REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 446 of 2012

NGUYOU NGIBUINI T/A/ NGIBUINI & ASSOCIATES, CONSULTING ARCHITECTS …….. ……. PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI …….……. DEFENDANT

R U L I N G

1. The Plaintiff's Application for consideration by the Court is by way of Notice of Motion dated 16 August 2012 and seeks that judgement be entered for the Plaintiff in the sum of Shs. 13,119,334.50/- together with interest thereon. The grounds upon which the Application are based are that the Defence filed herein does not raise any triable issues and contravenes the mandatory provisions of **Order 7 Rule 5 (b)**, **(c)** and **(d)** of the *Civil Procedure Rules, 2010*. Further, the Plaintiff maintained that the Defence contradicts the Defendant's own documents which have been filed along with the Plaint and which the Defendant had not challenged in its Defence. The Plaintiff, Nguyo Ngibuini swore an affidavit in support of the Application again dated 16 August 2012. The Application is opposed, the Defendant having filed Grounds of Opposition on 11 September 2012. To my mind, some of the Grounds of Opposition contained averments evidential in nature which would have best been contained in a Replying Affidavit, as they amounted to denials rules as regards the Affidavit in support of the Application.

2. The Plaintiff, in his Supporting Affidavit, gave details that part of the Defendant's building known as City Hall building had been gutted by fire in 2004. The Defendant had called for bids for interested persons to provide architectural and consultancy services for the repair of the building. The Plaintiff detailed that he had made a bid for the provision of such services which had been accepted by the Defendant. He stated that having complied with the conditions, he had signed the form of contract which the Defendant was also to execute. He confirmed that to date, the Defendant had not returned to him a copy of the form of contract duly executed. He maintained that thereafter the Defendant issued him with instructions to commence providing the said consultancy services and he did so. The Plaintiff maintained that he raised fee notes for the services that he provided to the Defendant which the latter partly settled. Further, he maintained that by letter dated 22 May 2008, the Defendant explicitly admitted the existence of the said Contract for services No. CE 26/2004 (hereinafter "the Contract"). In expanding on the fee notes raised, the Plaintiff explained that he had submitted 9 fee notes, the first 5 of which were paid and the remaining 4 went unpaid. The Plaintiff maintained that the Defendant had an elaborate accounting system requiring several approvals before invoices/fee notes could be paid, which only proved that the Contract was in existence. Thereafter, the Plaintiff annexed to his said Affidavit in support copies of the unpaid fee notes totalling Shs. 8,127,376/-. The Plaintiff also annexed to his said Affidavit a copy of the demand letter dated 16th of March 2012 which included a figure for interest accrued on 8 out of the 9 fee notes totalling Shs. 3,182,359 .12. Finally, the Plaintiff took issue with the point raised in the Defence that

he had failed to provide a Performance Bond in relation to his consultancy services. He attached to his said Affidavit a copy of the Performance Bond provided by his bankers, Kenya Commercial Bank Ltd., dated 30 May 2005.

3. In relation to the law, the Defendant's Grounds of Opposition put forward the concept that this suit does not fall within the kind of suit which can be tried by way of summary procedure. The Defendant also maintained that the Contract is disputed and its validity or otherwise could only be proved at full trial. The Defendant further maintained that there were triable issues. Of an evidential nature was the premise by the Defendant that the Plaintiff had failed to furnish the Defendant with a written acceptance of the Contract and a Performance Bond to an acceptable standard. The Defendant maintained that it was as a result of the Plaintiff failing to fulfill the preliminary conditions that the Contract was never executed. It maintained that the Plaintiff was only relying upon letters to prove the existence of the Contract and that mere correspondence and queries raised prior to and immediately after the bidding process, did not constitute a contract between the parties. In its view, the Plaintiff had not produced any evidence to prove that the Contract was executed and consequently the Defendant maintained that it was not liable for the alleged sum of Shs. 13,119,334.50. In its Grounds of Opposition, the Defendant made two further points: firstly, that the Defendant's decisions are evidenced through its Council's resolutions and none had been exhibited by the Plaintiff to this effect. Secondly, the Plaintiff had alleged that the Contract was in the sum of Shs. 11,602,691/-and that he had been paid some money towards that figure. What the Plaintiff had not explained to this court was his request for a further unexplained sum of Shs. 13,119,334 .50.

4. Mr. Gikandi, learned counsel for the Plaintiff, maintained in his submissions made before court on 3 December 2012, that the Defence was not accompanied by any witness statement, copies of documents or any list of witnesses as required by Order 7 Rules 1, 2 and particularly 5. He maintained that the Defendant had not attempted, to date, to regularise that irregularity. In his opinion, this court ought to enter judgement as in effect there is no Defence filed. He pointed to a Commercial Court direction in that regard. He noted that the Defendant had not filed any Replying Affidavit to the Plaintiff's Application. In the absence of a witness statement and the Defendant's documents, as well as a Replying Affidavit, there was nothing before the court. Mr. Gikandi further submitted that the Grounds of Opposition were based on the Defendant maintaining that the Plaintiff had to failed to furnish it with a written acceptance of the Contract and a Performance Bond. He referred the court to the Affidavit in support in that regard. As regards the differences between Shs. 13 million claimed and Shs. 11 million, the Contract value, counsel noted the Defendant's letter dated 22 May 2008 from the City Engineer (exhibited to the Supporting Affidavit) which he maintained was a Variation Order varying the contract sum to a total of Shs. 13,330,308 .20. Finally, the court was referred to the authority of **Mugunga General Stores versus Pepco Distributors Ltd (1987) KLR 150**. In that case, the Court of Appeal in considering the merits of a defence held as follows:

"First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

Secondly, it is for the defendant to put forward his defence, and when faced with a motion for summary judgement under Order XXXV the defendant must heed rule 2 of that Order.

'The defendant may show either by affidavit, or by oral evidence or otherwise that he should have leave to defend the suit.'"

It was Mr. Gikandi's contention that the Defendant had a duty under that rule to show by affidavit or by oral evidence that it be given leave to defend the suit. He noted that the Defence filed was a bare denial.

5. Mr. Koceyo appearing for the Defendant maintained that under **Order 7 Rule 5** as regards the filing of witness statements, such may be filed 15 days before the pre-trial conference. Similarly under Order 11, it detailed that it is at the stage of the pre-trial conference that witness statements need be filed as well as lists and bundles of documents. **Order 7** has no default clause as regards failure to file witness

statements and documents. In counsel's opinion the Defence filed did not offend the provisions of **Order 7 Rule 5**. He went on to submit that summary judgement could only be pronounced in clear and precise circumstances. He detailed that the Defence had merit for the following reasons: –

(a)the Contract at page 14 of the bundle exhibited to the Supporting Affidavit was not signed by the Defendant as admitted in paragraph 3 of the said Affidavit.

(b) The Contract sum was Shs. 11 million. The fee notes nos. 1 to 5 had been paid and such totalled Shs. 8.75 million. The court had not been told why the sum now claimed by the Plaintiff had risen to Shs. 13 million. He now must come to give evidence as to the actuality of the contract sum. Counsel maintained that even if the variation of the contract sum to Shs. 13,000,000/= is taken into account, there is no explanation by the Plaintiff why the amount now claimed in the Plaint is Shs. 21,000,000/-.

Mr. Koceyo further submitted that there was a problem as regards how the claimed interest had been calculated. The only indication in that regard was the letter of demand addressed to the Defendant by the Plaintiff's advocates. However even in that letter at paragraph b) interest was being claimed at court rates only commencing from the date of filing suit. However counsel noted that interest was now being claimed on late payments of the fee notes at an undisclosed rate.

6. Counsel for the Defendant noted that the Application was brought under Order 2 Rule 15 but the same contained no prayer to strike out the Defence. The court had not been addressed on any points in relation to the Defence under that Order. In counsel's opinion the Defence raised triable issues including the provision of an acceptable Performance Bond stop. Further, the question of interest was also a triable issue. The Defendant maintained that there was no revision to the Contract in relation to the contract sum and that is another triable issue. Finally, Mr. Koceyo submitted that the fact that the Contract was not signed and the fact that the Plaintiff was relying upon correspondence for proof thereof, he should have sought an order for specific performance for the Defendant to sign the Contract document. In counsel's opinion, the **Mugunga General Stores** case could be distinguished in that the same involved returned cheques. Mr. Gikandi, in a brief response, pointed to page 45 of the bundle exhibited to the Plaintiff's Supporting Affidavit as to the provision for variation of the Contract by the Defendant. He also confirmed that there had been payment made in the amount of Shs. 8,127,376/-. He was of the opinion that there could be no hesitation by the court in entering judgementfor the amount claimed in the Plaint. Matters in relation to interest and other points could await the full hearing of the suit.

7. In my opinion, the Plaintiff in coming before court under the provisions of **Order 36** Summary Procedure has only belatedly taken cognizance of the provisions of **Rule 1 (1)**:

"…….. Where the defendant has appeared but not filed a defence the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest,…….".

The Defendant herein has filed a defence as well as entered appearance. That Defence was filed on the 24 July 2012. What the Plaintiff has asked this court to believe and to find, is that because the Defendant has not complied with the provisions of the **Order 7 rule 5**, it should find that Defence filed by the Defendant is no defence at all. As I read that rule, the Defendant at the time of filing its Defence (and seeing that there is no counterclaim) should have also filed a list of witnesses to be called at the trial together with their written statements and copies of documents that the defendant would wish to rely on at the trial. I do not think that Mr. Koceyo is right in his submissions that those documents need only be supplied and filed within 15 days of the pre-trial conference, as according to my reading, such may only be done with the leave of the court which, in this case, has not been granted. However, in view of this omission by the Defendant, should the Defence be allowed to stand as filed? In this regard I take cognizance of **Order 51 Rule 10 (2)** which reads:

"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

If that were not sufficient reason for this court to close a blind eye to the Defendant's omission, then the

constitutional provisions with regard to Judicial authority and the exercise thereof need to be taken into account more particularly the provisions of Article 159 (2) (d) which reads:

"justice shall be administered without undue regard to procedural technicalities;"

8. Turning to applications for striking out pleadings under **Order 2 Rule 15**, *Civil Proceeded Rules, 2010* the definitive case on whether to allow a Defence to stand or otherwise is that of **D.T Dobie & Co. (K) Ltd v Muchina (1982) KLR 1**, the Court of Appeal observed at page 6 *inter alia*;

'Let's understand the principles upon which the court acts when dealing with an application under Order VI rule 13 (now Order 2 rule 15 (1))

"No exact paraphrase can be given but I think 'reasonable cause of action' means a cause of action with some chance of success when (as required by paragraph (2) of the rule) the allegations in the plaint are considered."

Per Lord Pearson in Drummond-Jackson versus British Medical Association (1970) 2 WLR 688 at p 696.

"A cause of action is an act on the part of the defendant that gives the plaintiff his cause of complaint."

Words and Phrases Vol 1 p 228.

"There is some difficulty in fixing a precise meaning to the term 'reasonable cause of action'…. In point of law and consequently in the view of a court of justice, every cause of action is reasonable cause but obviously some meaning must be assigned to the term 'reasonable'…. A pleading will not be struck out unless it is demurrable and something worse than demurrable."

Per Chitty J in Republic of Peru –vs- Perurian Guano Company 36 Ch. Div 489, at pages 495 and 496.

"It has been said more than once that the rule is only to be acted upon in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution."

Per Swinfen Eady L.J in Moore –vs- Lawson and Anor (1915) 31 TLR 418 at 419

"It is a very strong power indeed. It is a power which, if it is not most carefully exercised might conceivably lead a court to set aside an action in which there might really after all be a right and in which the conduct of the defendant might be very wrong and that of the plaintiff might be explicable in a reasonable way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon…. Therefore unless the case be absolutely clear, I do not think the statement of claim to be set aside as not showing a reasonable cause of action"

per Denman J in Kellaway v Bury (1892) 66 LT 599 at pp 600 and 601. Upon appeal:

"That is a very strong power and should only be exercised in cases which are clear and beyond all doubt…. The court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."

Per Lindley J ibid p 602.

"It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the jurisdiction should be exercised with extreme caution."

Per Lord Justice Swinfen Eady in Moore v Lawson and Another (supra) at p 419 .

"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved."

The Court of Appeal in the **D.T Dobie** case was dealing with the issue of summary procedure and dealing with the determination of a suit without the benefit of trial. The courts have to be very cautious in exercising such jurisdiction, but may be called upon when, in very clear circumstances, the issues are an abuse of the court process or will delay and embarrass the trial process. As summed up by ***Madan JA*** in the ***D. T. Dobie case:***

"it is relevant to consider all averments and prayers when assessing under Order VI rule 13 whether a pleading discloses a reasonable cause of action and also the contents of any affidavits that may be filed in support of an application……. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way.' (Sellers LJ (supra)). As far as possible indeed, there should be no opinions expressed on the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overreact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

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, providing it can be injected with real-life by amendment, it ought to be allowed to go forward for a court of justice ought not act in darkness without the full facts of a case before it."

I believe that these other considerations that I should take into account in considering the Application before me, always bearing in mind that I am bound by the decisions of the Court of Appeal.

9. I have perused the Defendant's Defence dated 24 July 2012. I have also examined at length the Affidavit in Support of the Application by the Plaintiff. To my mind, the Defendant seems to be hanging his defensive hat on the fact that the Contract was not executed by it nor supported by Resolution of the Council. As I see it, the Plaintiff applied for and won the tender for the provision of consultancy services and the Defendant's letter of 22 April 2005 is clear:

"I write to inform you that the City Council of Nairobi has accepted your bid for Contract No. CE: 26/2004 for Consultancy Services for Fire Gutted City Hall Buildings at the total sum of Kenya Shillings Eleven Million, Six Hundred and Two Thousand, Six Hundred Ninety One and Cents Twenty (11,602,691.20) only."

I don't see how the Defendant can deny that the Contract was entered into more particularly as it paid the Plaintiff's first 5 fee notes tendered to it. Further, I cannot see how the Defendant can deny the provision of the Performance Bond by the Plaintiff's bankers Kenya Commercial Bank Ltd by the latter's letter of 30 May 2005. Indeed in the banker's letter, the guarantee is in a sum of Shs. 1,740,404/-, whereas the required Performance Bond amount as per the Defendant's letter of 22 April 2005 issue in was in the amount of Shs. 1,160,269.12. Finally, I don't see how the Defendant can deny the contents of the City Engineer's letter to the Plaintiff dated the 22nd of May 2008 in which the revised contract sum was detailed at Shs. 13,330,308.20 up from the original contract sum of Shs. 11,602,691.20. However, I have

some sympathy with the Defendant with regard to the question of interest. Nowhere in the bid or contract documents exhibited to the Plaintiff's Supporting Affidavit is any mention of interest being payable or any rate as regards thereto in relation to late payment of fee notes. Further, I do not see much wrong with the fees claimed by the Plaintiff both for itself and on behalf of its associate consultants as regards unpaid fee notes nos. 6,7 and 8 at pages 42, 43 and 44 of the Plaintiff's exhibited documents. However, the calculations as per the Plaintiff's letter to the Defendant of 7 July 2011 at page 46 in relation to additional works do not match up with the revised contract sum as per the Defendant's said letter of the 22nd of May 2008 at page 45 of the bundle of exhibited documents. To my mind, such discrepancy does amount to a triable issue. Further, and as commented above, the claim for interest accrued as per the Plaintiff's advocates letter of demand of 16 March 2012 also raises queries in the mind of the court. It is also interesting to note that the Plaintiff has not included in his exhibited bundle of documents a copy of the fee note no.9, only referring to the amount thereof in his said letter of 7 July 2011.

10. Although I have little doubt that there are monies owed by the Defendant to the Plaintiff under the Contract, the actual amount thereof is unclear to me for the reasons detailed above. Accordingly, I do not consider that this is a case in which I can exercise my discretion in favour of the Plaintiff and entirely strike out the Defendant's Defence. The same shall stand and this matter shall go to full hearing. Accordingly, the Plaintiff's Notice of Motion dated 16 August 2012 is dismissed but with no order as to costs. The Defendant is reminded of its obligations under the provisions of **Order 7** and **Order 11**, *Civil Procedure Rules, 2010.*

DATED and delivered at Nairobi this 30th day of January 2013.

J. B. HAVELOCK
JUDGE