



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 68 OF 2012

STAIRS ENTERPRISES PLAINTIFF

VERSUS

**NATIONAL WATER CONSERVATION
 & PIPELINE CORPORAITON DEFENDANT**

R U L I N G

1. For determination before this Court is the Plaintiff’s Notice of Motion dated 20 July 2012. At the outset I should say that Mr. Nyaranga who appeared for the Plaintiff is in person, is the proprietor thereof. Being represented by a layman, the Plaintiff’s Pleadings and documentation herein, including the Application before Court, tend to be mixed up and confused particularly so far as the law is concerned. For example, the Plaint herein was filed on 3 February 2012. An Amended Plaintiff was filed on 22 February 2012. A Further Amended Plaintiff was filed on 8 March 2012 – without the leave of the Court. Memorandum of Appearance was filed by the advocates on record for the Defendant 14 March 2012
2. The Plaintiff’s Notice Motion dated 20 July 2012 was brought under the auspices of **Order 36 rule 1** of the *Civil Procedure Rules, 2010*, **sections 3 and 3A** of the *Civil Procedure Act*, **Order VI Rule 13 (1) (B), (C) and (D)** of what was termed *Civil Procedure Rule* as well as **Order 21 Rule 7**. I presume that the Application before Court is one for Summary Judgement as prayer 3 thereof reads:

“THAT judgement be entered in this suit in favour of the Plaintiff in the sum of Kshs. 77,458,405/= together with accrued interest at 20.5 % P. A thereon from 31/12/2011 until payment in full.”

Prayer 4 of the Application reads:

“THAT the Defendant Defence statement be struck out for failure to comply with

Civil Procedure rule Cap 21 order 7 rule 5, occasioned by omission of vital documents to accompany defence statement file in court on 30/3/2012 renders the same defence fatally defective.”

3. Dealing firstly with the Plaintiff’s references to the *Civil Procedure Act* and the *Civil Procedure Rules* in the heading to its Application, Order 36 Rule 1 does not apply as the Defendant herein has filed a Defence. Obviously, **Order VI Rule 13 (1)** also does not apply as per **Order 54, Civil Procedure Rules 2010**, the (old) *Civil Procedure Rules* were revoked. That leaves the Plaintiff with **Order 21 Rule 7, Civil Procedure Rules 2010**. **Order 21** covers Judgements and Decrees and has no relevance to the Application before this Court. However, I am minded of the provisions of **Order 51 rule 10 (1)** which reads:

“Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

It must also be appreciated that the Plaintiff is represented by a layman and perhaps more store must be taken of paragraph 4 of the Notice of Motion as quoted above in that the same is brought under **Order 7 rule 5** of the *Civil Procedure Rules, 2010*, which reads as follows:

“7. 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 witness 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”.

4. Unfortunately for the Plaintiff, the Grounds under which its Notice of Motion was based detailed items of fact which should have probably been brought before this Court by way of Affidavit. However the one point worth noting therein was paragraph 9 in which the Plaintiff maintained that the statement in paragraph 10 of the Defence of the Defendant as regards allegations of fraud by the Plaintiff was false, unfounded and defamatory as the Defendant had not attached any evidence or proof thereof. As the Defendant has yet to be put on its Defence, the lack of evidence with regard to fraud is hardly surprising. The Affidavit in support of the Plaintiff’s Application contains matters that frankly were best raised at the trial of this suit rather than on an interlocutory application. However, two paragraphs stand out being, firstly, paragraph 3 in which the Plaintiff noted that the Defendant’s Defence was filed in Court on 30 March 2012 without being accompanied by vital documents, hence not in compliance with **Order 7 rule 5** which rendered the Defence fatally defective so that it should be struck out. Then at paragraph 21 of the Supporting Affidavit, the Plaintiff detailed that the prayers for judgement in its favour for the services rendered as detailed in attached invoices amounting to Shs. 29,584,560/-plus accrued interest at Shs. 47,873,845/-giving a total of Shs. 77,458,405/-plus (interest?) at 20.5 percent per annum from 31 December 2011 until payment in full.
5. The Replying Affidavit of the Defendant was sworn by its Managing Director **Eng. Petronila Ogut** on 12 October 2012. The deponent put forward the Defendant’s difficulty as far as documentation in relation to these proceedings is concerned by stating that on the night of 24 September 2009 there had been a fire that had gutted the Defendant Corporation’s premises resulting in the loss and destruction of most of its records including the Plaintiff’s pre-qualification papers and other documents. It noted that the Defendant had requested the qualified

suppliers, who may have had pending claims with the Defendant, to provide supporting documents for verification including documents as regards the bills is raised to the Defendant. The deponent noted that the Plaintiff had failed and/or neglected to provide such pre-requisite documents to the Defendant for such verification. Eng. Ogut also stated that upon further review being carried out by the Defendant, it had established that the Plaintiff did not have the requisite qualifications or expertise to carry out the works for which it based its claim.

6. As regards this Application before Court, the Plaintiff filed 2 sets of written submissions on 5 December 2012 and 24 January 2013. It maintained that the second set of submissions overrode the first one. It noted that its Application before Court was filed on 20 July 2012 and again emphasised that it prayed for the Defendant's Defence to be struck out for failure to comply with the provisions of **Order 7 rule 5** of the *Civil Procedure Rules*. It maintained that the Replying Affidavit was baseless, conflicting, prejudicial, frivolous, an abuse of judicial process as well as being unprocedural. The Defendant maintained that under the provisions of **section 45 (1)** of the *Public Procurement and Disposal Act 2005* the procurement Department under an obligation to maintain records and archive documents relevant to its procurement and disposal procedures. The Plaintiff then went into details of the various contracts ostensibly awarded to it by the Defendant arriving at a total amount due and allegedly unpaid of Shs. 29,584,560/-. This was the same schedule which had accompanied the Supporting Affidavit to the Application.
7. The Submissions thereafter went into verbose, irrelevant and unnecessary details concerning the verification process entered into by the Defendant after the said fire, as well as maintaining that the forensics firm, KPMG, who had been hired by the Defendant for the verification process, had put a disclaimer as to responsibility in its Report. Further, its appointment had been illegitimate as the duty for forensic investigation in relation to state corporations is vested only in the Auditor General or the Kenya National Accounts office (whatever that may be). It is quite obvious to this Court that the Plaintiff had little or no idea as to the necessity for Pleadings to be relevant to the Application that they were in support of. The two points raised at paragraphs 5 and 6 of what the Plaintiff termed its "Overview" at the conclusion of its rambling submissions were;
 - a. There were no triable issues raised by the Defendant in paragraphs 1 - 8 of the Replying Affidavit.
 - b. The Defendant's Defence is non-compliant for failure to provide supporting documents as provided in **Order 7 rule 5**.

In the Plaintiff's view the Court should strike out the Defence and enter Judgement for the Plaintiff as appropriate.

8. The Defendant relied upon its two sets of submissions the first filed on 18 December 2012 and the second on 13 February 2013. Straightaway, the Defendant grasped the point that the Plaintiff herein sought summary judgement on the grounds that the Defendant had not filed its list of documents when filing its statement of Defence. Strangely, the Defendant did not embrace the point further but proceeded to comment upon the Supporting Affidavit to the Plaintiff's Application as well as setting out what it considered to be triable issues in relation to the Defence. In connection with the Supporting Affidavit, the Defendant noted that the Plaintiff had stated therein that he had supplied to the Defendant the requested documents for verification and confirmation of its claim. However, the Plaintiff had not shown any proof of such delivery of documents either through a covering letter or by attachment to the Supporting Affidavit. The Defendant referred to its letter dated 16 June 2011 requesting such documentation from its suppliers among others, the Plaintiff. The telling paragraph of its submissions so far as the Defendant was concerned read as follows:

"he never supplied the documents as requested and neither was it his intention to ever do so. It is the Plaintiff's intention to mislead this Honourable court with the documents annexed in his Plaint as the same are disputed and some of which have been drawn by the Plaintiff himself (please refer to the certificates of completion and acceptance for instance). It defeats conventional wisdom how a contractor would issue himself a certificate of completion as opposed to the contracting entity. Further, without any documentation, it would be impossible for the Defendant to pay any

supplier. Had the Plaintiff herein supplied the Defendant with the documents as requested, this suit would have been needless as the payments to the Plaintiff, if any, would have been made. In that light therefore, the Plaintiff's suit is premature and uncalled for and should be dismissed with costs to the Defendant/Respondent."

9. The Defendant's submissions then embarked upon detailing what he considered to be the 5 triable issues of the suit as follows:

"The first issue is whether the Plaintiff supplied the Defendant with the documents and information requested for vide the letter dated 16th June, 2012. Whereas the Plaintiff claims to have supplied the relevant documentation and additional information, he has not attempted to prove that fact to the court. This is a vital issue in this matter and the same can only be ascertained if this matter proceeds to a full trial.

Secondly, it is the Defendant's position, eloquently stated at paragraph 8 of the Defence, that the Plaintiff did not have the expertise to undertake consultancy services he alleges to have offered. It is inconceivable that such a contract work over Kshs. 70 million could be granted to a person without having the necessary expertise required to provide the services he alleges to have provided. Your Lordship, this issue can only be ascertained if a full trial is conducted.

Thirdly, the documents accompanying the Plaintiff are also in contention. By the said letter of 16th June, 2012 to the Defendant, the Plaintiff requested for additional information together with any supporting documents for verification by forensic experts and subsequent payment of outstanding amounts. The Plaintiff failed to do so. He however annexed some documents to the plaint herein whose authenticity has been denied by the Defendant and a full trial is a prerequisite to authenticate the same to safeguard public funds as the Defendant is funded by the taxpayer.

Fourth, the Defendant has pleaded fraud in its Defence and particularized the particulars of fraud. Such allegations are serious and cannot be wished away on technicalities that could give rise to loss of public funds on non-existent fraudulent claims and the court cannot turn a blind eye on the same.

Lastly Your Lordship, various unsubstantiated claims arising from different contracts have been lumped by the Plaintiff in this suit. It is virtually impossible for the Defendant to logically defend itself on the face of the pleadings filed herein and as the court will note, no particulars are set out as required in law for any of the claims".

10. In concluding its submissions, the Defendant referred to 3 cases which upheld the principle that if a *bona fide* triable issue is raised in the Defence, the Defendant must be given unconditional leave to defend. These cases were Osodo v Parties Bank International Ltd Civil Appeal No. 11 of 1980, Momanyi v Hatimy & Anor. Civil Appeal No. 139 of 2002 (both unreported) and Postal Corporation of Kenya v Inamdar & 3 Ors (2004) 1 KLR. Finally as regards the point that I raised in the introduction to this Ruling that Order 36 rule 1 cannot apply in an application for summary judgement where the defendant has filed a defence, the Defendant referred the Court to the case of James Juma Muchemi & Ptnrs. v Barclays Bank of Kenya & Anor HCCC No. 339 of 2011 reported at (2012) eKLR.

11. Quite clearly, the Defence filed herein on 30 March 2012 should, as per **Order 7 Rule 5**, have been accompanied by a list of the Defendant's witnesses to be called at the trial, written statements of those witnesses (except expert witnesses) and copies of documents which the Defendant would seek to rely upon at the trial. The Defendant has not filed these documents but as far as the witness statements are concerned, the proviso to **Rule 5** details that it may, with the leave of the court, be furnished at least 15 days prior to the trial conference under **Order 11**. As at the date hereof, the

Defendant has not applied for that leave. As regards the filing of a list and bundle of documents, the Replying Affidavit sworn by Eng. Ogut on 12 October 2012 clarified that there was a fire at the Defendant's premises on 24 September 2009, which destroyed all its records and, consequently, the Defendant is unable to comply with this provision. In this regard, the Court was interested to note that the skimpy documents provided by the Plaintiff to prove its claim were all dated prior to the 24 September 2009. One asks the question as to why, if the Plaintiff had not received payment in respect of the amounts that it is claiming, it has taken five years for it to file suit.

12. In coming to a decision as to whether to strike out the Defence for non-compliance with **Order 7 rule 5**, I am guided by the classic case before the **Court of Appeal** in **Castelino v Rodrigues (1972) EA 223** where the court held:

“Of course, rules are made to be observed, but irregularities of form may be ignored or cured by amendment when they have occasioned no prejudice. In these matters of form, courts are much less strict today than formerly.”

Further, in the case of **Unga Ltd v Amos Kinuthia Civil Appeal No. 175 of 1997**, it was held that deviation from form is not fatal if the substance is not affected and if the irregularity is not calculated to mislead.

Coming more up-to-date, I have received considerable assistance from my learned brother **Kimondo J.** in his recent Ruling in **Election Petition No. 2 of 2013 – Steven Kariuki v George Wanjohi & 2 Ors** in which he stated:

“Once seized of the dispute, the Court is enjoined by Article 159 (2) (d) of the Constitution to do substantial justice to the disputants expeditiously and without undue regard to technicalities. Rules of procedure have aptly been described as handmaidens of justice, not mistresses. See *Edward Steven Mwiti Vs Peter Irungu & 2 others (No. 2) Nairobi High Court ELC 105 of 2011 [2012]KLR*. This overriding principle is a guiding beacon for the court:

‘The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing’.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

But that is not to say that rules or technical rules shall not apply: only that the Court should not pay undue regard to them. If rules were to be thrown out of the window, chaos akin to a village *baraza*, will step in through the wide door.”

13. Later in his ruling, my learned brother **Kimondo J.** had this further to say:

“The Supreme Court has succinctly interpreted the boundaries of Article 159 (2) (d) in *Raila Odinga and others Vs Independent Electoral and Boundaries Commission and 3 others* Nairobi Petition No. 5 of 2013 [2013] eKLR. In a motion brought to strike out a further affidavit, the learned Judges delivered themselves as follows:

‘The essence of that provision is that a Court of law should not allow the prescribed procedure and forms to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-

in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course’.”

14. Having received considerable guidance from the wisdom of the Judges of the Supreme Court in the **Raila Odinga** case above, I must now turn my attention to determine the best course in relation to the parties in the suit before me. Without doubt, the Defendant has been put to great disadvantage as a result of the fire at its premises on the night of 24th September 2009. It no longer has its records in relation to any transaction that may have been undertaken on its behalf by the Plaintiff. Sensibly, it has tried to remedy that situation by calling for documentation from its suppliers including the Plaintiff more particularly in the latter case by its letter dated 16th June 2011 exhibited as “PAU 1” to the Replying Affidavit of **Eng. Ogut** sworn on 12th October 2012. The deponent to the Replying Affidavit detailed that no response had been received from the Plaintiff, which the Court considers strange in view of the fact that the said letter confirms that the Defendant will pay to the Plaintiff the initial sum of Shs. 1,585,298.80. The letter goes on to invite the Plaintiff to let the Defendant have details of its bank account, PIN Number as well as its VAT number in order to enable it to process payment. To my mind, the submissions of the Plaintiff in relation to the forensic audit ordered by the Defendant in relation to its own accounts were completely irrelevant to the matters before this Court.
15. As detailed above, the Defendant, in its initial submissions herein, set out what it considered to be the triable issues raised by its Defence. It also referred the Court to the 2 authorities of **Osodo v Parties Bank International Ltd** and **Momanyi v Hatimy & Anor** (both supra) which were Court of Appeal matters binding upon this Court. The second authority quoted from the first authority:

“If upon an application for summary judgement the defendant is able to raise a *prima facie* triable issue as the appellant did in this case, there is no room for discretion. There is only one course for the court to follow, i.e. to grant unconditional leave to defend.”

This direction seems clear to me and I am left with only the one option. The Plaintiff’s Notice of Motion dated 20 July 2012 is dismissed with costs to the Defendant.

DATED and delivered at Nairobi this 28th day of June, 2013.

J. B. HAVELOCK

JUDGE