REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 312 of 2012

CAPITAL CONSTRUCTION CO. LTD…….……PLAINTIFF/APPLICANT
VERSUS

NATIONAL WATER CONSERVATION AND

PIPELINE CORPORATION……..….DEFENDANT/RESPONDENT

RULING

1. The application by the Plaintiff is brought under the provisions of **Order 2 Rule 15(1)(b), (c) and (d)**, **Order 51 Rule 1** of the *Civil Procedure Rules*, **Section 3A** of the *Civil Procedure Act* in which the Plaintiff seeks for orders *inter alia* striking out the Amended Defence dated 12th October, 2011 and that judgment be entered as prayed for in the Amended Plaint dated 29th August, 2011. The application is premised on the grounds that the Amended Defence is a composition of mere denials, is an abuse of the court process and would embarrass or delay the fair trial of the action.

2. The application is supported by the Affidavit of Venkata Chainulu Ganti, the Plaintiff's Managing Director, sworn on 17th November, 2011. The deponent details that the Plaintiff and Defendant entered into a contract for the construction of the Defendant's headquarters through Contract No. **NWCPC/HQ/13/06/07** for the amount of Kshs. 485,400,820/- which was to commence on 24th April, 2008. Mr. Ganti maintained that the Defendant wrongfully terminated the contract on 17th April, 2009, subsequently leading to this claim by the Plaintiff. He further contended that the Amended Defence is hollow and tends to retract from plainly obvious matters. It should therefore be struck out and judgment entered as prayed for in the Amended Plaint.

3. In opposing the application, the Defendants filed a Replying Affidavit sworn by Eng. Petronila Ogut, the Managing Director of the Defendant, dated 25th January, 2012. It was contended therein that it was the Plaintiff who had rescinded the Contract and could therefore not claim for breach thereof. After a joint assessment of the work done, the Plaintiff was paid Kshs. 26,800,746/- as per the valuation report. The deponent maintained that the Amended Defence raised triable issues that have to be canvassed in court at a full hearing in due course. He regarded the Plaintiffs claim as untenable and that the entire application was an abuse of the process of the court. Finally, he had been advised by his advocates on record that the striking out of pleadings is a draconian way of dealing with disputes. He further contended that the application was brought in bad faith as the Plaintiff was fully aware that the Contract had been terminated as a result of material breach by the Plaintiff.

4. In considering an application to strike out pleadings, this court has regard of the case of **D.T Dobie & Co. (K) Ltd v Muchina (1982) KLR 1**, where the Court of Appeal held at page 6:

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

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

Per Swin fen Eady L.J in <u>Moore –vs- Lawson and Anor</u> (1915) 31 TLR 418 at 419

"It is a very strong power indeed. It is a power which, if it not be 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 explicable in a reasonable way. Unless it is a very clear case indeed"….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….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…"

The court in the **<u>D.T Dobie</u>** case was dealing with the issue of summary procedure as well as the determination of a suit without the benefit of trial. This court needs to be very cautious in exercising the jurisdiction, but such may be exercised when, in very clear circumstances, the issues raised in the pleadings are an abuse of the court process or will delay and embarrass the trial process.

5. The application before court is brought under **Order 2 Rule 15 (1) (b), (c) and (d)** in that it is scandalous, frivolous and vexatious, it may prejudice, embarrass or delay the trial of the action and is an abuse of the court process. The Plaintiff's allegations are that the Amended Defence is a mere denial, which is nevertheless hollow and retracts from obvious matters. In its submissions, which are not dated but were filed on 15th August, 2012, the Plaintiff submits that the Defendant in its Amended Defence failed to explain the circumstances under which the contract was terminated before the contractual term expired. The Plaintiff also submitted that the Joint Valuation Report did not mention the Plaintiff as a party to the Report or that the valuation was in relation to the Contract. It is the Plaintiff's view that the Valuation Report is vague, inconclusive and cannot assist the court in determining the suit. It does not however, detail as to just how the Amended Defence fell into the circumstances where a pleading out to be struck out. The Plaintiff's claim is for the colossal amount, Kshs. 55,059,777.40/- as per the Affidavit of the said Venkata Chainulu Ganti at paragraphs 11(h) and 14(1) A. of the Amended Plaint of 29th August, 2011. This court is very reluctant to grant the prayers sought in the application unless it is satisfied that the Plaintiff has clearly demonstrated that the Amended Defence is a sham and an abuse of the process of the court.

6. Further, the Plaintiff has admitted receiving Kshs. 26,800,746/- as per the Joint Valuation Report that was executed by representatives of the Contractor, the Project Quantity Surveyor and the Client, as witnessed by the executed document of 11th June, 2009 and 12th June, 2009 and marked as "PO1" in the Replying Affidavit. This was the same amount that the Defendant in its Replying Affidavit at paragraph 4 admits as having paid to the Plaintiff. However that was in partial satisfaction of the amount claimed.

7. In my opinion, the Defendant's Amended Defence does not fall within the pigeon-hole of **Order 2 Rule 15 (1) (b), (c) and (d)**. The basis of the Defendant's said Amended Defence is that the Joint Valuation Report clearly demonstrated that the valuation of the amount due to the Plaintiff was put at Kshs. 26,800,746/- which was duly paid and which the Plaintiff does not refute. I do not consider the Amended Defence as frivolous and vexatious as the Plaintiff would want the court to believe. The onus is on the Plaintiff to show that it was entitled to an amount over and above what it was paid, which presumably is the amount which is in dispute as between the parties. As I have already detailed the amount that the Plaintiff is claiming is colossal. However, be that as it may, it would only be in the interest of justice and fairness that this matter is set down for hearing and the suit determined on merits. I am satisfied that the Amended Defence has set up triable issues.

8. For any court to strike out a pleading on record in line with the principles for striking out pleadings as

set out in **D.T Dobie & Co. (K) Ltd v Muchina** (supra) the threshold is high as to just what amounts to mere denial, sham or abuse of the process of the court or what would embarrass and delay the court in such process. Consequently in my opinion, the application lacks merit and I dismiss the same with costs to the Defendant.

DATED and delivered at Nairobi this 11th day of February 2013

J. B.HAVELOCK
JUDGE