



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 244 OF 2012

PCEA TUMUTUMU HOSPITALPLAINTIFF

VERSUS

MEDICOMP TECHNO SERVICES LTD.....RESPONDENT

RULING

1. By a notice of motion brought under order 2 rule 15 of the Civil Procedure Rules the Plaintiff/Applicant moved the court for orders:
 1. ***That the statement of defence filed herein be struck out with cost.***
 2. ***That judgment be entered for the Plaintiff as prayed for in the plaint***
 3. ***That the cost of the application be provided for.***
2. The application was grounded on the grounds that the statement of defence filed is scandalous, frivolous and vexatious. The defence is embarrassing to the Plaintiff and solely calculated in delaying fair trial of the suit and is therefore an abuse of the process of court.
3. It was supported by the affidavit of one David Kariuki Maringa who described himself as the Hospital Administrator of the Plaintiff who deponed that sometimes in October 2011 the hospital decided to buy and install an oxygen plant and the defendant was contracted to do so at an agreed cost of 74,309 Euros.
4. That the Applicant made 50% down payment on 23rd November 2011 and the final balance on 19th January 2012 and that the defendant defence that the Plaintiff failed to pay the full price is solely meant to embarrass and scandalize the hospital.
5. That upon contacting the main suppliers Oxyplus Technologies of France on 13th July 2012 by email he received a response that the defendant only remitted 20% of the purchase price despite having received full payment by 19th January 2012 and that the defence does not raise any triable issue.
6. In response to the said application the defendant filed a replying affidavit sworn by George Jombo in which he deponed that the defence raises triable issue in that the defendant has raised the issue of whether the Plaintiff has a legal capacity to sue and to be sued and that the contract entered would be null and void if the Plaintiff did not have capacity to contract.
7. It is further deponed that the Plaintiff failed to honour the agreement and pay the full purchase price.
8. At this stage what the court is called upon is to see whether the defence raises any triable issue as it is trite law that even if there is just one triable issue the defendant should be allowed to defend the suit.
9. In the case of D.T. DOBIE Co. (k) LTD v MUCHINA [1982] KLR1 Madan JA at page 9 had this

to say”

“The court ought to act very cautiously and consider all facts of the case without embarking upon a trial thereof before dismissing a case on being otherwise an abuse of the process of 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.”

10. The Defendant/Respondent in opposition to the application herein has relied upon the case of GULANA & another v JIRONGO NAIROBI HIGH COURT CIVIL CASE NO. 393 OF 2003 where in Ringera J as he then was it was held that when the defence raises a substantial and bona fide arguable point it cannot be struck out under then order vi rule 13(1)(b)(c) and (e) of the Civil Procedure Rules.

11. From the defence and the submissions by Advocates for the parties herein I am of the considered view that the defence herein raises triable issues which ought to be determined by way of the trial and for the purposes of this application I have identified the following triable issues:

1. ***Whether the Applicant had legal capacity to enter into a contract with the defendant.***
2. ***Whether the Applicant has legal capacity to sue and to be sued.***
3. ***What were the terms of contract entered into between the Plaintiff and the defendant and whether the Plaintiff fulfilled the terms thereof.***
4. ***Whether the defendant has breached the terms of the said agreement.***

1. These to my mind are issues that can only be determined through oral evidence and subjected to the test of cross examination.
2. I therefore dismiss the application herein dated 27th March 2013 with cost in the cause.
3. The main suit should be fixed for hearing the parties having complied with order 11 of Civil Procedure Rules.

Dated at Nyeri this 26th day of September 2013.

J. WAKIAGA

JUDGE

26/9/2013

Before Hon. Justice J. Wakiaga - Judge

Court clerk - Wanjohi

Mr. Muthoni for Mwangi for Respondent

Mr. Kariuki for Kinyua for Plaintiff/applicant

Court: Ruling delivered in open court.

J. WAKIAGA

JUDGE