REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 590 OF 2010

ZENITH STEEL FABRICATORS LTD.....PLAINTIFF

VERSUS

TRIPLE EIGHT CONSTRUCTION (KENYA) LTD.....1ST DEFENDANT

NJUCA CONSOLIDATED COMPANY LTD.....2ND DEFENDANT

RULING

This application is brought by a chamber summons dated 31st January, 2011 and taken out under Order 2 Rule 15 (1) (b) and (d) and Order 13 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law. The applicant seeks an order that the defendant's statement of defence filed on 15th December, 2010 and served upon the plaintiff's advocates on 14th January, 2011 be struck out with costs for being frivolous, vexatious and otherwise an abuse of the process of the court, and judgment be entered in favour of the plaintiff in the sum of Kshs 13,792,839.80 with costs and interest as prayed in the plaint. In the alternative, the applicant prays that judgment on admission be entered in favour of the applicant against the respondent, jointly and severally, in the sum of Kshs 13,792,839.80 with costs and interest as prayed in the plaint. It also prays that the costs of this application be borne by the respondents.

The application is supported by the annexed affidavit of Raheem Abbas Biviji, a Director of the applicant company. It is based on the grounds that –

(a) The applicant's claim is founded upon the final accounts and certificate issued by the respondents in the applicant's favour on 8th October, 2009.

(b) The respondents are truly and justly indebted to the plaintiff in the said admitted sum of Kshs 13,792,839.80.

In a nutshell, the applicant's case is that the respondent awarded to the applicants a tender in the sum of Kshs 82,257,252.60. The applicants completed the works which were the subject matter of the tender and were paid by the respondents a total of Kshs 68,464,412.80 on account thereby leaving a balance of Kshs 13,792,839.80 which is the subject matter of this claim.

In opposition to the application, the respondents filed a replying affidavit sworn on the 22nd February, 2011 by Simon N Waburi, the 1st defendant's Managing Director. The deponent concedes in that affidavit that the respondent contracted the applicant for some work and material supply. However, he avers that payment was to be effected once the projects were inspected and a final inspection report availed. After the inspection was carried out, it revealed that the works carried out the by plaintiff were defective and the defects were highlighted in the report availed to the applicant to rectify the defects. The applicant was to maintain the said works for a period of one year from the date of handing over the project without defects but at the expiry of the said period, it emerged that the defects noted had still not been rectified which position still subsists to date. The applicants have to date not rectified the defects pointed out to them by the respondents and therefore payment has not arisen until the said material defects are rectified. In the absence of a certificate of making good of defects, which is a compliance certificate issued to release the contractor from the contract, then no contractor can receive final payments on services rendered.

With leave of the court, the parties filed written submissions. After considering the pleadings and those submissions, the main issue to be determined is whether the respondents have raised any triable issue or issues so that the suit may go to trial. In considering that issue, it is prudent to recall the words of the Court of Appeal in **RAMJI MAKJI GUDKA LTD** v **ALFRED MUCHIRA & 2 ORS** [2005] eKLR in which the court observed that –

"…**In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issue to warrant adjudication by the court."**

And in **D.T. DOBIE & CO. (K) LTD** v **MUCHINA** [1982] KLR 1 Madan JA, as he then was, said at page 9 that –

"**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 or 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 court 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'."**

The applicant's case is that the respondent awarded to the applicants a contract for the fabrication and installation of steel structures at the respondents' Konza, Makindu, Manyani and Samburu sites. The total cost of the tender awarded to the applicant was Kshs. 82,257,252.60. During the construction period, the respondent paid to the applicant a total of Kshs 68, 464,412.80 on account leaving a balance of Kshs 13,792,839.84. On completion of the works to the satisfaction of the respondent, the latter prepared the final accounts and certificate of completion dated 8th October, 2009 which was sent to the applicants on 14th October, 2009 for confirmation, and the latter duly confirmed the same as the figures tallied with the applicant's own records.

The only difference between the parties herein is whether the time is ripe for payment as the applicants allege or whether any such payment as maintained by the respondent revealed that the works carried out by the applicant were defective and the defects highlighted in a report availed to the applicants for rectification of the defects. The applicant was to maintain the said works for a period of one year from the date of handing over the project without defects, but at the expiry of the said period it emerged that the

defects noted had not been rectified which position subsists to date.

Under Section 109 of the Evidence Act, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In the circumstances of this case, the applicants have produced a document addressed to them by the respondents. It is dated 8th October, 2009 and is entitled "*final account*". In that letter, the respondents address the applicants, *inter alia*, as follows –

"**We refer to your letter… dated 7th October, 2009 and calculate final accounts as follows –**

Net amount for Zenith Steel

Fabricators Ltd **Kshs 82,257,252,60**

Less payments to date

(as per attached schedule **Kshs 68,464,412.80**

Total balance **Kshs 13,792,839.80**

…

Please sign in the space provided below to signify agreement of Kshs 82,257,252.60 as nett value of works executed under this sub-contract and to confirm that you will have no other claim whatsoever in connection with this project and that you accept the balance of Kshs 13,792,839.80 and that once this payment is received when due, it will be for full and final settlement of this account."

Under Section 109 of the Evidence Act (supra), it is up to the respondents to produce any report which allegedly negates the duty to pay the above sum of money which they conceded was due and payable. However, they have not produced any such report even though they allege that it was served upon the applicant. If there had been such a report, nothing would have been easier than for them to produce it or a copy thereof. Since they have not produced any such report, the only inference this court can draw is that there was no such a report and in its absence the applicant has established a case for judgment on admission.

For the above reasons, I find that the applicants have proved their case on a balance of probability and that they are entitled to judgment as prayed. In the circumstances, the respondent's defence in this matter is hereby struck out as being frivolous, vexatious and an abuse of the court process. In sum, judgment is hereby entered for the applicant for the sum of Kshs 13,792,832.80 with costs and interest as prayed in the plaint.

Alternatively, judgment on admission is hereby entered in favour of the applicant against the respondents, jointly and severally, in the sum of Kshs 13,792,839.80 with costs and interest as prayed in the plaint.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 30th day of June, 2011.

L NJAGI

JUDGE