21,974,035/= plus costs and interest. The balance of the Plaintiff's Claim shall proceed to full hearing.
- b. The Plaintiff is awarded costs of the Notice of Motion.

DATED and DELIVERED at MOMBASA this 24th day of September, 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

Court Assistant:-

For the Plaintiffs:-

For the Defendants:-

Court:

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE