



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 91 OF 2012

W. MUCHANGA & E. OLUNGA T/A WOMI ASSOCIATES PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL DEFENDANT

RULING

By a Plaint dated 5th September, 2008, the Plaintiffs pleaded that on or about 12th April, 1990, they were commissioned by the National Council for Science and Technology under the Ministry of Science and Technology as Architects of some works at a premises known as Emperor Plaza on LR No. 209/4492 Nairobi. The contractual sum was Kshs.22,555,464/20 which works the Plaintiffs undertook and completed.

The Plaintiffs claimed that although they raised their invoice on or about 28th May, 1993 for Kshs.7,285,933/40, the Defendant delayed settling the same. That under the contract between the Plaintiffs and the Defendant failure to pay the sums due within sixty (60) days attracted interest at a rate not exceeding the prevailing bank rates on the amount. That due to the delay in settling the amount due, as at 14th April, 2004 the amount stood at Kshs.339,387,222` ` /70 of which the Defendant only paid Kshs.5,460,282/-. The Plaintiffs pleaded that as at 2nd May, 2007, the amount had reached Kshs.1,273,177,936/60 which they claimed together with interest at the rate of 25% from the said date until payment in full.

In its Defence, the Defendant has denied the Plaintiffs' claim of Kshs.1,273,177,936/40, it has admitted the commissioning of the Plaintiffs as consultant for the renovation and partitioning of Emperor Plaza but contended that the Plaintiffs' fees has been fully paid.

The Plaintiffs' suit was filed on 16th September, 2008. No action was taken until the filing of the motion the subject of this ruling. Although order 2 Rule 15 allows an application to strike out a pleading to be made at any stage of the proceedings, my view is that in the event nothing if there is compelling that impedes the making of such an application, the same should be made at the earliest opportunity. To wait for a period of over three (3) years after the close of pleadings to apply to strike out a pleading, is in itself

bad faith and an abuse of the court process. Section 1A of the Civil Procedure Act enjoins both the parties and the court to at all times conduct litigation with a view to expeditious resolution of civil disputes. In my view therefore, an application under Order 2 Rule 15 should be made soon after close of pleadings before the parties commence the pre trials.

Be that as it may, the Plaintiffs have brought their motion which this court will nevertheless consider on merit.

By a Notice of Motion dated 10th March, 2012, the Plaintiffs have applied for the Defendant's Statement of Defence to be struck out under Order 2 Rule 15(1), (c) and (d) of the Civil Procedure Rules on the grounds that the Defence may prejudice, embarrass or delay the fair trial of the action, that it is otherwise an abuse of the court process and that the Defence is evasive, inconsistent and does not raise bonafide triable issues.

In support of the motion the Plaintiffs filed a Supporting Affidavit sworn by Wanyonyi Muchanga on 10th March, 2012 and written submissions dated 10th April, 2012 which were ably hi-lighted by Mr. Wafula, learned Counsel for the Plaintiffs. The Plaintiffs contended that the Defendant had admitted that the Plaintiffs had been commissioned as lead consultant/Architects for some works in or about 1990 which works were completed in 1993, that the contract between the parties provided for payment of interest on the outstanding at the prevailing bank rates, that they submitted their final accounts to the Defendant of Kshs.5,460,282/- which remained unpaid and continue to attract interest which as at 28th May, 2003 had amounted to Kshs.292,575,191/94, that on 30th June, 2004 the Ministry of Education paid the Plaintiff Kshs.5,460,282/- being the principal sum out of the Plaintiffs' bill of Kshs.339,387,222/70.

The Plaintiffs contended that in 2008, due to an overdraft thee had taken with Fidelity Bank Ltd, the bank obtained Judgment against them but the Defendant confirmed to the bank in writing that the Plaintiffs' claim was receiving attention as to the modus of settlement.

Mr. Wafula submitted that the Defendants defence was a mere denial, evasive and a general denial, that the Defendant's acknowledgment of the debt by its letter of 13th February, 2008 defeated as claim of limitation under Section 3(2) of Public Authorities Limitation Act.

Counsel submitted that the Defendant was estopped under Section 120 of the Evidence Act from denying the fact of the Plaintiffs' engagement and the correspondence written by the various Permanent Secretaries, reliance was put in the case of **Esther Akinyi Odidi & 2 others –vs- Sagar Hardware stores Ltd & Another, KSM HCCA No.97 of 2005 (UR)**, counsel urged the court to analyse the Defence vis a vis the Plaintiff and on the authority of **Brite Print (K) Ltd –vs- AG HCCC No. 1096 of 2000 (UR)** find the same to be a mere denial and consequently strike it out. Further reliance was placed on the cases of **Raghibir Singh Chatte –vs- NBK Ltd (1996) e KLR, Kasoco Ltd –vs- A.G HCCC No. 91 of 2012 (UR) and Busch –vs- Steves 1963 IQB1**. Counsel urged the court to allow the application.

The Defendant filed Grounds of Opposition, a Replying Affidavit and written submissions which were ably hi-lighted by Mr. Kipkoge, the learned Litigation Counsel for the Attorney General. The Defendant contended that the Plaintiffs' claim was bad in law, incompetent and an abuse of the court process, that the claim was statutorily time barred, that the defence raises bona fide triable issues, that there was no valid Government contract since it was not countersigned by the Permanent Secretary Treasury, that the parties did not adopt the Government conditions of contract, that the correspondence relied on is confidential and therefore inadmissible in law and that the claim for interest does not lie in law.

It was submitted on behalf of the Defendant that save for a letter dated 12th April, 1990, commissioning the Plaintiff as the architect in respect of works undertaken on Emperor Plaza, there was no other document setting out the agreed terms and conditions of the engagement, that under the Government Contracts Act Chapter 25 Laws of Kenya, then in force, the contract should have been executed by the accounting officer of the ministry concerned and that since the value of the contract

exceeded Kshs.250,000/-, the same should have been countersigned by the Permanent Secretary, Treasury.

Mr. Kipkoge further submitted that the agreement exhibited to the Supporting Affidavit related to the engagement of Ongata Works Ltd as the contractor not the Plaintiffs', that the conditions of engagement and scales of fees exhibited are of 1989 edition yet under the contract in question the applicable one was the 1977 edition, that the applicable statutory provisions are those under the Architects and Quantity Surveyors Act Cap 525 under which no interest is payable on professional fees, that the correspondence being relied on to defeat limitation can only be looked into at the trial. Counsel relied on the cases of **D.T. Dobie Ltd –vs- Muchina (1982) KLR 1**, **Good –vs- Parry (1963) 1 ALL ER 59**, **Yobesh Amoro –vs- Heritage All Insurance (2007) e KLR**.

I have considered the Affidavits on record, the rival submissions and authorities relied on by the parties. The law on striking out pleadings was settled by the Court of Appeal in the case of **D.T Dobie Ltd –vs- Muchina (1982) 1** wherein at page 9 of the court observed:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action of being otherwise an abuse of the process of the 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 occur 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” (Sellers LJ (Supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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

The principles set out above apply to suits as well as to Defences. It is not disputed that the Plaintiffs were commissioned by a department in Government known as the National Council of Science and Technology for carrying out some works in a building known as Emperor Plaza LR No. 209/4492 Nairobi. The date of engagement is agreed to be in 1990. It is also not disputed that the Plaintiffs did carry out the works they were engaged for. It is also not in dispute that the Plaintiffs have been fully paid the principal sum. The dispute between the parties is whether the Plaintiffs have been fully paid for their services, whether the Plaintiff is entitled to claim interest on the delayed payment of their fees and whether the Plaintiffs' claim is time barred.

The letter dated 12th April, 1990 which commissioned the Plaintiffs to offer the professional services in question was not produced. This court is therefore unable to discern the terms and conditions of engagement under that letter.

What was exhibited as “WM1a” is an Agreement and Schedule of Conditions of Building Contract (without quantities) dated 4th May, 1992 between the National Council of Science and Technology and Ongata Works Ltd. There is also a Handing Over Certificate dated 10th November, 1992 by the Plaintiffs. There is also the Conditions of Engagement and Scales of Fees for Professional Services for Building and Civil Engineering Works second edition 1989 (hereinafter “Conditions of Engagement and Scales of fees for Professional Services.”)

The Plaintiffs' entire claim is made up of the interest charged upon the principal sum under clause 215.02 of the said Conditions of Engagement and Scales of Fees for Professional Services which provided that:-

“215.02 All the sums due to the consultants under these conditions shall be paid within 60 days of the submission to the client of the correct accounts. After this period the consultant may claim interest at a rate not exceeding that of the prevailing bank overdraft on the amount.”

Mr. Kipkogei submitted that these conditions of engagement and scales of fees for professional services were of 1989 second edition yet the contract exhibited as “WM1a” talked of the 1977 edition. The Plaintiffs did not adduce any evidence to show that the 1977 edition and the 1989 2nd edition were similar in terms. Further, there is nothing on record to show that the so called Conditions of Engagement and Scales of Fees For Professional Services were applicable in the engagement of the Plaintiffs by the said National Council of Science and Technology.

I have also perused the said Conditions of Engagements and Scales of Fees for Professional Services and I have confirmed that the same is divided into seven (7) sections to wit, Sections 100, 200, 300, 400, 500, 600 & 700. Section 100 thereof relates to Memorandum of Agreement. In that section, the agreement between the parties is set out. In Section 200, the conditions of engagement are set out. It is under this Section, i.e. Section 215.02 that the Plaintiff's claim has been calculated and made. However, Section 100 which is the Memorandum of Agreement is blank. It is not signed by any of the parties. The issue that arises then is can the Plaintiffs claim under these conditions which were never executed by the parties? Are the conditions applicable as a matter of course or they must be part of the executed Memorandum of Agreement? To me these are not frivolous issues. The Plaintiffs have not shown that the agreement/contract they entered into with the Defendant incorporated these conditions that they seek to rely in their claim.

The other issue raised is that the contract under which the Plaintiff has sued the Attorney General was no a valid contract which can be enforced. Mr. Kipkogei referred the court to Sections 2 and 8 of the Government Contracts Act Chapter 25 Laws of Kenya which was in force at the time the alleged contract was entered. Under the said sections contracts entered on behalf of the Government had to be signed by either accounting officer or the receiver of revenue for the ministry or department concerned.

Further, contracts for more than Kshs.250,000/- had to be signed or counter-signed by the Permanent Secretary to the Treasury or a person authorized to do so in that behalf.

I am aware of the decision in **Equip Agencies Ltd –vs- The A.G NRB HCCC No. 1459 of 1999 (UR)** wherein Kuloba J (as he then was) held that a person dealing with the government is not to be expected to know the internal policies and procedures and that if such procedures are flouted the Government is still bound. However, can a contract that is against an express provision of the law be said an internal workings of the Government? I think this is also a triable issue since all persons are deemed to know the law.

On these grounds alone, I am convinced that I need not examine the other issues raised by the parties since in whichever way I rule on them, they will have no effect on the decision herein. Those issues are better resolved by the trial court which will have the benefit of tested evidence.

Accordingly, I decline to grant the application dated 10th March, 2012 and dismiss the same with costs.

DATED and delivered at Nairobi this 28th day of May, 2012.

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A. MABEYA

JUDGE