



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 164 OF 2013

TRUE NORTH CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 25th February 2014 and filed on 26th February 2013 was brought under the provisions of Sections, 1A, 1B and 3A of the Civil Procedure Act Cap 21 (laws of Kenya), Order 13 Rule 2 of the Civil Procedure Rules, 2010, and any other enabling provisions of the law. Prayers (1) of the said application is spent. The remaining orders sought were as follows:-
 - a. **Spent**
 - b. **THAT this Honourable Court be pleased to enter judgment on admission as against the Defendant herein for the sum of Kshs 26,000,000/=.**
 - c. **THAT upon grant of Prayer 1 above, the Honourable Court be pleased to award the Plaintiff/Applicant interest on the sum of Kshs 26,000,000/= at court rates from 15th March 2012.**
 - d. **THAT the costs of the application be borne by the Defendant.**

PLAINTIFF'S CASE

2. The application was premised on the ground that the Defendant had admitted being indebted to the Plaintiff in the sum of Kshs 26,000,000/=. It was supported by Affidavits of Benson Muramba Sifuma that were sworn on 25th February 2014 and 28th May 2014 respectively.
3. The Plaintiff's case was that on 4th December 2010, it entered into a tripartite agreement with the Defendant and Eco Bank Kenya Limited (hereinafter referred to as 'the Bank') in which it was agreed that all monies due to the Plaintiff from the Defendant would be channelled through the

Plaintiff's account at the Bank.

4. Subsequently, on 17th December 2010, the Plaintiff entered into an agreement with the Defendant for the emergency maintenance of Nangili- Moi's Bridge Road Contract No KeNHA/RD/247/2010 (hereinafter referred to as "the Contract") at a contract sum of Kshs 225,969,425.64 (hereinafter referred to as "the Contract Sum") whereupon on 3rd May 2012 and pursuant to the Assignment and Domiciliation Agreement, the Plaintiff secured a financial facility from the Bank to enable it meet its obligations to the Defendant under the said Contract.
5. The Plaintiff said that it was entitled to claim for variation of price (hereinafter referred to as "VOP") of products during the pendency of the contract under Clause 70 of the Contract. It forwarded a Certificate of VOP amounting to Kshs 46,000,000/= to the Defendant which the Defendant reviewed downwards to Kshs 26,000,000/= to which the Plaintiff protested.
6. It stated that the Defendant wrote a letter to the Eldoret Branch of the Bank on 15th March 2012 indicating that it was processing the sum of Kshs 26,000,000/=, a fact the Plaintiff stated the Defendant admitted in Paragraph (16) of its Statement of Defence dated 10th June 2013.
7. It was the Plaintiff's further case that it had completed 75% of the contractual works and that it forwarded a Certificate of VOP to the Defendant on 30th March 2012. It averred that the Defendant had never expressly disputed the Certificate of Variation for the sum of Kshs 46,000,000/= or contended that the same was not in compliance with *Federation Internationale des Ingenieurs*(hereinafter referred to as "the FIDIC") Conditions of Contract.
8. It therefore urged the court to enter judgment on admission against the Defendant to prevent the sum of Kshs 26,000,000/= being absorbed by interest and penalty charges of 21.5% which would greatly prejudice it.
9. In its written submissions dated 3rd April 2014 and filed on 4th April 2014, the Plaintiff stated that it had demonstrated that this was a clear case where the court should enter judgment on admission against the Defendant. It relied on the cases of **Choitram vs Nazari [1984] KLR** and **Kiprotich vs Gathia & Others [1976-80] 1 KLR 105** where the common thread was that the judge's discretion to enter judgment on admission had to be exercised cautiously and only in plain case where the admission was so clear and unequivocal .

DEFENDANT'S CASE

10. In response to the said application, Isaiah Japhet Onsongo, a Senior Engineer (Maintenance) at the Defendant Corporation swore a Replying Affidavit on 20th May 2014. It was filed on the same date.
11. The Defendant did not dispute the existence of the Contract between it and the Plaintiff or that the Plaintiff was entitled to VOP under Clause 70 of the FIDIC Conditions of Contract. It, however, denied that the Plaintiff submitted a Certificate of VOP amounting to Kshs 46,000,000/=, that it unilaterally revised the Certificate of VOP downwards to Kshs 26,000,000/=, that the Plaintiff had submitted a Certificate of VOP amounting to Kshs 26,000,000/= or that it had admitted owing the Plaintiff the said sum of Kshs 26,000,000/=.
12. Its argument was that the processing of an Interim Payment of Certificate and/or Certificate of VOP was not synonymous with payment or admission of the validity of the claim. It referred the court to the definition of "**process**" from the Oxford Dictionary where it was defined as "**a series of actions of steps taken in order to achieve a particular thing.**"
13. It added that, in any event, Clause 70 of the said Contract had to be read and interpreted together with Clause 56.1 therein which provided that the payments under the Contract were to be made on the basis of works undertaken, measured and certified for payment in accordance with Clause 60 of the said FIDIC Conditions of Contract and that as at 22nd June 2012, the Plaintiff had only undertaken 74% of the contractual work measured.
14. In its written submissions dated 17th June 2014 and filed on 19th June 2014, the Defendant was in agreement with the Plaintiff that judgment on admission could only be entered in the clearest of cases. It referred the court to the cases of **Choitram vs Nazari**(Supra), **Cassam vs Sachania [1982] KLR 191**, **Sunrose Nurseries vs Gatoka Limited [2014] eKLR**, **Cycle Importers Limited vs Tausi Assurance Company Limited [2013] eKLR**, amongst other cases, in this regard.

15. It was its argument that the Defendant had raised serious points of law in Paragraphs 17- 20 of its Replying Affidavit with regard to the Plaintiff's compliance of Clauses 60 and 70 of the FIDIC Conditions of Contract and there having been triable issues, the Plaintiff's application ought not to be allowed.

LEGAL ANALYSIS

16. Order 13 Rule 2 of the Civil Procedure Rules, 2010 under which the Plaintiff sought for entry of judgment on admission provides as follows:-

“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 just.”

17. In Paragraph 3 of the Defendant's letter dated 15th March 2012 to the Eldoret Branch of the Bank annexed to the Plaintiff's Supporting Affidavit exhibit marked “ BMS-3”, the Defendant stated thus:-

“Further be informed that the delay for the release of funds of the same contract from Kenya Roads Board has been occasioned by reasons beyond our control.”

18. It was this assertion by the Defendant that the Plaintiff argued was an admission of the sum of Kshs 26,000,000/= and which the Defendant vehemently denied.

19. The Plaintiff's letter dated 30th March 2012 annexed to the Plaintiff's Supplementary Affidavit marked “BMS- 2” which attached a claim for VOP for Kshs 46,000,000/= was copied to the Resident Engineer. It was acknowledged by the Defendant on the same date. The Plaintiff made no mention of the sum of Kshs 26,000,000/= as had been alluded to by the Defendant in its letter dated 15th March 2012.

20. From the documents that have been placed before the court, it does not appear that the Defendant arbitrarily and unilaterally revised the Certificate of VOP downwards to Kshs 26,000,000/= as it had requested the Plaintiff to prepare a Certificate of VOP amounting to Kshs 26,000,000/= in its said letter.

21. Evidently, judgment on admission against a defendant can only be entered where there is a clear and an unequivocal admission of the sum owed to the other party. Indeed, a party should only be denied an opportunity to ventilate its case at full trial only as a last resort as such action is too draconian-**See Jackson Biegon vs Charles Too [2005] eKLR and Patel vs EA Cargo Handling Services [1974] EA 75.**

22. The evidence presented by the Plaintiff herein lends the court to find that the threshold for entry of judgment on admission had not been reached for the reasons shown hereinbelow.

23. Firstly, a careful perusal of the letter of 15th March 2012 shows that the payment of the sum of Kshs 26,000,000/= was conditional as it was subject to the Plaintiff satisfactorily completing the works. The Plaintiff did not present any evidence before this court to show that it had satisfactorily completed the works.

24. Secondly, in Paragraph 16 of its Statement of Defence, the Defendant stated that it had admitted that it was processing an additional amount of Kshs 26,000,000/= plus VAT but did not admit the said sum. The court does not find this to have been a clear and unequivocal admission of the said sum. The court is more persuaded by the Defendant's submissions it did not make any admission of the VOP amounting to Kshs 26,000,000/=.

25. Thirdly, the Interim Certificate amounting to Kshs 46,000,000/= was not signed by the Resident Engineer unlike the Interim Certificates Nos 1, 2, 3, 4 and 5, Substantial Completion Notice, Summary Bills of Quantities that had been attached in the Defendant's Replying Affidavit. It only bore the signature and stamp from the Plaintiff.

26. Notably, for the works to be satisfied, the Resident Engineer was required to approve the Certificate the Plaintiff relied upon in accordance with Clause 60 of the FIDIC Conditions of

Contract. The same provided as follows:-

“ 60.1 The Contractor shall submit to the Engineer after the end of each month six copies, each signed by the Contractor’s representative approved by the Engineer in accordance with Clause 15.1, of a statement in such form as the Engineer may from time to time prescribe...

60.2 The Engineer shall, within 28 days of receiving such statement, certify to the Employer the amount of payment to the Contractor which he considers due and payable...”

20.It is therefore evident from the parties’ submissions that the issue of Certificates for payment was a very pertinent and central issue of the dispute between the parties. There were several critical requirements that the Plaintiff did not appear to have complied with as regards the Certificate of VOP that it forwarded to the Defendant vide its letter of 30th March 2012 as indicated hereinabove.

21.The court therefore agrees with the Defendant’s submissions that its Statement of Defence did raise triable issues that would prevent the court entering judgment on admission.

27.Having said so, it is evident from Clause 67 of the FIDIC Conditions of Contract that there was an elaborate dispute resolution mechanism. Disputes between the Employer and the Contractor had to be referred to the Engineer in the first instance if a dispute arose. Any party that was not satisfied with his decision was required to refer the matter for amicable settlement. The party that was not satisfied with that decision was then required to refer the matter to arbitration which was the last dispute resolution mechanism that was provided for therein.

22.To oust the jurisdiction of this court from hearing and determining the matter herein, the Defendant was required to bring an application to stay the proceedings herein not later than when it first entered appearance in this matter as was stipulated in Section 6 of the Arbitration Act,. It did not do so. Instead, it filed its Statement of Defence dated 10th July 2013 on 11th July 2013 thus waiving its rights to refer this matter for arbitration as provided by the FIDIC Conditions of Contract. The jurisdiction of this court was thus invoked. The court came to a similar conclusion in the case of **Joel Kamau Kibe vs The Kenyan Alliance Insurance Co Ltd [2008] eKLR.**

23.Unless the parties were to agree to have this matter referred to arbitration under the provisions of Order 46 (1) of the Civil Procedure Rules, Cap 21(laws of Kenya), this court would for all purposes and intent be clothed with jurisdiction to hear and determine this matter to its logical conclusion.

24.If they did so, they did not place any evidence before the court to demonstrate this fact.

25.Although the avenue to refer the matter to arbitration at this point was closed and that such referral to arbitration under FIDIC conditions of contract would be premature at this stage as parties did not appear to have referred the dispute to the Engineer for his decision, Article 159 (2) (c) of the Constitution of Kenya, 2010 and the Civil Procedure Act and Civil Procedure Rules have expanded the mandate of the court to promote or refer matters to other alternative dispute resolution mechanisms, where appropriate.

26.Article 159 (2)(c) of the Constitution of Kenya, 2010 provides as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms...”

27.Section 59 C of the Civil Procedure Act provides as follows:-

“(1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or the court considers the case suitable for such referral(emphasis court)

(2) Any other method of alternative dispute resolution shall be governed by such procedure

as the parties themselves agree to or as the Court may, in its discretion order (emphasis court).”

28. In addition, Order 46 Rule 20 stipulates as follows:-

“1. Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion(emphasis court) **or at the request of the parties, any other appropriate means of dispute resolution**(emphasis court) **(including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act.**

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution (emphasis court)...”

29. There was no evidence that was furnished by the Plaintiff to indicate that it had referred its dispute with the Defendant to the Engineer for determination. Bearing in mind the provisions of the Constitution of Kenya, Civil Procedure Act and Civil Procedure Rules, 2010, this court takes the view that the dispute between the Plaintiff and the Defendant is one that would require resolution through the mechanisms that were set out in Clause 67 of the FIDIC conditions of contract.

30. In addition to the provisions of Article 159 (2) (c) of the Constitution of Kenya, 2010 and the provisions of Order 46 Rule 20 of the Civil Procedure Rules, 2010 and Section 59 C of the Civil Procedure Act, this court is empowered by Section 3A of the Civil Procedure Act that stipulates that nothing in the said Act shall otherwise limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court.

31. Section 1A of the said Act also mandates this court, while exercising power, to bear in mind the overriding objectives, which is, to facilitate the just, expeditious and affordable resolution of disputes. This is aimed at attaining the efficient disposal of the business of the court.

32. Accordingly, having carefully considered the pleadings, the affidavit evidence and oral and written submissions, the court finds that the issue between the parties was not a legal issue that should be decided by this court but rather by the Engineer in the first instance as parties are bound by the terms of their contract. The dispute was technical in nature as the same deal with issuance of Certificates by the Engineer and the court would have no expertise in determining whether or not the interim certificates were payable.

33. Indeed, the decision by the Engineer is any other method of dispute resolution that is not excluded by Article 159 (2) (c) of the Constitution of Kenya and would best resolve the dispute herein as, by their very execution of the FIDIC conditions of contract, they had clearly opted for a mode of settlement of their disputes in another fora other than the court. Parties are, however, at liberty to invoke the jurisdiction on this court only as has been provided by the law.

DISPOSITION

34. For the foregoing reasons, the court finds that the Plaintiff’s Notice of Motion application dated 25th February 2013 and filed on 26th February 2013 was not merited and the same is hereby dismissed with costs to the Defendant.

35. The Plaintiff and the Defendant are hereby directed to present their respective cases at the right forum for a just and expeditious determination of the dispute herein with a view to attaining the overriding objectives as envisaged in Sections 1A and 1B of the Civil Procedure Act.

36. For the avoidance of doubt, the court hereby directs that the proceedings herein be stayed and that parties commence settlement of their dispute in accordance with Clause 67 of the FIDIC Conditions of Contract as calling upon this court to intervene in the dispute between them regarding the validity or otherwise of the Plaintiff’s claims would be attempting to clothe this court with jurisdiction and power that clearly belong to the Engineer and Arbitrator.

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of October 2014

J. KAMAU

JUDGE