



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 512 OF 2013

MWEHA ENTERPRISES LTD.....PLAINTIFF

• VERSUS -

KENYA TRADE NETWORK AGENCY.....DEFENDANT

RULING

1. By a Notice of Motion dated 24th January 2014, the plaintiff asked this court to strike out the defendant's Defence dated 23rd December 2013, and to thereafter enter judgment in favour of the plaintiff, as prayed in the plaint.
2. The plaintiff believes that the Defence was scandalous, frivolous and vexatious. Therefore, it is the plaintiff's contention that the said Defence was proffered simply to prejudice, embarrass and delay the fair trial and the expeditious disposal of the suit.
3. The plaintiff further asserted that the Defence was an abuse of the process of the court.
4. Mr. Mungla, the learned advocate for the plaintiff, appreciated that it was the plaintiff's obligation to satisfy the court that the Defence was scandalous, frivolous and vexatious. He also added that the plaintiff was obliged to prove that the Defence was an abuse of the process of the court.
5. In an endeavour to discharge that onus, the plaintiff submitted that the defendant cannot be heard to deny having instructed the plaintiff to carry out the "Completion Works".
6. The reason for that contention was that there were written instructions to that effect.
7. As far as the plaintiff was concerned, the defendant cannot be permitted to hide behind the contention that the instructions to the plaintiff came from the Ministry of Public Works.
8. The plaintiff emphasized that whereas the letter in issue was signed by the Project Manager, it was written on behalf of the defendant, who was the client in the said project.
9. When the defendant denied being the author of the letter in issue, the plaintiff considered it to be trifling with the court.
10. It is the plaintiff's position that the defendant did not deny the contents of the letter, in which they were, inter alia, named as the client.
11. The plaintiff further pointed out that the defendant admitted that the work was indeed done by the plaintiff. Thereafter, the defendant was said to have moved onto the facility which the plaintiff put together, and they were using the said facility.
12. The defendant had not lodged any complaint about the workmanship or at all.
13. And given the fact that the work done by the plaintiff had even been jointly measured by the Project Manager, the plaintiff submitted that the defendant ought not to be allowed to continue to enjoy the facility without it being paid for.
14. Another issue which the plaintiff touched on was in relation to the defendant's contention that it

- only begun operations in July 2012.
15. Given the fact that the defendant was a State Corporation which was established by a Gazette Notice published on 28th January 2011, the plaintiff believes that the defendant incurred the liability in issue, during its legal existence.
 16. The plaintiff expressed the view that the date when the defendant started operations was simply an irrelevant administrative issue.
 17. In the result, the plaintiff submitted that the matters raised in the Defence were not *bona fide*. They were described as not giving rise to any triable issues which could proceed to a full trial.
 18. I was therefore invited to strike out the Defence.
 19. In the answer to the application, Mrs. Kashindi, the learned advocate for the Defendant, submitted that the Defence raised several triable issues.
 20. The first such issue was said to arise from the identity of the person who gave instructions to the plaintiff to carry out the works at the **EMBANKMENT PLAZA**.
 21. It was the defendant's position that the instructions did not emanate from them, but from County Works Office, Nairobi, who were acting at the behest of the Ministry of Public Works.
 22. The defendant categorically denied the contention that the Region Works Officer at the Ministry of Public Works acted on the authority of the defendant.
 23. The defendant said that the instructing client was the Ministry of Public Works. Therefore, the defendant is of the view that the plaintiff had sued the wrong party.
 24. The defendant invited the court to examine the correspondence and to take note of the following;
 - i. The letter which made reference to the sums allegedly owed to the plaintiff was not written by the defendant;
 - ii. In any event, the said letter did not state that the defendant owed the plaintiff the sums now claimed in the plaint;
 - iii. The letter did not refer to "*Completion Works*", but only to a "*Joint remeasurement of the works*".
 25. The defendant described itself as a beneficiary of the works, but denied responsibility for paying for the same. Indeed, the defendant pointed out that even though the plaintiff had already received some payments, none of those payments were made by the plaintiff.
 26. I have given careful consideration to the submissions made before me.
 27. The law governing the striking out of pleadings is well settled.
 28. First, the courts remind themselves that it should exercise its power to strike out pleadings sparingly and cautiously. That position was restated by Nyamweya J. In **JOHN WANDURI NJOROGI VS. ESTHER WANGUI NGUGI & ANOTHER ELC NO. 370 OF 2010**.
 29. To my mind, the reason why the court deems it necessary to act with caution and calculated steps before striking out pleadings is that it is important to try and always give each party an opportunity to present his case.
 30. Pleadings do not tell the whole story. Pleadings are only the framework upon which the party builds its full case.
 31. If the court was quick to shut out pleadings, a party who may otherwise have a good case could be deprived of the opportunity to provide evidence to prove his case.
 32. In **D.T. DOBIE & COMPANY (KENYA) LIMITED VS MUCHINA** [1982] KLR 1, Madan J.A (as he then was) stated as follows;

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it".
 33. Both parties in this case acknowledge that legal pronouncement. Therefore, in determining this application I will be asking myself if the defence was so hopeless that it plainly discloses no reasonable defence to the claim.

34. Quoting from the decision of the Court of Appeal in **OLYMPIC ESCORT INTERNATIONAL CO. LTD & 2 OTHERS VS PARMINDER SINGH SANDHU & ANOTHER** [2009] e KLR, the plaintiff noted:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide”.

35. By necessary implication, therefore, the plaintiff must be understood to be saying that the defence herein lacks *bona fides*. The plaintiff described the said defence as a casual denial and a red herring which was meant to hoodwink the gullible. The plaintiff saw through the defendant’s smokescreen, and invited the court to avoid being blinded by it.

36. The plaint in this case is brief: it is captured in six short paragraphs. At paragraph 3, it reads as follows;

“The plaintiff’s claim against the defendant is for the sum of Kshs. 8,752,851/92 being certified works undertaken by the plaintiff at the defendant’s express request on the refurbishment of the ceiling, gypsum ceiling decoration, air conditioning improvement and washrooms at the defendant’s Embankment Plaza offices, full particulars whereof are known to the defendant”.

37. In effect, the plaintiff says that it was expressly tasked by the defendant to undertake the specified works. Having done so, the same were certified to be valued at Kshs. 8,752,851/92. Therefore, the plaintiff says that there is no defence to that certified sum.

38. But the defendant denies giving to the plaintiff, the alleged express request to carry out the works in issue.

39. The defendant also says that it was the Ministry of Public Works who gave instructions to the plaintiff; and that the Ministry did not do so on behalf of the defendant.

40. On the other hand, the defendant acknowledges having confirmed that availability of funds. But it insisted that the said confirmation was only intended for the purposes of facilitating the preparation of a tender document.

41. As no such tender document was ever produced, the defendant asserted that there was no contract between it and the plaintiff.

42. Finally, the defendant asserted that prior to July 2012 it had not commenced operations.

43. In response to that last assertion, the plaintiff pointed out that the defendant was established by Legal Notice No. 6 which was published in the Special Issue of the Kenya Gazette Supplement No. 4 of 28th January 2011. Therefore, as far as the plaintiff was concerned, it was irrelevant as to the date when the defendant commenced operations. Such a matter was deemed to be simply an administrative issue; considering that the defendant had incurred legal liabilities during its legal existence.

44. My determination of the application starts at that point. I ask myself whether or not it mattered that the defendant may have commenced operations in July 2012, when it is borne in mind that it was established in January 2011.

45. To my mind, the point which the defendant is making was that although it may have already been established in January 2011, it could not have given instructions before it commenced actual operations.

46. As the instructions in contention were issued on 5th March 2012, I understand the defendant to be saying that it could not have issued such instructions, as it had not yet commenced operations.

47. The defendant has not denied that it was established in January 2011. That means that it could have entered into contracts from that date. But it is one thing to have that capacity in theory, and quite a different thing to actually enter into contracts.

48. Thus, whereas the defendant may have had legal capacity to enter into a contract, it says that it did not do so because it had not commenced operations.

49. In the circumstances, the plaintiff would have to demonstrate not only the legal capacity of the defendant to enter into the contract, but also that the defendant did enter the contract before it begun operations.

50. To my mind, the next issue which will need to be determined is the terms and conditions of the

contract between the parties.

51. Although the parties have not expressly mentioned the question regarding the said terms and conditions, the same can be discerned from their respective submissions, coupled with the documentation.
52. The letter from the Office of the Deputy Prime Minister & Ministry of Finance, dated 1st November 2011, made reference to the;

“Proposed New Office Partitioning to 1st floor at Embankment Plaza for Ken trade. Tender No. NBI/DO7/13/2011-2012”.

53. That letter told the plaintiff, *inter alia*, that they would be called upon to sign the contract after 14 days.
54. When that contract is revealed to the court, it will make it clear who the parties to the contract are. At present, the same is not yet clear.
55. The letter dated 5th March 2012, is what the plaintiff cites as the document through which the defendant authorized the plaintiff to carry out the works which have now become the subject matter of the case in court. That letter is titled;

“RE: AUTHORISATION TO COMPLETE BUILDERS WORKS & SERVICES INSTALLATION AT 1ST FLOOR OF EMBARKMENT PLAZA FOR KEN TRADE-MINISTRY OF FINANCE”

56. The letter made reference to;

“...the advice from the client i.e Kenya Trade Network Agency (Ken Trade) vide letter reference No. KTNA/GEN/VOL 1/15 in which the client confirmed the availability of funds to carry out works as described in our bills of quantities, as shall be provided”.

57. I note that the Ministry of Public Works expressed the view that the “Completion Works” were interrelated to contract No. NBI-D07/13/2011 – 2012. That contract is, presumably the one cited in the letter dated 1st November 2011.
58. But the Ministry of Public Works also made it clear that “other contractual matters are being addressed”.
59. Mr. Richard M. Macharia, a director of the Plaintiff company confirmed, in his Witness Statement dated 20th November 2013, that other contractual matters were still being addressed.
60. Because of the dispute between the parties, it would be useful for the parties to make available to the court, the contract which subsequently addressed the issues which were still outstanding by 5th March 2012. Through that contract, the court will make a clear determination as to the rights and obligations of the parties.
61. On 4th September 2013, the Ministry of Lands, Housing and Urban Development wrote to the defendant stating that;

“The amount considered due for payment is Kenya Shillings Eight Million Seven Hundred and Fifty Two Thousand Eight Hundred and Fifty One Cents Ninety Two (Kshs. 8,752,851.92) only”.

62. That amount of money was said to be due after a joint re-measurement of the works between the contractor and the client.
63. The defendant pointed out that the letter did not specify who was to pay the outstanding amount. In particular, the defendant said that the letter did not state that the defendant was to pay the amount in issue.
64. In effect, the defendant is not challenging the statement made by the Ministry of Lands, Housing and Urban Development, that Kshs. 8,752,851/92 is payable. Their position is that that sum is not payable by the defendant.

- 65.Can the defendant enjoy the facilities but not pay for them?
- 66.If the defendant entered into a contract with the plaintiff, which led to the construction of the facility; and if the defendant was liable to pay for the works, then this court would have no hesitation to strike out the defence.
- 67.But in this instance, the contract which is cited in the letter dated 4th September 2013 (being **“PHASE II: TENDER NO. CQS/D07/88/2011-2012”** has not yet been made available to this court.
- 68.I reiterate that when the contracts are placed before the court, the rights and obligations of the parties will be made obvious. It is at that stage that the court will tell whether or not the defence herein was a sham.
- 69.For now, I find that the defence raises triable issues. Therefore, the defendant is granted unconditional leave to defend the suit.
- 70.The application dated 23rd December 2013 is dismissed. The plaintiff will pay the costs of that application, in any event.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of JULY 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mungla for the Plaintiff.

Miss Maragia for the Defendant.