



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 819 OF 2010

ARTESIAN (K) LIMITED PLAINTIFF/APPLICANT
VERSUS
PRIME DRILLERS & CONTRACTORS LIMITED DEFENDANT/RESPONDENT

RULING

1. The plaintiff's application dated 13th January, 2011 seeks summary judgment in the sum of **US Dollars 37,999** together with interest from the date of filing the suit as well as costs of the application.
2. The application was supported by an affidavit sworn by **Zacharia Njoroge Kiruka** who did not disclose the capacity in which he swore the affidavit. He merely described himself as a resident of Nairobi. The court does not know whether he is in any way associated with the plaintiff company and if so, his position in the company.
3. In paragraph 1 of his affidavit, Mr. Kiruka deposed:

“1. That I am personally aware that the defendant is truly indebted to the plaintiff in the sum of US Dollars 37,999 being part of the consideration for the contract entered into between the parties herein on 18th May, 2009 and the defendant was so indebted at the commencement of this suit.”
4. **Order 36 rule 1(2)** of the **Civil Procedure Rules, 2010** requires that an application for summary judgment be supported by **“an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.”** To the extent that the identity of the maker of this affidavit is not known, Zacharia Njoroge Kiruka does not fit the description of such a person.
5. The basis of the plaintiff's application is that the defendant issued cheque No. 300012 dated 30th June, 2009 for US Dollars 37,999 which was returned unpaid upon presentation. A copy of the said cheque together with the advice slip from the plaintiff's bank was annexed to the affidavit of Mr. Kiruka. In that regard, it was contended that the defendant has no defence to this suit.
6. The defendant filed a replying affidavit that was sworn by **Patrick Wainaina Gichuhi**, its Managing Director. He stated that the plaintiff had breached an agreement executed between the parties on 18th

May, 2009 in that it did not deliver the completion reports of seven successful boreholes to the defendant with borehole logs and neither did the plaintiff issue any invoice yet the payment of US Dollars 37,800 was pegged on those conditions.

7. Mr. Gichuhi further stated that the defendant issued two cheques, Cheque No. 30011 for US Dollars 13300 and Cheque No. 30012 for US Dollars 37,999 on 18th May, 2009 and the second cheque was payable upon delivery of the documents stated hereinabove.

8. The plaintiff presented the cheque for US Dollars 37,999 on 23rd September, 2009 long after it had matured. At that point the plaintiff had not delivered the documents as per the contract and against the advice by the defendant not to present the cheque for payment, Mr. Gichuhi added.

9. Mr. Gichuhi further stated that the plaintiff has to date failed to present the said documents and the defendant has not been paid for the contract by Sudan People's Liberation Army.

10. In view of the foregoing, the defendant contended that the plaintiff's application is misconceived and amounts to an abuse of the court process.

11. Upon the filing of an application for summary judgment the defendant is required to show either by affidavit or by oral evidence or otherwise that he should be granted leave to defend the suit.

12. Where it appears to the court that a defendant has an arguable defence he ought to be permitted to defend the suit. Leave to defend the suit can be granted unconditionally or subject to such terms as the court may deem appropriate.

13. In **GICIEM CONSTRUCTION COMPANY v ALMAGAMATED TRADES AND SERVICES [1983] KLR 156** the Court of Appeal held, *inter alia*:

(i) The power to grant summary judgment should be exercised cautiously bearing in mind that it was intended to apply only to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow the defendant to defend for mere purposes of delay. Conditional leave to defend should only be granted where there is evidence of bad faith on the part of the defendant or of suspicion of his conduct or where the defence is a sham.

(ii) Where the defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence, or even fair probability that he has a bona fide defence he ought to have leave to defend.

14. I have already pointed out that the court cannot base any reliance on the affidavit sworn by Mr. Kiruka in support of the application for summary judgment. In my view therefore, the application for summary judgment is bad in law and does not lie.

15. But even if the capacity of Mr. Kiruka to swear the said affidavit had been disclosed, I think the defendant's replying affidavit discloses triable issues. The plaintiff did not seek leave to file a further affidavit to controvert the issues raised by the defendant, particularly regarding the plaintiff's failure to complete the contract that was entered into between the parties.

16. The defendant has explained the circumstances under which the dishonoured cheque was issued and in my view therefore, the defendant is entitled to unconditional leave to defend the suit.

17. Lastly, the plaintiff's application for summary judgment was filed on 17th January, 2011 whereas the defendant had entered appearance on 23rd December, 2010.

18. **Order 50 rule 4** stipulates that between 21st December in any year and 13th January in the next year time does not run for purposes of amending, delivering or filing of any pleadings. That being the case, the

time for filing the statement of defence was to expire on 27th January, 2011 but the same was filed on 19th January, 2011.

19. Although the plaintiff was at liberty to file the application for summary judgment any time before the statement of defence was put in, the defendant cannot be faulted for having filed its defence before determination of the application although ideally the filing of the defence ought to have awaited the outcome of the summary judgment application.

20. All in all, I find no merit in the plaintiff's application and dismiss the same with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Masinde for the Plaintiff

Mr. Karuga for the Defendant