



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 151 of 2009

JARED ODUOR OSODO
T/A JAREDO BUILDING CONSTRUCTION **PLAINTIFF/APPLICANT**

VERSUS

BEN GAKERE NYUTHO **DEFENDANT/RESPONDENT**

RULING

1. The plaintiff instituted this suit against the defendant seeking for recovery of Ksh.4.313,207/= with interest and costs being the balance of the construction costs incurred by the plaintiff while constructing for the defendant a commercial cum residential premises at Roysambu Nairobi. The defendant filed a defence in which he denied liability and contends that the plaintiff was fully paid for the work he was contracted to do. This prompted the plaintiff to file a notice of motion dated 26th May 2009, which is brought under the provisions of section XXXV **rule 1 (a) of the Civil Procedure Rules.**
2. The plaintiff is seeking for summary judgment on the grounds that his claim is liquidated and the defence does not raise any triable issues. This application is supported by the affidavit of **Jared Oduor Osondo** sworn on 26th May 2009. This affidavit has given a detailed account of how the plaintiff and the defendant entered into an agreement dated 10th November 2007. The plaintiff was to construct a foundation and ground floor for a commercial and a residential premises on the defendant's plot no. BHC215/1012/49 Roysambu Nairobi.
3. When the plaintiff completed the construction of the ground floor, the defendant requested him to continue with the construction of the 1st, 2nd, 3rd, 4th and 5th floors. This construction was based on a bill of quantity prepared by S. Mwankii on 2nd October 2007. The plaintiff contends that he dutifully continued with the construction and completed the building at the costs of Ksh.22,838.542/= Out of which Ksh11,570.120 was directly deposited into the plaintiffs account by the defendant at Equity Bank. The defendant also made direct payments of Ksh.6.955.215/- to suppliers of building materials but left a balance

of 4.313,207 which is outstanding and due to the plaintiff. The plaintiff wrote a letter to the defendant requesting him to settle the outstanding account but the defendant failed despite promising to settle the outstanding account and thus the present suit.

4. This application was opposed by the defendant; his counsel relied on the replying affidavit sworn on 17th June 2009 by Ben Gakere Mugo. The defendant maintains that the plaintiff was paid all his dues and money used to be deposited in his account at Equity Bank and at no time did the plaintiff utilize his own money. The plaintiff was also faulted for not showing any receipts or invoices on how he spent the money he is claiming from the defendant. The defence raises triable issues on whether there was an agreement and the terms and conditions of such an agreement.
5. Moreover the plaintiff has not produced conclusive evidence of how he arrived at the sum of ksh.4.313,207/- there is also a discrepancy between the documents produced by the plaintiff regarding the bill of quantity and the one produced by the defendant which shows a big difference in the costing. Further, the agreement exhibited by the defendant required the matter to be referred for arbitration. Counsel submitted that the plaintiff has not presented a clear case to warrant the entry of summary judgment, the issues raised in the defence on accounts and the agreement are triable issues which the court should determine.
6. Under the provisions of order **XXXV of the Civil procedure Rules** it is intended to allow a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick summary judgment without being unnecessarily kept from what is due to him by way of delaying tactics by a defendant. The primary issue for determination in this case is whether the plaintiff's claim is straight forward and whether the defence by the defendant raises triable issues. The agreement exhibited by the plaintiff in support of the application is for the construction of a foundation and ground floor works for residential flats on the defendant's plot at Roysambu.
7. There is no agreement for the construction of 1st, 2nd, 3rd, 4th and 5th floors. The second issue of concern is the allegation by the defendant that the plaintiff was fully paid for the work done. The plaintiff has not shown how he arrived at the sum he is claiming by way of summary judgment, no receipts or invoices are annexed to this application. Going by the allegations made by the defendant, it cannot be said with certainty that the plaintiff's claim is clear. It is not possible for the court to know exactly how the claim by the plaintiff is arrived at. All I can say is the defence raises triable issues which can only be sorted out at the trial so that the plaintiff can give evidence and produce evidence on how he arrived at the sum claimed.
8. Accordingly I disallow the application for summary judgment. The suit to proceed for hearing. Costs will be in the cause.

RULING READ AND SIGNED ON 19TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE