REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 612 OF 2012

KISUMU CONCRETE PRODUCTS LTD. ………..………. PLAINTIFF

VERSUS

CEMENTERS LTD. ……………………………..………….. DEFENDANT

R U L I N G

1. What is for determination before this Court is the Plaintiff's Application brought by way of Notice of Motion dated 8th October 2012 seeking summary judgement as against the Defendant. The Application is brought under **Order 36** of the Civil Procedure Rules, 2010 and is supported by the annexed Affidavit of one **Vimal L. Rabadia** sworn on even date therewith. The Grounds upon which the Application are based are that there are no *bone fide* triable issues as raised in the Defence and that the Defendant is truly indebted to the Plaintiff in the amount claimed in the Plaint. The Defendant filed Grounds of Opposition dated 15th of October 2012 in which it maintained that the Application was ill-conceived, devoid of merit, premature and a gross abuse of the Court process.
2. The said Affidavit in support of the Application detailed that the deponent was a director of the Plaintiff Company based in Kisumu. It particularized that the Defendant had contracted the Plaintiff in or about November 2011 to carry out excavation works at the Defendant's property situated in Upper Hill, Nairobi at the agreed price/rates of Shs. 2900/-per cubic metre of excavation. The Plaintiff maintained that as at 15th June 2012, the Defendant owed to it the amounts (which, it stated, was not in dispute) of Shs. 7,958,115/-for work done up to that date. The Plaintiff maintained that it had carried out further works as between 15th June 2012 and 5th July 2012 valued at Shs. 6,424,735/-which again, the Plaintiff maintained, was not in dispute. The Plaintiff had dispatched a demand letter on 9th July 2012 which was responded to by the Defendant on 13th July 2012. By that letter, the deponent of the Affidavit in support maintained that the Defendant had admitted the amount of excavation work carried out by the Plaintiff but purported to reduce the amount owed on account of alleged diesel consumption and equipment hire charges. The Plaintiff maintained that it did not take any diesel from the Defendant nor did the Defendant hire any equipment on the Plaintiff's behalf. The Plaintiff had used its own diesel and machinery to carry out the work.
3. The Defendant responded to the Application by way of a Replying Affidavit sworn by its Managing Director one **Ramesh Vishram** sworn on 26th November 2012. The deponent maintained that by its said letter dated 13th July 2012, it only admitted that the amount owing to the Plaintiff was Shs. 5,109,588/-for which a Consent Order had been recorded. He went on to state that the Plaintiff, in its said letter of 9th July 2012, had admitted that the Defendant had paid out an amount of US $30,000 on its behalf. The deponent went on to say that the amount in dispute as between the parties were Shs. 6,791,270/-. This amount had been deducted from the

invoice of the Plaintiff on account of the Defendant having to hire machinery and provided fuel plus having incurred costs of disposing materials from its site. It gave details as to how that amount was incurred as follows: (a) Hire charges for machinery Shs. 5,252,190/- (b) Diesel consumption therefore Shs. 792,880 (c) Charges for material disposal Shs. 725,000/-and (d) Diesel supplied of Shs. 31,200/-making a total of Shs. 6,791,270/-. The deponent attached copies of documents to its Replying Affidavit, supporting the listed expenses.

4. With the leave of the Court granted on6th November 2012, the Plaintiff herein filed a Supplementary Affidavit on 7th December 2012. Again Mr. Rabadia swore the said Supplementary Affidavit which, however, was undated. At paragraph 4 of that Supplementary Affidavit, the deponent accepted that the sum of US $30,000 was deductible from the total amount of the work invoiced as the Defendant had paid that sum to Atlas Copco on the Plaintiff's behalf and at its request. However, the deponent denied that the Defendant had hired any excavator for the Plaintiff to speed up the excavation. Further, the Defendant had not purchased any diesel for and on behalf of the Plaintiff. If such had been purchased then the same was not supplied to or used by the Plaintiff. The deponent further maintained that the Plaintiff had carried out the excavation and carted away the excavated material itself. If the Defendant had disposed of any such material, then such disposal would have been outside the measured and agreed excavation work carried out by the Plaintiff. Mr. Rabadia speculated that as the Defendant had asked the Plaintiff to stop the excavation work and move its equipment from the site prior to the complete excavation being carried out, the Defendant may have hired an excavator and/or contracted other parties to do the further work required. However, he summed up the net amount due to the Plaintiff as to i) Outstanding amount before 15th June 2012 – Shs. 7,958,117/-; ii) Work done up to 5th July 2012 – Shs. 5,538,565/-; iii) VAT on ii) above – Shs. 886,170.40 giving a total of Shs. 14,382,852.40. From this sum would be deducted the amount admitted as paid being Shs. 5,109,588/- giving a net amount due of Shs. 9,273,264.40.
5. The Court notes that the Defendant filed a Further Affidavit dated 28th May 2013. However such was filed without leave of the Court and, as a result, this Court takes no cognizance of its contents. However, the parties had agreed before Court on 20th November 2012 to enter into a consent order which read as follows:

> **"By consent, the defendant to pay the sum of KShs 5,109,588.00 to the Plaintiff within 30 days from today. That the matter be mentioned on 18th December 2012 to confirm compliance with payment and for further directions on the Notice of Motion dated 8/10/2012."**

Similarly, by consent on 6th June 2013, the parties agreed to deal with the Application before Court by the filing of written submissions on either side. The Plaintiff's submissions were filed on 21th June 2013 and noted the Grounds of Opposition and Affidavits filed by the Defendant as well as its own Defence dated 15th October 2012, after the date of the Plaintiff's Notice of Motion seeking Summary Judgement. Upon perusal of the record, the Court notes that the Defence was filed in time and that it detailed at paragraph 5 thereof that the Plaintiff had fraudulently misrepresented to the Defendant that it had adequate machinery and resources, both material and financial, to carry out the excavation works the subject of the contract between the parties. It also alleged that the Plaintiff had failed to carry out the excavation work within agreed timeframes, had failed to dump excavated material at designated and agreed sites and had failed to allocate adequate resources to the excavation works. Further, the Plaintiff had used faulty machines for the excavation works and had failed to meet its financial obligations to third parties.

6. The Plaintiff's submissions went straight to the law citing to Court the case of **Giciem Construction Company v Amalgamated Trade and Services** **(1983) KLR 156** as to the Court of Appeal's finding that:

> **"The object of Order XXXV** (now Order 36) **of the Civil Procedure Rules is to enable the plaintiff with a liquidated claim, in which the defendant has no reasonable**

defence, to obtain a quick judgement without being subjected to a lengthy unnecessary trial (Zola v Ralli Brothers (1969) EA p 691)".

The Plaintiff went into details of the cause of action being what it termed was a simple contract evidenced by a Local Purchase Order to excavate and carry away from the Defendant's site at an agreed price of Shs. 2900/-per cubic metre. The Plaintiff had moved to site and carried out the excavation work as per the contract. On 5th July 2012, the Defendant had instructed the Plaintiff to stop the excavation works and remove its machines from site. It was common ground that at the time of stopping work, the value of the same in money terms had been agreed at Shs. 14,382,852.40. Of this amount, the Defendant had only admitted Shs. 5,109,588/-. The Plaintiff went on to submit that there were no *bona fide* triable issues. It then went on to enumerate the Defendant's points raised in its Replying Affidavit including the hire of machines, diesel consumption, removal of materials from site etc. It went on to maintain that any separate contract entered into by the Defendant with third parties to complete the excavation work could not be used as the basis for asking this Court to decline the Application for Summary Judgement.

7. As regards the Defendant's defence of fraudulent misrepresentation that the Plaintiff had inadequate machinery and resources to carry out the contract work, the Plaintiff maintained that such a defence was a sham as the Plaintiff was to be paid for actual work done. The Plaintiff had been so paid and there was no warranty or representation by it as to the adequacy of machinery and resources as the Defendant was now trying to allege. Finally, the Plaintiff pointed the Court to the finding of a Court of Appeal for Eastern Africa case with nearly similar facts to the one before Court – **Gupta v Continental Builders Ltd (1978) KLR 83**. The Plaintiff pointed to the finding of **Madan JA** at page 93 of that authority in which he stated:

"What emerges clearly after a careful examination of the pleadings, documents and proceedings in this case is that the contractor did work for the appellant and the corporation as its joint and several employer which was certified beyond dispute (at least to the value of Shs. 119,000) by the employer's own quantity surveyor and a certificate for it was issued by its own architect. It would be a monstrous failure of justice if the contractor is kept out of its money. Justice demands, therefore the law requires, that the appellant should pay the sum of Shs.119,000 with interest and costs to the contractor."

8. The Defendant's submissions filed on 28th June 2013 went into what it termed the brief background of the case. It maintained that the Plaintiff had fraudulently misrepresented to it that it had the technical and financial capacity to carry out the said excavation works as per the contract. Such was important to the Defendant as it stood to incur huge penalties for any delay in the performance of the excavation works. It maintained that the Defendant, having realised that the works were beyond the scope of the Plaintiff's ability, instructed it to quit the site. It went on to say that according to the Defendant's calculations the value of the work undertaken by the Plaintiff as at 5th July 2012 was Shs. 5,109,588/-which amount had been paid to the Plaintiff in full. The Defendant then went on to refer the Court to the cases of **Shah v Padamshi (1984) KLR 531, Camille v Merali (1966) EA 411, Lalji T/A Vakkep Building Contractors v Carousel Ltd (1989) KLR 386** as well as the Plaintiff's authority – **Giciem Construction Co Ltd (supra)**. The Defendant maintained that caution should be exercised in granting summary judgement as such was a drastic remedy involving the denial of the party against whom it is given, a right to defend. It maintained that the general rule is that leave to defend should be given unconditionally unless there was a good ground for thinking that the defence put forward was no more than a sham. It summed up what it considered to be the serious triable issues as follows:

"1. This case involves construction and/or interpretation of the parties' agreement especially on whether the parties performed their obligations under the agreement.

2. There are serious and weighty allegations of breach of contract and fraudulent misrepresentation against the Plaintiff which allegations have not been controverted.

3. **The Defendant has a valid counterclaim against the Plaintiff which it cannot file at present time as the construction work is still ongoing and the final quantification is what will determine the losses incurred by the Defendant.”**

Thereafter, the Defendant went into details as to its viewpoint with regard to the points of defence that it maintained were pertinent and necessary to be determined by this Court at the trial in due course.

9. In an application for summary judgment pursuant to **Order 36 Rule 1** of the *Civil Procedure Rules, 2010,* it is provided that where the Defendant has entered appearance but no defence has been filed, the Plaintiff may apply for judgment, of 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 plain and obvious cases. 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 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.”**

10. As pointed out by the Plaintiff in its submissions, its Application herein was filed before the Defence was filed, a matter of 8 days. As a result, the Application at the time it was filed, satisfied the criteria set out in Order 36 Rule 1. The whole question now before this Court is whether the Defendant has put up triable issues sufficient for this matter to go to full hearing in due course. I have carefully perused the Defence dated 15th October 2012. In my opinion, the Defence as filed

does raise triable issues firstly, as regards to whether the Plaintiff fraudulently misrepresented that it had the capacity to execute the excavation contract. Secondly, to the Plaintiff carry out the excavation work as contracted so to do. The Defendant's point in this regard was that the excavation works were not carried out promptly and in good time. As a result, the Defendant lost time in carrying out its main contract to develop the site. As the Defendant detailed in the said Defence, it had a duty to mitigate its losses which are particularised as:

i. Terminating the contract.

ii. Hiring an excavation machine.

iii. Availing fuel for the excavation machines.

iv. Carrying out disposal of the excavated waste.

v. Paying USD 30,000.00 on behalf of the Plaintiff to a third party.

vi. Undertaking an audit of the project to determine its losses.

In my opinion and despite the Plaintiff's protestations, these are all matters which require determination as between the parties. These are all triable issues. As a result, I do not consider the Plaintiff to be entitled to Summary Judgement in this respect. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 8th of October 2012, with costs to the Defendant.

DATED and delivered at Nairobi this 19th day of November, 2013.

J. B. HAVELOCK

JUDGE