



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.178 OF 2013

SEYANI BROTHERS & COMPANY LIMITED.....PLAINTIFF

VS.

AFFILIATED BUSINESS CONTACTS LIMITEDDEFENDANT

RULING

1. The application before the Court is a Notice of Motion dated 8th October 2013. The application seeks the following Orders:
 - a. That the Defendant's Defence dated 21st June, 2013 be struck out and summary Judgement be entered in favor of the Plaintiff and against the Defendant as prayed in the Plaint.
 - b. That the cost of this application and the suit be borne by the Defendant.
2. The application is premised on the grounds stated herein and is supported by Affidavit of **HIRJI KHIMJI SEYANI** dated 8th October 2013.
3. The application is opposed by Grounds of Opposition and Replying Affidavit filed on 7th February 2014. The Replying Affidavit is sworn by **ZEPHANIAH GITAU MBUGUA**.
4. The brief history of the application is that the Plaintiff vide a Plaint filed in Court on 10th May 2012 claims a balance of **Kshs. 42,998,667.58** with interest of **20% p.a** from the Defendant as account of a contractual obligation under which the Plaintiff alleges to have carried out certain construction works on the suit property amounting to Kshs.61,510,064.10 part of which was paid. The Plaintiff alleges that it carried out the construction works and handed over the premise to the Defendant who has now refused or failed to pay the said balance. The Plaintiff alleges that the Defendant entered appearance and filed a Defence in response to the suit, but that the said Defence is laden with mere denials and does not raise any triable issues, hence this application to strike it off.
5. In response **Mr. Zephaniah Gitau Mbugu** who has deponed in the Replying Affidavit that he is a Director of the Defendant's company states that there is a good defence to the claims and that the Defendant has specifically denied that it breached terms of the agreement between it and the Plaintiff, and further that the issues can best be determined in a full hearing.
6. I have carefully considered the application and the submissions of the parties. The only issue I

wish to raise for determination is whether or not there are triable issues in the suit.

7. It is now a well settled position that a Court of law can only strike out a defence, or enter summary judgement on the most clear of cases. Where there is the slightest of doubt the Court cannot exercise such discretion as such a doubt obliterates the Courts discretion. I have considered the Defence herein. It does not seem to me to be a mere defence. Of greater importance, however is the conduct of the Plaintiff. The Plaintiff alleges that it completed the construction of the suit property and then handed them over to the Defendant and the Defendant refused or failed to honour the interim certificates number 13 and 2. The question which arises to an ordinary mind is why would the Plaintiff issue Interim Certificates which are not paid by the Defendant and the Plaintiff nonetheless proceeds to complete the works and hand over the premises to the Defendant? When the Defendant states in the Defence that it had not breached the terms of the contract, I think, this becomes a triable issue. The Plaintiff should explain in a trial process how, despite issuing Interim Certificate which were not paid, it proceeded to complete the works and hand them over to the Defendant. The Defendant will also be heard on how this action was possible.
8. It may also be that there is a good explanation for the Plaintiff's action, and that explanation is contained in the contractual document. However, that contractual document as annexed to the application is a huge document running to over 50 pages. The interpretation of that document, and the determination of the terms thereof, cannot be left only to this court. It is a process which requires the input of all the parties in a trial.
9. For the said reasons I am not satisfied that this application is merited, and I dismiss it with costs to the Defendant/Respondent.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

Present:-

Bundotich for Plaintiff

M/S. Kimani holding brief Njeru for Defendant

Teresia – Court clerk

