



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 375 of 2011

CHAPTER PROPERTY CONSULTANTS
LIMITED.....APPLICANT

VERSUS

TANATHI WATER SERVICES
BOARD.....RESPONDENT

RULING

1. The Application before court is the Plaintiff's Notice of Motion dated 17 November 2011. It prays this court that it should be pleased to enter Summary Judgement as against the Defendant in the amount of KShs.13,416,393/- plus V.A.T in the amount of KShs.2,146,623/-. The Application is based on 4 Grounds as follows:

“1. THAT the Defendant’s purported defence filed herein is a ridiculous bare flat denial defence and is therefore not a defence at all to this suit.

2. THAT the purported defence is tendered merely to delay and/or derail the speedy conclusion of this suit.

3. THAT there is overwhelming documentary evidence hereto annexed to conclusively determine this suit at this stage.

4. THAT the Defendant is truly and justly indebted to the Plaintiff in the sum claimed and there is no defence to the suit herein.

2. The Application is further supported by the Affidavit of **Bernard Woie Kavivya** sworn on the 17th November 2011. He deponed to being the Managing Director of the Plaintiff company which is in the business of professional valuation. He stated that the Plaintiff responded to a tender advertisement in the local press in October 2009, put in by the Defendant seeking tenderers for the provision of professional valuation services to the Defendant. The deponent stated that subsequently he was informed that the Plaintiff had been awarded the tender and he met with officers of the Defendant on 22nd of April 2010 and duly signed the formal contract assigning to the Plaintiff the said valuation services. From April 2010 until August 2010 correspondence was exchanged as between the Plaintiff and the Defendant, the

valuation report being completed on 31st of July 2010 and presented to the Defendant on 3 August 2010. The deponent went on to say that the report was made in 4 volumes and was accompanied by a soft copy on CD-ROM. He maintained that to date, the Plaintiff had not received any objection, queries or adverse comments from the Defendant in regard to the report. The deponent went on to say that by letter dated 6 August 2010, the Plaintiff wrote to the Defendant and enclosed a fee note for the services rendered together with a copy of the Valuers' Rules 1995 to support its charges so raised. Thereafter, the Plaintiff wrote several letters to the Defendant demanding payment of its fees but received no response with regard to thereto. Seven months later, the Defendant wrote on 16 March 2011 to the Plaintiff claiming that there was no valid contract as between them and that it did not have the funds to pay the Plaintiff's fees. Thereafter, the matter was placed in the hands of the Plaintiff's advocates to pursue payment.

3. The Application was opposed by the Defendant who filed the Replying Affidavit of **Brenda Kiberege** dated third of February 2012 who described herself therein as the Defendant's Legal and Corporate Affairs Manager. She swore to the fact that the Applicant had indeed tendered for the provision of valuation services to the Defendant and although the Applicant submitted a tender, it did not qualify since it did not even get to the financial stage. The Defendant did not admit to the existence of any contract between it and the Plaintiff and maintained that the copy of the alleged contract annexed to the Plaintiff's said affidavit in support of the Application, was not properly executed since it did not even have the Board's Seal affixed thereto. Further, the deponent averred that the Plaintiff had not produced before court a certification of completion upon the Defendant's satisfaction of its work. She went on to say that without such certification, the Plaintiff cannot claim payment for a job for which it neither has a valid contract nor did it complete or carry out. In stark contrast to the rest of her Replying Affidavit, the deponent reiterated that the Plaintiff did in fact participate and submitted both technical and financial proposals to the Defendant. However, she stated, the Plaintiff did not make it through the technical evaluation and was therefore not invited for the financial opening. She drew the Court's attention to the letter dated 16 March 2011 from the Defendant to the Plaintiff as regards the settlement of the latter's professional fees which was exhibited at "BWK7 (a)-(b)" to the Affidavit in support of the Application. The deponent wrapped up her Replying Affidavit by stating that she believed that the Defence filed herein revealed triable issues and requested this Court to dismiss the Plaintiff's said Application.

4. Following upon my allowing the Defendant's Application for it to file a Further Affidavit on 30th March 2012, the Defendant, again through **Brenda Kibegere**, filed a Further Affidavit on 10 April 2012. The deponent had earlier indicated that she had obtained back from the Kenya Anti-Corruption Commission, some documents that she considered were relevant to these proceedings. Although she reiterated her first Affidavit as to the Plaintiff answering the tender for the provision of valuation services, she also confirmed her previous statement that it had not made it beyond the technical evaluation stage and attached a copy of the Defendant's technical score sheet. She also attached a copy of the minutes of the opening of the tender for valuation of assets dated 19 November 2009, which indicated the Plaintiff as no.11 out of 11 on the list of tenderers. The technical score sheet also detailed that the Plaintiff had come 10th equal out of 11 with only 10 points, the highest tenderer accumulating 89 points. The minutes of the meeting of the Financial Proposal meeting held on 4th March 2010, also exhibited to the deponent's said Further Affidavit, detailed the names of 5 tenderers of which the Plaintiff was not one. It was interesting to note that the highest fees quoted for the work were KShs.13,547,150/- while the lowest were KShs.2,435,632/-.

5. The Plaintiff filed its Submissions as regards the Application on 15 February 2012 while the Defendant filed its on 11 April 2012. The Plaintiff outlined the chronology of its claim, detailing the contract being signed by both parties on the 22 April 2010 and the presentation of its Report to the Defendant on 3 August 2010. It also detailed the forwarding of the Plaintiff's fee note for settlement on 6 August 2010. It submitted that the fees were based on the scale fees as per the Valuers' (Forms and Fees) Amendment Rules 1995 as had been agreed in the contract. The Plaintiff then attacked what it maintained was the Defendant's purported Defence. It queried how the Defendant could state that there was no valid contract when the Plaintiff had exhibited the same to the Affidavit in Support of the Application as "BWK-2". It further submitted that the fact that the contract exhibited was not sealed was because it was a photocopy and the Plaintiff could demonstrate to this court that the original was sealed. The Plaintiff also criticized the statement in the Replying Affidavit that as the "contract" had an arbitration clause, the

parties should proceed to arbitration. It queried as to just how the Defendant intended to proceed to arbitration under a contract that it did not recognize.

6. The Plaintiff also took issue with the paragraph in the Replying Affidavit which detailed that the Plaintiff could not be paid, as his work had not been certified by the Defendant. It submitted that all the Defendant had to do in those circumstances was never certify the work so that the Plaintiff would never get paid. It pointed out that the Plaintiff's report had never been criticized or queried by the Defendant in any way. The Plaintiff urged the Court to look at the Defence and see that it was a sham, comprising of flat denials and contradictions being both incoherent and unintelligent. Thereafter, the Plaintiff referred me to 2 authorities the first being *Nairobi Civil Appeal No. 11 of 1996 **John Paul Titi v Mumias Sugar Co. Ltd*** in which, the Plaintiff stated that the Court had occasion to dismiss evasive and incoherent defences as unsustainable. The second authority was the oft quoted case of ***Zola & Anor. v Ralli Brothers Ltd (1969) EA 691*** where the Plaintiff submitted, that the Court of Appeal had observed that it was not enough to merely traverse in general terms all the contentions in the application. The Plaintiff maintained that the Defendant had not produced one single document to support its bare flat denials. It was the Plaintiff's contention that the Defence did not raise a single triable issue. [It should be noted here that the Plaintiff's submissions were filed in Court on 15 February 2012 while the Defendant's Further Affidavit with attached documentation, was not filed in Court until 10 April 2012, largely as a result of the Plaintiff's objections to the same resulting in my Ruling herein dated 30 March 2012].

7. The Defendant's submissions detailed what it considered to be 4 Issues as regards this case as follows:

“1. Whether the plaintiff was awarded a tender for valuation of assets.

2. Whether there is a valid contract between the plaintiff and the Defendant.

3. Whether the Plaintiff can be allowed to rely on a contract and at the same avoid the arbitration clause.

4. Whether the plaintiff is entitled to summary Judgement”.

The Submissions continued by repeating what had been set out in the Defendant's Further Affidavit as to the Plaintiff not going beyond the technical evaluation stage of the tendering process and not being one of the 5 firms going forward to the financial stage. It was the submission of the Defendant that the Plaintiff was not awarded the tender since it did not make it through the technical evaluation. As regards the second issue above, the copy of the purported contract as exhibited to the Affidavit in support of the Application did not detail the common seal of either the Plaintiff or the Defendant. The Defendant maintained that if the Plaintiff had the original contract with seals endorsed thereon, then it should produce it in court and the only way that it could be produced would be by way of viva voce evidence presumably presented by the advocate who had witnessed the document, one Kilonzo C. Muindi.

8. As regards the position with respect to the arbitration clause in the contract, the Defendant wondered why the Plaintiff, if relying upon the contract exhibited to the Affidavit in support, had not referred the matter as between Plaintiff and Defendant to arbitration rather than coming before court. It was the Defendant's submissions that the Plaintiff cannot be allowed to enforce the contract selectively. To this end, the Defendant relied upon the authority of the ***William Oluande v American Life Insurance Company (K) Limited*** being *Nairobi HCCC No.721 of 2004* as per ***Ojwang J*** (as he then was). Regarding the fourth issue as to whether the Plaintiff was entitled to summary judgement, the Defendant pointed out that the Plaintiff's application sought to invoke **Order 36 Rules 1 and 2** of the *Civil Procedure Rules*.

It is submitted those Rules were only applicable where defendant had appeared but not filed a defence. In the instant suit, the Defendant had already filed a Memorandum of Appearance and Defence before the Plaintiff's Application had been filed. The Defendant pointed out that the Plaintiff's main ground for filing the Application was that it considered the Defendant's Defence is a bare flat denial. It wondered

why the Plaintiff had not sought an Order from this court in its prayers to strike out the Defence for failure to disclose a reasonable cause of action or defence. The Defendant submitted that the Plaintiff is not entitled to seek summary judgement under **Order 36 Rule 1** as the Defendant had already filed its Defence. Further, the Defendant submitted that its Defence has raised triable issues in that it denied that the Plaintiff had been awarded the said tender and/or that it had entered into a valid contract with the Plaintiff herein. Finally, the Defendant submitted that the only way that the Plaintiff could prove its averment that it was awarded the said tender and entered into the said contract, is by going through the motions of trial.

9. The dictum of **Sir Charles Newbold** in the celebrated case of **Zola v Ralli Brothers** (*supra*) has long been the principle as regards applications for summary judgement. He has referred to therein to the old **Order 35** which is now **Order 36** of the Civil Procedure Rules, 2010. He stated as follows:

"Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgement. The mere right of the defendant to be indemnified by, or to have claim over against, a third party in respect of the defendant's liability to the plaintiff, or to recover from a third party or from the plaintiff by way of counterclaim, a sum of money which does not directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining a summary judgement. Normally a defendant who wishes to resist the entry of summary judgement should place evidence by way of affidavit before the judge showing some reasonable ground of defence."

Of course, **Order 36 r. 2** of the current Civil Procedure Rules states:

"The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit".

10. Further the Plaintiff also relied upon the passage in the **John Paul Titi** case (*supra*) as stated by **Ojwang J** as follows:

"The denial by the appellant is obviously evasive. Moreover it is inconsistent with his total denial of indebtedness to the respondent. In Raghib Singh Chatte v National Bank of Kenya Civil Appeal No. 50 of 1996 (unreported) the appellant denied that the respondent extended any overdraft facilities to him and then in the same breath stated, without saying how and when, it had been paid. Akiwumi JA delivering the majority judgement said

"such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of O.6 r.13 (1)(a)."

In my view, I did not consider the remarks of **Ojwang J** as being particularly pertinent to the application before me. Such would all depend upon how one looks at the Defence. I have perused the Defence filed herein on 19 October 2011. In paragraph 3 thereof, the Defendant denied that it awarded to the Plaintiff a tender for the provision of valuation services of all its assets located in Machakos, Makueni and Kitui counties. In paragraph 4, it states that it is true that the Plaintiff did tender for the valuation of assets but that it failed to qualify. At paragraphs 5, the Defendant denies ever entering into a written contract with the Plaintiff on 22 April 2010 or at all. In fact, at paragraph 6, the Defendant denied the existence of any written contract between the Plaintiff and itself. As to the valuation report that the Plaintiff stated that it is submitted to the Defendant, the latter denies ever having received the same. The Defendant denied ever having received a fee note from the Plaintiff and averred at paragraph 9 of the Defence that as per the rules of its Board of Directors concerning any work carried out by the contractor, that contractor would need to get a certification of completion for the Board's satisfaction. The Defendant maintained that the Plaintiff never obtained a certification of completion. Finally, in its Defence, the Defendant referred to the arbitration clause in the alleged contract as between the Plaintiff and the Defendant before denying that it

owed any moneys to the Plaintiff whatsoever.

11. To my mind, although the Defendant's Defence was expressed in fairly general terms, there were salient points therein which took issue with the contents of the Plaint. The provisions of Order 36 Rule 2 permit me when considering an application for summary judgement to look at the affidavit evidence produced by the Defendant in an answer to the Application. I consider the documentation exhibited to **Brenda Kiberege's** Further Affidavit dated 10 April 2012 sufficient to show firstly that the Plaintiff did tender for the professional valuation work but that in the technical evaluation exercise it came equal last as per the list of tenderers detailed in the Technical Score Sheet exhibited as "**BK 2**". Further, the minutes of the opening of financial proposals dated 4 March 2010 exhibited as "**BK3**" quite clearly detail that there were five tenderers who were considered in connection with the financials, the Defendant not being one of them. To my way of thinking such evidence does open up doubts as regards the Plaintiff's Application. Such doubts, in my mind, amount to triable issues. Further, I tend to agree with the submissions of the Defendant that perhaps the Plaintiff would have been better to come before this court seeking to strike out the Defence rather than by way of an application for summary judgement. I also take on board the point raised by the Defendant, that if the Plaintiff was or is relying upon the alleged contract with the Defendant dated 22nd of April 2010 and bearing in mind the arbitration clause in that contract, it is my opinion that the Plaintiff should have referred its dispute with the Defendant to arbitration for resolution. With reference to the alleged contract, there is no evidence on the photo copy attached to the Affidavit in support of the Application that either the Defendant's or the Plaintiff's, Seals were ever fixed to the document bearing in mind that the execution clause does read "Sealed, Signed and Delivered". I have also examined what is termed "Executive Summary" dated 31st of July 2010. I am sure that the deponent to the Plaintiff's Affidavit in support of the Application will come under considerable cross-examination as to the content of such Executive Summary at the hearing of this matter in due course. I also wondered why Exhibit "**BWK 5 (a) - (b)**" detailed that the Plaintiff's earlier fee note dated third of August 2010 was withdrawn and replaced by a revised fee note for KShs. 13,416,393/-. Again these are matters which are best left for the hearing of this suit in due course.

12. The upshot of all the above is that I am not satisfied that the Plaintiff herein is deserving of an order for summary judgement. In my view, the Defendant has put up a sufficient number of matters that I would consider are triable issues. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 17 November 2011 with costs to the Defendant.

DATED and delivered at Nairobi this 30th day of July 2012

J. B. HAVELOCK
JUDGE