



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 85 of 2009

**ASWA DEVELOPERS AND CONTRACTORS LIMITED.....
PLAINTIFF**

VERSUS

**COMPACT FREIGHT SYSTEMS LIMITED.....
.....DEFENDANT**

RULING

By way of Chamber summons dated 28th October 2009 invoking the provisions of **Order VI rules 3 and 13 (c) and (d)** the Plaintiff is seeking the following prayers:

- 1. That this Honourable Court be pleased to strike out the defence filed herein.**
- 2. That pursuant to prayer 1 above, judgment be entered in favour of the Plaintiff and as against the Defendant in the liquidated sum of Kshs. 7,234,623.70/ =**
- 3. That costs of the application and the suit be provided for.**

The application is supported by the affidavit of Stephen Wangombe a director of the Plaintiff company. The Plaintiff deposes that pursuant to an oral contract it rendered civil construction works to the Defendant in the sum of Kshs. 6,803,985.30 and materials worth Kshs. 430,638.40 making a total claim of Kshs. 7,234,623.70. That it was agreed that the Defendant would settle certificates within five days of certification. The Defendant did not pay the certificates as agreed and that the Plaintiff stopped works sometime in September 2008. This was through letter dated 24th September 2008 annexed as exhibit "SW3". Failure to pay grounded the financial capacity of the Plaintiff. The project manager wrote letter dated 8th October 2008 raising concerns over delay in completion of the project by Plaintiff and acknowledged that works were 95% complete. That the Defendant's agent forwarded to the Plaintiff a valuation of the works completed as per the site valuation and issued certificate no. 4 in the sum of Kshs. 6,803,985.30. The valuation letter is annexed as exhibit "SW5". That the valuation took into account the unfinished works and the certificate was in respect of completed works and uncompleted works. That the Defendant while breaching the agreement to make payment, proceeded to terminate the contract. That the certified amount still remains unpaid to date.

The Plaintiff contends that some paragraphs of the defence (7 and 12) contravene the provisions of Order VI Rule 13. The paragraphs set out matters of evidence and not relevant facts necessary to establish a defence. It is contended that the allegations in paragraph 9 of the defence are false. It is also contended that the allegations in paragraph 10 of the defence have been brought up for the first time with the object of justifying failure to pay. It is also contended that the allegations in paragraph 13 and 14 of the defence are untrue and irrelevant because it is upon the termination of the contract that the inspection was done and the value of the works done and completed certified by the Defendants project manager. That paragraphs 16 and 17 of the defence are also irrelevant since the project managers were on site as agents of the Defendants. That the allegations of fraud and or deceit are not valid since the certification of works by the project managers was not based on information provided by Plaintiff but on actual site inspection. That the project managers are expert engineers who understand their job professionally. That the Plaintiff contends that its claim is solely premised on completed works and indeed so certified. That the works were at all times inspected by the project manager who is an expert. That it is in the interest of justice that the application be allowed.

The Defendant opposed the application through a replying affidavit sworn by Bazil Mgana Ziro on 7th December 2009. The Defendant depones that the construction agreement was partly oral and partly in writing. The Defendant contracted the Plaintiff to design and build a Container stacking yard suitable for user and put up according to the structural and engineering standards a work suitable for use of heavy laden trucks and machinery weight of 100 tons. To the extent that the contract was oral it comprised of conversation and telephone exchanges. To the extent that it was in writing it comprised of letters exchanged between the parties and project Consultant Stroutel Afrique Consultants Limited, bill of quantities for the works, design works and civil works quotation by the Plaintiff. The Defendant depones what accordingly to them were the fundamental terms of the contract. They contend that the Plaintiff breached the fundamental terms of the contract as particularized in paragraph 8 of the replying affidavit. That as a result of sub-standard works the cabro works done by the Plaintiff in a section contractually marked as Area "B" it sank and deformed along tyres marks when the envisaged heavy trucks and equipment passed thereon. That through subsequent agreement dated 2nd July 2008 and 2nd August 2008 the Plaintiff admitted the breach and in particular that the little construction work delivered was sub-standard and unfit for the aforesaid specific purpose.

That the Defendant sets out additional fundamental terms of the supplementary agreement dated 2nd July 2008 in paragraph 11 of the replying affidavit. The Defendant contends that the Plaintiff breached the subsequent agreement of 2nd July 2008. Through an agreement dated 2nd July 2008 the parties agreed that the Plaintiff would redo the cabro block paving on the entire area with defects and rectify. That the Plaintiff failed to rectify the defects.

The Defendant takes issue with the certificates issued by project consultant and contends that the certificates issued were to be for works that meet the contractual specifications. The purported certificates were issued for works that were substandard and unfit for the purpose intended. The Defendant accuses the Plaintiff of engaging in fraud and deceit against the Defendant and the project consultant. The allegations in form of averments are set out in paragraph 17 of the replying affidavit. That the Defendant has suffered loss because the work done by Plaintiff was substandard and collapsed and failed even before the Plaintiff left the site.

That in view of the foregoing the Defendant contends that the purported certificates of payment were issued prematurely, contrary to the terms of the contract, are deceitful, fraudulent and do not create any obligation on the Defendant to pay or otherwise. Consequently, the Defendant is not liable to the Plaintiff in the sum of Kshs.. 6,803,985.30 as alleged in the plaint or at all. The Defendant has released the goods to the Plaintiff for collection. The Defendant contends that the Plaintiff's application is misconceived and lacks in merit. The Defendant prays that it be dismissed.

Parties agreed by consent on the 20th May 2010 to proceed by way of written submissions. The Plaintiff filed its written submissions on 3rd June 2010 and the Defendant responded on 30th June 2010. The Plaintiff thereafter filed a reply to the Defendant's submission on 7th July 2010. Parties appeared before

me on 9th July 2010 and I gave a ruling date of 9th September 2010. I regret the delay in delivering the ruling. It was occasioned by factors some beyond my control.

I have considered the chamber summons application, the replying affidavit by the Defendant as well as the rival submissions. The Plaintiff has put forward a claim of Kshs. 7,234,623.70/= as due and owing from the Defendant for work done that has been certified by the project consultants. The Defendant resists the claim and contends that the Plaintiff was in breach of the contracts that were partly oral and in writing and the Plaintiff procured the certificates through deceit, fraudulently or by providing misleading information. That the work done by the Plaintiff was substandard and collapsed even before the Plaintiff left the site. The Plaintiff on the other hand contends that the certificate of completed works had taken into account all defects and is a net of what is due to the Plaintiff for the completed works and not uncompleted works.

I must warn myself that in an application seeking to strike out a pleading the court should not embark on a trail based on affidavits. The jurisdiction to strike out is exercised where the facts are plain and it is obvious without protracted argument or minute examination of documents that the pleading is incurably bad. It is not exercised on the basis that the allegations in the pleading are untrue or false. The case put forward by the Plaintiff is mainly to the effect that the allegations contained in the defence cannot withstand scrutiny. Embarking on such an analysis is tantamount to usurping the role of the trial court. The peculiar facts in this suit make it unsuitable for exercise of the draconian power of striking out. Firstly, the contract between the parties is not clear. It was both oral and in writing. It is difficult to ascertain what part was oral and what is in writing. Secondly, the parties do not agree on the position of project consultant. Plaintiff contends that project consultant was agent for the Defendant but the Defendant contends that he was a common consultant. The decision in the case of **Ramji Ratna & Company Ltd vs. Cotton Board of Kenya HCCC No. 1298 of 1990 (High Court Nairobi)** relied upon by the Plaintiff is distinguishable. In the case the Court found it as a fact that the professional consultants were agents of the Defendant who was the employer. The contract in issue was governed under the Building Contract. The Plaintiff also relied on the decision in **Gulf Fabricators Ltd v. Municipal Council of Kisumu [2006] eKLR**. The decision clarifies the role of a project Engineer as being to prepare an interim valuation of the work and any materials on the site to accompany a certificate for payment. The decision is good law where the status of the Project Engineer is not in dispute. In this suit the status of project consultant was in dispute and it would be prejudicial to the parties to make a final finding on the basis of conflicting affidavit evidence that the valuation by Project consultant was binding on the Defendant.

The decision in **Kehar Singh (KALS) Limited v Associated Steel Limited HCC No. 2215 of 1980** is also distinguishable. The court was considering the status of final certificate in a standard building contract. There is no standard building contract in this case. Plaintiff counsel has also relied on the case of **Kephah Maina Wangai t/a Kephah Consultancy v. Donwoods Company Limited [2006] eKLR**. The decision highlights the principles that guide the court in an application for summary judgment. Where there is no defence, a Plaintiff is entitled to apply to immediate summary judgment of a liquidated debt or demand (See **Gupta v Continental Builders Ltd**). What I find relevant to the circumstances of this case is the quotation from the case of **Giciem Construction Company v. Amalgamated Trade & Services**. The quote states:

“It is dangerous to give summary judgment in a case in which such as this where it involves an oral agreement and each party alleges different varied terms and conditions of the agreement, as this automatically raises triable issues”

The Defendant has relied on the case of **Westmont Power Kenya Ltd v. Frederick and another p2003] KLR 357 at p. 359** where the court observed that where serious allegations of fraud and other wrong doings are made such issues can only be decided during a proper trial and not on conflicting affidavits.

For the foregoing reasons I find that the defence is not embarrassing, scandalous or frivolous. Neither is it an abuse of the court process. I therefore dismiss the Chamber Summons application dated 28th October 2009 as lacking merit with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 16TH DAY OF JULY 2012.

M.K. IBRAHIM
JUDGE

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DATED AND DELIVERED AT MOMBASA ON THIS 25TH DAY OF

JULY 2012.

R.M. MWONGO
JUDGE