REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 107 OF 2012

ASSEMBLED ENTERPRISES LIMITED……..……..……PLAINTIFF

VS

NATIONAL WATER CONSERVATION

& PIPELINE CORPORATION…….....……...DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 1st March 2012 brought the Plaintiff/Applicant under Order 36 Rules 1(a) (2) and 2 of the Civil Procedure Rules, 2010. . The Application seeks orders that summary judgment be entered against the Defendant for the sum of Kshs. 5,147,500/- together with interest as prayed in the Plaint. In the alternative, the Plaintiff seeks judgment against the Defendant for the said sum of Kshs. 5,147,500.00 on the basis that the said sum is admitted by the Defendant as due and owing to the Plaintiff.

2. The application is based on grounds set out on the face of the application and is further buttressed by the affidavit of KamauGachanja, a Director of the Plaintiff sworn on 1st March 2012.

3. The Applicant's case is that following several demand letters from the Plaintiff, the Defendant through letters dated 22nd February 2010 and 16th June 2011, the Defendant admitted that after analysis of the Plaintiff's pending bill, the sum of Kshs. 5,147,500/- was due and owing to the Plaintiff. There is therefore no defence to the claim in view of the admission. There are equally no triable issues arising to warrant subjection of this suit to full trial.

4. The Defendant opposes the application through a replying affidavit sworn by Engineer Petronilla A. Ogut its Managing Director and filed on 20th March 2012. Through the affidavit, the Defendant claims that owing to a fire that gutted its premises on 24th September 2009, most of its company records had been destroyed but that it had commenced forensic analysis of supplier claims including those of the Plaintiff, relying partly on documents presented by the claimants.In respect of the Plaintiff's claim, the Defendant points out that there is a discrepancy in the five local purchase orders supplied as they are dated November 2008 onwards yet the work tickets and the requisition orders constituting the transport services rendered are of various dates in 2007 and early 2008. It is therefore not possible that the Plaintiff rendered services even before issuance of local purchase orders. The Defendant claims that a simple computation of the Local Purchase Orders reveal that the Defendant's claim is for a sum of Kshs.

1,698,830/- hence the claim for Kshs. 5,147,500/- is not justified by the Plaintiff. The Defendant contends further that the letters of 22nd February 2010 and 16th June 2011 do not constitute admissions of the claim. It also accuses the Plaintiff of deliberately leaving out a letter dated 8th October 2010 which asked for supporting documents. The Defendant therefore had a defence to the claim raising triable issues.

5. I have carefully evaluated the application based on the affidavit evidence placed before. I have also considered the oral submissions by counsel for the respective parties.

6. Order 36 Rule 1 of the Civil Procedure Rules, 2010 on which the prayer for summary judgment is anchored provides that a plaintiff may apply for judgment to be entered against the defendant in all cases where ***inter alia***, the claim is liquidated, with or without interest. This summary procedure for pursuing judgment has been variously tested by courts in Kenya and these invariably taken the view that the plaintiff must show that, on a balance of probability, the defendant has no good defence capable of raising triable issues. In **Zola and Another Vs. Rathi Brothers limited and Another** (1969 EA 691) at P694, Newbold P summarized the test as follows:

"Order XXXV (now Order 36) is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant."

7. Applying the above principle to the present case, the affidavit evidence placed before me readily reveals that the claim by the Defendant while being a money claim is none the less one which is still disputed by the Defendant as to the true quantum of the sum payable. The parties are still in the process of reconciling the claim and the correspondence exchanged shows that no final figure has been settled upon by the parties. The letter dated 22nd February 2010 acknowledges receipt of the claim and indicates that the same would be subjected to a pending bills committee for verification while the letter of 16th June 2011indicates at bullet No.1 that the claim for the sum of Kshs. 5,147,500/- requires further analysis. The letter requests the Plaintiff to provide necessary documents in support of the claims as earlier requested in a letter dated 8th October 2010. The claim therefore is not one over which it can be said that the Defendant clearly has no good defence to as to merit summary judgment.

8. Further, Order 36 Rule 1(1)(b) of the Civil Procedure Rules, 2010 now discourages summary procedure where a defence has been filed, no matter how weak, courts should not grant summary judgment. In my evaluation of the defence filed, I do find that a number of triable issues are discernible. These include the discrepancy arising from the fact that the work tickets and the requisition orders pre-date the local purchase orders constituting the contracts upon which the transport services were rendered. The issue of quantum of the claim is also a key triable issue in my view.

9. The prayer for summary judgment therefore fails.

10. With regard to the alternative prayer for judgment to entered on admission, I am again not convinced that the Plaintiff's claim is unequivocally admitted. As already discussed above in respect of the letters of 22nd February 2010 and 16th June 2011, none of the letters contain a final position by the Defendant as to what sum is established as due and owing to the Plaintiff. The former letter merely states that the claim has been received and will undergo verification while the latter letter still calls for further information to assist in the analysis of the claim. Further, the replying affidavit of the Defendant's Managing Director pokes more holes on the quantum of the claim by stating that a casual computation shows that the claim is hardly more that Kshs. 1,698,830/-. For these reasons, I would hesitate to enter judgment under this alternative prayer.

11. Overall, my view is that the claim in this matter is one over which the parties can easily agree upon amicably and save each other from the court process. The parties should seriously consider getting together and carrying out a joint computation of the claim as the suit in this matter is wholly about reconciliation of the Plaintiff's pending bills. I do not see the Defendant having a serious problem settling the sum claimed if the parties can agree on quantum.

12. For now, the order that commends itself to me is that the Plaintiff's Notice of Motion application dated 1st March 2012 fails and is hereby dismissed with costs.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24thDAY OF MAY 2012.

J. M. MUTAVA
JUDGE