



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 208 of 2012

JOMAT CONSTRUCTION LIMITED PLAINTIFF

VERSUS

NYORO CONSTRUCTION CO. LIMITED DEFENDANT

RULING

1. The Plaintiff herein seeks to strike out the written Statement of Defence dated 18 May 2012 by way of a Notice of Motion dated 1 October 2012. In its Application, the Plaintiff further seeks that judgement be entered as prayed in the Plaint dated 30 March 2012 filed herein on 12 April 2012. The grounds upon which the Application are premised are that the Statement of Defence consists of mere denials and that the Defendant has failed to file witness statements as well as a list and bundle of documents required to accompany a Defence under the provisions of **Order 7 rule 5** of the *Civil Procedure Rules, 2010*. Further, the Plaintiff maintains that the Defence contains no triable issues and that the same is frivolous, vexatious and intended to prejudice and delay the fair trial of this suit.

2. The said Application is supported by the Affidavit of **Joshua Ndiangui**, the Technical Director of the Plaintiff company, sworn on 1 October 2012. The deponent detailed that the Plaintiff company had entered into an agreement (hereinafter “the Agreement”) with the Defendant company whereby the Defendant was to hire from the Plaintiff various units of construction equipment/vehicles. He attached marked as “JN 1” a copy of the Agreement dated 12 August 2009. Acting upon the terms of the Agreement, the deponent detailed that the Plaintiff company had availed the construction equipment and vehicles for the Defendant’s use. Thereafter the Plaintiff had rendered invoices together with monthly statements of account and periodic demands for settlement of the same. However the outstanding amount as claimed in the Plaint remained unpaid thereby necessitating the Plaintiff to file this suit. The Plaintiff maintained that the Defendant, in its Defence, did not refute the facts of the Agreement and further, it admitted receiving the said construction equipment/vehicles. The only matter that the Defendant denied was its refusal or failure to pay the amounts by way of hire charges as demanded by the Plaintiff.

3. The Defendant replied to the Application as per the Replying Affidavit sworn by its Managing Director **Josiah Njoroge Njuguna** dated 25 October 2012. The deponent immediately commenced his Affidavit by stating that he had been advised by the Defendant’s advocates on record that the Application before Court was bad in law as the same was grounded on an imagined contract being “Conditions of Contract for Works of Civil Engineering Construction” issued by the *Federation Internationale Des*

Ingeniieurs Council (FIDIC). Such a document had neither been adopted nor referred to in the terms of the Agreement. The deponent maintained that the Agreement was purely for the hire of equipment and transport vehicles not for works of civil engineering. He reiterated the Defence filed by the Defendant on 18 May 2012. He went on to say that he had again been advised by the Defendant's advocates on record that the Defendant had not breached any of the rules of procedure as **Order 7 Rule 5** of the *Civil Procedure Rules 2010* has a proviso thereto upon which the Defendant relied. He concluded his Replying Affidavit by stating that it was in the best interests of justice, and both parties will be best served, by the main suit being heard on merit and not through summary proceedings.

4. This Court confesses to be as equally confused as the Defendant herein as regards the Plaintiff's reference to the FIDIC contract as annexed to the Affidavit in support of the Application as "J. N. 3". I have perused that document and there is no mention therein of either of the parties hereto and there is no execution clause. In this regard, I fully accept the Defendant's contention that such was never entered into between the parties and that the only Agreement signed by both parties is that dated 12 August 2008 (or is it 2009?) exhibited as "J. N. 1" to the Affidavit in support of the Application. To my mind, the Agreement is clear in that it details the seven types of machinery hired by the Plaintiff to the Defendant along with the Daily Hire Rate for each.

5. In that Affidavit the deponent raised the question of the proviso to **Order 7 Rule 5** of the *Civil Procedure Rules, 2010*. That Rule reads as follows:

"5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by –

- (a) an affidavit under Order 4 rule 1 (2) where there is a counterclaim;**
- (b) a list of witnesses to be called at the trial;**
- (c) written statements signed by the witnesses except expert witnesses; and**
- (d) copies of documents to be relied on at the trial.**

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11".

It seems to me that what the Defendant is saying in its Replying Affidavit is that it does not have to file its list of witnesses to be called at the trial and written statements signed by those witnesses, as well as the copies of documents upon which it intends to rely on at the trial. With due respect, where a defendant wishes to exercise the option as regards not filing signed witness statements until 15 days prior to the trial, it requires leave of the Court. I have perused the Court's record as regards this file and nowhere can I find that the Defendant ever applied for leave as above. To my mind, the Defendant is clearly in breach of **Order 7 rule 5** and remains so up until now. In any event, it ought to have filed copies of the documents upon which it intends to rely upon at the trial hereof as such do not form part of the proviso to **Rule 5**.

6. In any application for the striking out of a pleading this Court is guided by the direction of the Court of Appeal in the well-known authority of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** wherein the Court stated:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no 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 the case before it."

In the D.T Dobie case, the Court analyzed the issue of summary determination of proceedings and the principles that emerge are that the power to strike out a pleading in a summary manner is a draconian

remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

. That takes me to a perusal of the Defendant's Statement of Defence filed herein on 18 May 2012. To my mind, the only sentence in the whole Defence which resembles a triable issue is contained in paragraph 5 and reads:

“Further the Defendant states that it has paid all verified and genuine invoices in accordance with the terms of agreement between the parties.”

The remainder of the Defence details mere denials on the Defendant's part. It admits the Agreement but states that it has paid in full and puts the Plaintiff to strict proof of its assertions in the Plaintiff. This is all very well but the Defendant, in its Replying Affidavit to the Application, did not deny the contents of the invoices exhibited by the Plaintiff to its Affidavit in support of the Application. Somewhat luckily for the Defendant, the Plaintiff failed in Exhibit “J. N. 2”, to detail totals in relation to the hire charges for the various pieces of machinery/vehicles hired to the Defendant from October 2008 through to July 2011.

8. As a result, this Court had to resort to the suit documentation as filed by the Plaintiff along with its Plaintiff. Apart from the several letters written by the Plaintiff to the Defendant with regard to outstanding payment details, I noted that each of them referred to “our final invoice”. However, I cannot find any invoice amongst the Plaintiff's documentation only what is termed a “Summary of Hire”. This document brought some confusion to my mind in that there were 2 rates detailed for the various months of hire from October 2008 to July 2011. The first column featured an hourly rate (which would be in line with the Agreement) and then a second column entitled “Jomat Computation”. At the end of the “Summary of Hire” in looking at the grand total under both columns there would appear to be an amount owing by the Defendant to the Plaintiff under the “Hourly rates” column of Shs. 5,634,688/-while under the “Jomat Computation” column the amount owing is Shs. 27,201,003/-. This latter amount is not the amount claimed in the Plaintiff which in prayer a) seeks an amount of Shs. 27,291,003/-, a difference of Shs. 90,000/-. In my opinion, such requires explanation from the Plaintiff which is presumably why the Defendant in paragraph 7 of its Statement of Defence has put the Plaintiff to strict proof of the amount it claims.

9. The conclusion to all the above is that I am unable to order the striking out of the Defence herein and the entering of Judgement in favour of the Plaintiff. The Plaintiff's Notice of Motion dated 1 October 2012 is hereby dismissed with costs to the Defendant.

DATED and delivered at Nairobi this 23rd day of April, 2013

**J. B. HAVELOCK
JUDGE**