



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 166 of 2012

KITEK (7) LIMITED.....PLAINTIFF

VERSUS

**CHAIRMAN-COLONEL CHARLES WANAKUTA
SECRETARY-COLONEL JOHN SWINFEN
ASSISTANT SECRETARY-COLONEL WYCLIFFE**

ANGOYA

**THE TERRITORIAL COMMANDER-JOASH MALABI
THE TERRITORIAL COMMANDER-JOHN**

WAINRIGHT

THE TERRITORIAL COMMANDER-WILLIAM

ROBERTS

**THE CHIEF SECRETARY -KENNETH G. HODDER
THE CHIEF SECRETARY-COL. GABRIEL KATHURI
THE CHIEF SECRETARY-BENJAMIN MNYAMPI
FINANCIAL SECRETARY-LT. COL. JEQEZA**

TIMOTHY MABAS

(Sued in their capacities as Official of the SALVATION ARMY).....DEFENDANTS

R U L I N G

1. By its Notice of Motion dated 17th April, 2012, the Plaintiff has applied under Order 36 Rule 1, Order 51 Rule 1 and 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act for Summary Judgment against the Defendant as prayed for in the Plaint which seeks Kshs. 78,891,254.72/- together with interest and costs. The application is supported by the Affidavits of Joseph K. Kimani sworn on 17th April, 2012 and 15th June, 2012, respectively.
2. The Plaintiff contends that it entered into an Agreement and Conditions of Contract for Building Works on 18th December, 2007 with the Defendants, that it carried out its obligations under the contract by constructing the Defendants headquarters to completion and delivered the building to the Defendants, that pursuant thereto the Defendants did release part of the contract price, that the defendants were issued with a Final Valuation for payment of the outstanding balance of Kshs. 78,891,254.72/- prepared by the Quantity Surveyor on 20th December, 2011, that the Defendant did not challenge the Final Certificate or initiate Arbitral proceedings to raise any grievances in respect of the balance within the period set out in the contract. That the Plaintiff was therefore constrained to file suit to recover the amount as claimed in

the suit against the Defendants.

3. Mr. Oluoch learned counsel for the Plaintiff submitted that the admitted sum of Kshs. 41,736,497.60/- had been paid. What was in dispute was the Kshs. 37, 154,757.12/-, that the issue raised in the Replying Affidavit by the Defendants had been discussed before the preparation of the final accounts, counsel was of the view therefore that the matters cannot be raised at this stage. He urged that the application be allowed.

4. The Defendants filed a Replying Affidavit by Lieutenant Colonel Jejeza Timothy Mabaso in opposition to the application. The Defendants contended that Defendants Nos. 1, 2, 3, 5, 6, 7 and 8 had been wrongly joined in the suit as they were not officials of the Salvation Army Kenya West Territory, that the Defendants dispute the Plaintiff's claim, that in terms of the Final Certificate the Defendants had fully paid all the nominated sub-contractors, that they had retained Kshs. 4,487,871/- being the retention monies, that the amount claimed included a sum of Kshs. 27,881,115.41/- being interest at 30% per annum which was not contractual, that the Defendants were not privy to any agreement between the Plaintiff and its bankers.

5. Mr. Omondi learned counsel for the Defendants submitted that the Defendants had a defence on merit, he referred to the draft defence annexed to Replying Affidavit to buttress his submission, that Clause No. 34.6 of the contract had been deleted thereby making the claim for interest untenable, that the certificate is erroneous as it had certified interest that was not contractual, that Kshs. 3.1M had been claimed for under special security over and above the claim for extension of time and therefore had no basis. Counsel argued that the application be dismissed.

6. I have carefully considered the Affidavits on record and the submissions of counsels. The law on summary judgment is well settled. In the **Halisbury's Laws of England, 4th Edition, Volume 37 at paragraph 14** the learned authors have observed that:-

'the Defendant does not have to show a complete defence but only fair probability of a defence or that there is a real substantial issue or question to be tried or that there was dispute and facts which raise a reasonable doubt whether the Plaintiff is entitled to judgment.'

In **Sunderji v Clyde House Co. Ltd (1984) KLR 499** it was held;

'An application for summary judgment under order XXXV of the Civil Procedure Rules should not be allowed where pleadings and affidavits disclose issues of fact and law.'

In **Gohil v Wamai [1983] KLR 489**, Chesoni Ag J.A (as he was then) said at page 496;

'The basis of an application for summary judgment under order XXXV is that the Defendant has no defence to claim (Zola & Another v Ralli Bros Ltd & Another [1969] E.A 691) rule 2(1) of order XXXV requires the defendant to show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state that he has a good defence on merit. He must go further and show that the defence is genuine or arguable or raises triable issues. He must show that he has a reasonable ground of defence to the claim...if the defendant establishes what he is required to under rule 2(1) of order XXXV the court shall grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is dismissed.'

In **Kirat Singh & Co v P Mughji (1952) E.A.C.A 33**, it was held that;

'...in order to decide whether or not there is an arguable defence, the court must look at the whole of the respondent's replying affidavit and defence.'

In **Shah v Padamshi (1984) KLR 531** at page 532 it was held;

'In dealing with applications for summary judgment, if a triable issue is found to exist, the court must order a trial even if the court strongly feels that the defendant is unlikely to succeed at trial.'

In **Hasmani v Banque Du Congo Belge (1938)** 5 E.A.C.A it was held;

'If there is one triable issue contained in the affidavit supporting the application for leave to appear and defend, then the appellant is entitled to have leave to appear and defend unconditionally.'

7. From the foregoing the principles in an application for a summary judgment are well settled. That where the Defendant has some semblance of a defence to the Plaintiff's claim, a Defendant is entitled to conditional leave to defend. But where the Defendant shows that there is even one triable issue, the court is to order unconditional leave to defend the claim.

8. In this case, it is not denied that there was a contract between the Plaintiff and the Defendants, it is also in dispute that out of the Plaintiff's total claim in the Plaintiff for Kshs. 78,891,254.72/-, a total sum of Kshs. 41,736,497.60/- has been paid by the Defendants pursuant to the consent recorded in court on 23rd May, 2012. The amount in contention is the balance of Kshs. 37,154,757.12/-. From the Replying Affidavit, the Defendants are emphatic that the Final Certificate is not final for the reason that it contains mistakes. That it includes a sum of Kshs. 3.1M for special security for the 2007 violence yet an extension of time had been granted and paid for, that it contains a claim for approximately Kshs. 28M being interest at the rate of 30% per annum yet the clause for interest in the contract had been cancelled by the parties. Finally the Defendant contended that they have paid all the sub-contractors in terms of the Final Certificate and there are no monies due thereon.

9. I have seen Page 30 of the Contract between the parties dated 18th December, 2007. Clause 34.6 which provided for payment of interest at commercial bank lending rates has been deleted and counter-signed for as are many other clauses. I have seen Clauses 37 and 38 of the contract, they provide for extension of time and loss and expense. Clause 37.1 in particular specifies the instances when the contractor can claim loss and expense. They do not include the special security as is contended in respect of a sum of Kshs. 3.1M included in the Final Certificate dated 20th December, 2011. The sum of Kshs. 78,891,254.72 has been broken down as being payable to the Plaintiff, six (6) other sub-contractors and a sum of Kshs. 4,487,871/- thereon was to be retained by the Defendants. However, the Plaintiff's claim is in respect of the entire sum.

10. I have noted that the Plaintiff did file a Supplementary Affidavit on 19th June, 2012. In it, the Plaintiff did not challenge or deny some of the issues raised by the Defendants. These are:-

- a) If clause 34.6 of the main contract had been deleted, is the claim for Kshs. 78,891,254.72/- proper if it included a sum of approximately Kshs. 28M being interest on late settlement of certificates?
- b) Under what head in the contract is the amount of Kshs. 3.1M certified by the Architect in the final account claimable in view of the provisions of Clauses Nos. 36 and 37 of the Contract?
- c) If the Defendants have actually paid the sub-contractors what was certified as due to them in the Final Certificate, is the Plaintiff still entitled to claim the sum even if it was paid after the filing of the suit?
- d) In view of the provisions of Clause 34.22 of the contract can the Final Certificate be taken to be conclusive and unchallengeable?

11. To my mind, these and other issues raised by the Defendants in their Replying Affidavit are bonafide, triable issues. In the premises, I decline the Notice of Motion dated 17th April, 2012 and allow the Defendants to defend the claim unconditionally since the Defendant did admit and pay Kshs. 41,736,497.60/- after the filing of the application, I will order that the costs of the Motion abide by the outcome of the suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of September, 2012

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A. MABEYA
JUDGE