REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 464 OF 2012

CHINA SICHUAN CORPORATION FOR INTERNATIONAL TECHNO-ECONOMIC

CO-OPERATION (SIETCO) ……..…… PLAINTIFF/RESPONDENT

VERSUS

KIGWE COMPLEX LTD. ……..…….. DEFENDANT/APPLICANT

R U L I N G

1. For the determination of the Court are three applications filed by both parties in this suit. The first application is dated 16th August, 2012 filed by the Plaintiff pursuant to **Order 36 Rule 1 and 50** of the *Civil Procedure Rules* **and Section 1A, 1B and 3A** of the *Civil Procedure Act*. The Plaintiff in that application seeks prayers for summary judgment against the Defendant on the grounds that the claim in the Plaint is for a liquidated amount for which the Defendant is truly indebted and owes the Plaintiff and that there is no dispute as to the amount owing. The Application is supported by the Affidavit of **Zhang Shifei** sworn on even date.
2. The second application is dated 19th March, 2013 filed by the Defendant. In that application, made pursuant to the provisions of **Orders 4 Rule 4(1) and (6) and 51** of the *Civil Procedure Rules* and **Section 1A, 1B and 3A** of the *Civil Procedure Act*, the Defendant seeks to strike out the Plaint dated 19th July, 2012 for being fatally defective and bad in law. The Defendant contended that the verifying affidavit in support of the Plaint is sworn without the authority of the Plaintiff and that the suit is filed without any resolution by the Plaintiff. There is no affidavit attached in support of the Defendant's said application.
3. The third application again by the Defendant is dated 5th April, 2013. That application is brought pursuant to the provisions of **Orders 17 and 51 (1) & (3)** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Defendant seeks leave from this Honourable Court to file its Defence and Counterclaim out of time. The application is further supported by the Affidavit of **David Waiganjo Kigwe**, but on which date it was sworn is not stated.
4. In determining the matters at hand, this Court will first deal with the Defendant's application dated 19th March, 2013 seeking to strike out the Plaintiff's claim and brought pursuant to the provisions of **Order 4 Rule 1(1) & (6)** of the *Civil Procedure Rules*. Such are the provisions of the *Civil*

Procedure Rules that relate to Plaints generally. It is noted that should the Defendant be successful in its striking out application, the other applications before this Court will fall away. **Rule 1 (1)** as above reads:

> **"(1) Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so".**

Sub-rule (6) also referred to in the application reads:

> **"(6) The court may of its own motion or on the application by the Plaintiff or the Defendant order to be struck out any plaint or counterclaim which does not comply with sub-rules (2), (3), (4) and (5) of this rule"**.

However, upon a closer perusal and inspection of the Defendant's application, the Court discovered that there was no affidavit attached to the same so as to verify the correctness of the averments made by the Defendant therein. Under **Order 51 Rule 4** of the *Civil Procedure Rules*, an affidavit shall be served if it is intended to be adduced as evidence. The said proviso reads:

> **"(4) Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, *a copy of any affidavit intended to be used shall be served."*** (Underlining mine).

5. The wording of **Order 51 Rule 4** is couched in mandatory terms i.e. that an affidavit shall be filed and served together with the application. The application dated 19th March, 2013 states that it is predicated upon the affidavit of **David Waiganji Kigwe**, which affidavit, upon closer scrutiny, has not been availed to Court. The Defendant's said application also reads:

> **"WHICH APPLICATION is further supported by the annexed supporting affidavit of DAVID WAIGANJO KIGWE and such further or other grounds as shall be adduced at the hearing hereof".**

The Applicant clearly had an intention of using the Affidavit of **David Waiganjo Kigwe** to support its said application and it should therefore have served the Affidavit with the application. *Article 159 (2) (d)* of the *Constitution* provides that the Court may determine matters without undue regard to procedural technicalities. This Court has also taken cognizance of the provisions 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."**

However, as reiterated by Musinga, J in **Willis Evans Otieno v Law Society of Kenya & 2 Others (2011) eKLR**, referred to in the submissions by the Defendant, this constitutional provision cannot be used as a panacea for an incompetent pleading, the instant application being deemed as such, i.e. incompetent for failing to subscribe to the provisions of **Order 51 Rule 4**. I also find that the inadvertence of the Defendant to attach the Supporting Affidavit of **David Waiganjo Kigwe** to its application does affect the substance thereof and consequently the Defendant cannot take advantage of the provisions of **Order 51 Rule 10 (2)**. Even if I did find that the Defendant's said Application was competent, it is to be noted that the Plaint filed herein on 19 July 2012 details in paragraph 1 that the Plaintiff is a limited liability company incorporated in the Peoples' Republic of China and is registered under the Companies Act here, I can only assume that it is a Foreign Company registered in Kenya. The Defendant has put forward nothing to show that companies registered in the Peoples' Republic of China are required to have Company Seals. To my mind, the Affidavit in support of the Plaint sworn by Li Jin Cheng on 16th July 2012 clearly states that the deponent is authorised by the Plaintiff's Board of directors to swear the said Affidavit in support.

6. The above notwithstanding, if the Court is in any event, persuaded to give effect to the provisions of *Article 159 (2) (d)* of the *Constitution*, the Court will and is persuaded by the ruling of Kimondo, J in **Mohammad Hassim Pondor & Another v Summit Travel Services Ltd & 4 Others (2011) eKLR** where the learned Judge reiterated as follows ***inter alia***:

> **"…again an application to strike out a pleading must be brought with expedition. Where there has been inordinate delay in bringing it, the Court will frown upon it and will not exercise its discretion in favour of the applicant."**

As above, the Plaint is dated 16th July, 2012 and filed on 19th July, 2012. The Defendant entered appearance on 10th August, 2012. The application to strike out is dated 19th March, 2013, a period of over seven (7) months since the institution of the suit. This delay is unexplained and in the opinion of this Court, inordinate. As a result, this Court is not bound to exercise its discretion in favour of the Defendant. The upshot is that the Defendant's application dated 19th March, 2013 is without merit and is dismissed with costs to the Plaintiff.

7. The second application is by the Plaintiff and is dated 16th August 2012 brought pursuant to the provisions of **Order 36 Rule 1 and Order 50** and **Sections 1A, 1B and 3A** of the *Civil Procedure Rules*. The applicant seeks the following prayers:

> **"1. THAT the Honourable Court be pleased to enter summary judgment in favour of the Plaintiff and against the Defendant for the sum of Kshs. 25,899,301.60 and interest as specifically pleaded and prayed for in the Plaint dated 16th July, 2012 and filed in Court on 19th July, 2012.**
>
> **2. THAT the costs of this application be borne by the Defendant".**

The application is predicated upon the grounds that the judgment is for a liquidated amount, to which there is no dispute. The amount is due and owing from the Defendant and that this indebtedness of the Defendant to the Plaintiff necessitated the commencement of the suit herein.

8. The application is further supported by the Affidavit of **Zhang Shifei**, sworn on 16th August, 2013. It is deponed that the Applicant and the Respondent entered into a contract (for the construction of a commercial/residential complex known as the Kigwe Complex), on 31st March, 2011 for a consideration of Kshs. 156,680,815/- for a contract period of Twelve (12) months. It is averred that the Applicant commenced with the works, pursuant to the contract and was subsequently issued valuation certificates by the Project Manager for payment, all of which were honoured by the Respondent, except for valuation certificate No. 7 which is the cause of the present dispute. It is also averred that on 3rd May, 2012 a joint inspection and measurement exercise was conducted at the site, at which the Project Manager, the Project Architect, the Project Quantity Surveyor, the Services Engineer, a Representative for the Structural Engineer, the Clerk of Works, the Site Agent and the Applicant were present. Subsequent to which visit, the Project Manager issued a Final Valuation Statement on 22nd May, 2012, certifying the amount due to the Applicant as Kshs. 17,339,150/70. Further, it is averred that the total amount due and owing to the Applicant from the Respondent is Kshs. 22,899,301/60.
9. The application is opposed. In the affidavit in response to that application sworn by David Waiganjo Kigwe on unspecified date, it is deponed that, in as much as it was admitted that indeed there was a contract between the applicant and the respondent, to which certificate No. 7 is still pending payment, it was further averred that the non-payment was due to the poor workmanship and construction of the top floor of the complex without approval from the (then) City Council of Nairobi. It is also deponed that the Notice of Termination issued by the Plaintiff on 9th February, 2012 was despite protests by the Respondent as to the addressing of its issues raised concerning the construction without approval which, in its view, jeopardised the entire project. It was further deponed that the Final Valuation Statement dated 22nd May, 2012 did not resolve the issue of the

unapproved construction and neither did it account for the whereabouts of some of the materials on site.

10. Further in opposing the application for summary judgment, the Defendant filed an application dated 5th April, 2013 seeking leave to file his Defence and Counterclaim out of time. That application is made pursuant to **Orders 17 and 51 Rule 1 & 3** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. In the draft Defence and Counterclaim annexed to the Application, several issues were raised including latent defects which were nonetheless approved by the 2nd to 6th Defendants named in the Counterclaim, conspiracy by the Defendants to the Counterclaim and a claim for missing materials from the construction site. The Defendant also claimed that the construction was without proper approvals from the City Council of Nairobi, which thereby jeopardized the entire project to the detriment of the Defendant.
11. In an application for summary judgment pursuant to **Order 36 Rule 1** of the *Civil Procedure Rules*, it is provided that where the Defendant has entered appearance but no defence has been filed, the Plaintiff may apply for judgment, in a liquidated claim, plus any interest or profits accruing. The aforementioned **Order Rule 1** reads:

> **"(1) In all suits where a plaintiff seeks judgment for—**
>
> **(a) a liquidated demand with or without interest; or**
>
> **(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**
>
> **where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."**

Chesoni, J (as he then was) in **Richard H. Page & Associates Ltd v Ashok Kumar Kapoor (1979) KLR 246** reiterated that the purpose of summary judgment applications was to obtain a quick judgment where there was evidently and plainly no defence to the claim. In **Achkay Holdings Ltd v N.M Shah T/A Braidwood College H.C.C.C No. 2190 of 1994; (1995) eKLR** it was reiterated that such procedure should only be allowed in instances of clear and obvious unsustainability of a cause of action or defence. The learned judges found inter alia:

> **"The summary procedure under Order 6 Rule 13 can only be adopted when it can be clearly seen that a cause of action or defence on the face of it is obviously unsustainable and should be applied only in a plain and obvious case. The learned judge refused to grant the application because the pleadings involved serious unresolved issues which could only be determined at the trial."**

This position was adopted by Visram, J (as he then was) in **Lacoste Ltd v Henry Oulo Ndede [2005] eKLR** in which he held inter alia:

> **"I am not at all convinced that this was a proper case for a summary procedure. As the Courts have indicated over and over again, summary procedure is drastic; it removes a litigant from the seat of justice without a hearing based on evidence that can be tested in cross-examination; and must be used sparingly in clear and straight forward cases where there are indeed no triable issues. Here there were actually two triable issues-both raised in the defence - relating to the failure of the Appellant's financiers to provide a satisfactory report, and breach of confidentiality. These issues were sufficient for the case to proceed to trial, and the lower court erred in not subjecting the case to full trial."**

12. The Defendant in this matter before Court has, up until now, failed to submit and file a defence in answer to the claim by the Plaintiff. Does such failure necessitate a quick judgment as was held in **Richard H. Page & Associates Ltd v Ashok Kumar Kapoor** (supra)? Does the draft Defence and Counterclaim annexed to the Defendant's application dated 5th April, 2012 raise any such triable issues that may only be verified and determined at a trial? The Plaintiff argues in its submissions dated 23rd May, 2013 that the draft Defence and Counterclaim of the Defendant does not raise any such triable issues and that the Court should proceed to enter judgment against the Defendant and allow the Plaintiff's application dated 16th of August 2012. The Plaintiff relied on the cases of **APA Insurance Ltd v City Hopper Ltd & 2 Others (2010) eKLR** and **Magunga General Stores v Pepco Distributors Ltd (1988-1992) 2 KAR 89** to buttress its arguments in this regard. In the former, Koome, J (as she then was) reiterated as follows:

> **"These rules basically provide that a Plaintiff with a liquidated claim to which there is clearly no defence can obtain a quick summary judgment without being unnecessarily kept from what is due to it by way of delaying tactics by the defendants. The principle element for consideration in this application is whether the plaintiff's case is clear and plain; that the defendants are truly and justly indebted to the plaintiff. The other issue to consider is whether the defence raises triable issue(s) which should entitle the defendant to defend it at the trial. This can be demonstrated by the statement of defence which must disclose triable issue(s) a replying affidavit which must show the defence discloses triable issues."**

In **Magunga General Stores v Pepco Distributors Ltd** (supra) Platt, JA (as he then was) held inter alia:

> **"…it is for the defendant to put forward his defence, and, when faced with a motion of summary judgment under order 35, the defendant must heed r. 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.'**
>
> **From rule 6 provides that it appears to the court that any defendant has a good defence, then he may be allowed to defend, while if there is not a good defence, the plaintiff shall be entitled to judgment."**

Obviously, from the foregoing, the Defendant has to establish a defence to the issues raised in the claim, or, as reiterated in **APA Insurance Ltd v City Hopper Ltd & 2 Others** (supra), it has to raise triable issues.

13. According the Blacks' Law Dictionary, 9th Edition at page 1644, a "triable issue" is deemed to mean ***"subject or liable to judicial examination and trial'*** whilst "the trial" has been given to mean ***"a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."*** Therefore, triable issues are those that are subject to judicial examination in a Court, for determination on their merits. As a result, does the Defendant's draft Defence and Counterclaim raise any triable issues as per the aforementioned cases of **APA Insurance Ltd v City Hopper Ltd & 2 Others** and **Lacoste Ltd v Henry Oulo Ndede** (supra)? The Court has examined the draft Defence and Counterclaim marked as **"DWK-1"** annexed to the application dated 5th April, 2012, for leave to file a Defence and Counterclaim out of time. At paragraph 8, the Defendant alleges that the responsibility for the quality of the works lay with the Plaintiff, and which, according to the Defendant, had several defects as listed in sub-paragraphs numbered (a) – (k). The Defendant also alleges in paragraph 8 (l) that there had been no prior approval issued for the construction of the 4th Floor of the Complex by the City Council of Nairobi, which was unlawful and detrimental to the Defendant and which, in any event, jeopardized the entire project. At paragraph 11, the Defendant raises the issue of unaccounted materials that had already been paid for and which were on site prior to the termination of the contract by the Plaintiff. In the

Counterclaim, the Defendant reiterates the allegations made in the Defence and further, that the valuation certificates were issued in collusion as between the named 1st – 6th Defendants in the Counterclaim, and which, in the deponent's opinion, were not conclusive evidence and/or proof of performance of the contract. In a letter addressed to the Plaintiff dated 29th March, 2012 by the Project Manager, (named as the 2nd Defendant in the Counterclaim, included at page 62 the Bundle of Documents dated 16th July, 2012 filed together with the Plaint), at paragraph 2) it read that:

> **"(2) While the Client accepts your termination of the contract, you are aware of the issues he raised about the works which have resulted to the current stalemate."**

14. In my opinion, the Defendant has, therefore, raised four (4) distinct issues from the foregoing namely:

a. There was no approval issued by the City Council of Nairobi prior to the construction of the 4th Floor;
b. That there were materials that had not been accounted for upon termination of the contract;
c. That the construction was not to the standard and specifications as per the building contract dated 31st March, 2011; and
d. There was collusion between as the Plaintiff and the named 1st – 6th Defendants.

In my opinion, these issues as raised by the Defendant in his draft Defence and Counterclaim, are issues whose merit may only be ascertained by a hearing of this matter in due course. I consider that the issues raised by the Defendant are of a serious nature and whose veracity and correctness need be cross-examined and tested. The proper forum in which these issues may be canvassed is by full trial. In this regard, I adopt the position as reiterated in the English Court of Appeal in **Wenlock v Maloney & Others (1965) 1 W.L.R 1238** where at 1242 Sellers, J held *inter alia***;**

> **"… 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 trial as the court itself is not usually fully informed so as to deal with the merits."**

This was similar to the position adopted by Madan, J (as he then was) in **D.T Dobie (K) Ltd v Muchina (1982) KLR 1** when he stated inter alia:

> **"At this stage, the Court ought not 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."**

15. I am acutely aware of the findings of this Court in its Ruling dated 24th January 2013 as regards the Defendant's application dated the 27th August 2012 seeking a stay of proceedings pending arbitration. At that stage, this Court was aware of the Plaintiff's application for Summary Judgement dated 16th August 2012 and it also took into account the Affidavit in support of the Defendant's said application for stay of proceedings dated 27th August 2012 and, more particularly, the Further Affidavit filed by the Defendant dated 10th October 2012. The issues raise therein are the same issues that now are for consideration before Court in determining as to whether the Defendant should have leave to file its Defence and Counterclaim out of time. What is certain is that this Court's Ruling dated 24th January 2013 refusing a stay of proceedings and reference to arbitration was based purely upon the fact that the Defendant had filed its said application outside the time limit as detailed in **section 6 (1)** of the *Arbitration Act*. That Application should have been filed at the time when the Defendant entered appearance on 10th August 2012.
16. Coming to the issues that are raised by the Defendant in its current application before Court, I find

that the same as raised in the draft Defence and Counterclaim are weighty issues, which should be properly canvassed and determined at trial. As had been previously determined in the various cases aforementioned, summary judgment is a drastic measure (see **Lacoste Ltd v Henry Oulo Ndede**) which ought to be exercised only in plain and obvious circumstances. The Court should exercise its discretion carefully and as reiterated in **D.T Dobie (K) Ltd v Muchina** (supra), cautiously and in consideration of all the facts of the case. As had been propounded by the Defendant, there are indeed several issues raised in the draft Defence and Counterclaim, which would best be determined with the benefit of a trial. I am also satisfied that the delay in filing the Defence was satisfactorily explained in that there was a pending application before Court for determination which was dated 28th August, 2012 , my Ruling in relation to which was only delivered on 24th January, 2013.

17. The upshot is that the application by the Defendant dated 5th April, 2013 is allowed. The Defendant is hereby granted leave to file his Defence and Counterclaim within seven (7) days from the date hereof and the same shall be served upon the Plaintiff and the 2nd to 6th Defendants detailed in the Counterclaim within seven (7) days of filing. Conversely, the application by the Plaintiff dated 16th August, 2012 is dismissed. Costs shall abide the outcome of the suit.

DATED and delivered at Nairobi this 31st day of October, 2013.

J. B. HAVELOCK

JUDGE