



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**CIVIL CASE 285 OF 2006**

**EPCO BUILDERS LIMITED ..... PLAINTIFF**

**VERSUS**

**BALOZI HOUSING CO-OPERATIVE SOCIETY LTD. .... DEFENDANT**

**RULING**

Before me is a notice of motion made by the plaintiff under the provisions of **order XXXV rule 1(b)** and **Order XII rule 6** of the **Civil Procedure Rules** seeking summary judgment to be entered for the plaintiff as against the defendant as prayed in the plaint. In the alternative, the plaintiff prayed for judgment to be entered on admission in favour of the plaintiff as against the defendant. The grounds in support of the motion are on the face of application. The plaintiff contends that the defendant, through its advocate had admitted in writing owing the amount claimed by the plaintiff and had further offered to liquidate the debt. The plaintiff was of the view that the defence filed by the defendant had not disclose a reasonable cause of action and therefore constituted an abuse of the court process. The application is supported by the annexed affidavit of Ramji Varsani, a director of the plaintiff.

The application is opposed. Menelik Kwamla Makonnen, the Chairman of the defendant co-operative society swore a replying affidavit in opposition to the application. He deponed that the plaintiff and the defendant entered into an agreement by which the defendant was to construct phase 1 of a housing unit comprising of 37 units in the defendant's parcel of land known as L.R. No.12422/6. According to the deponent, although the plaintiff substantially completed the construction of the said housing units, a difference arose between the plaintiff and the defendant concerning the quality of workmanship. The construction was further delayed and adversely affected by failure by members of the defendant to make their contributions in time. He deponed that the difference was resolved and it was agreed that the plaintiff was to be paid a sum of Kshs.15,420,403/=. It was this amount that the members of the defendant society had made attempts to settle but due to financial difficulties and the problems related to the completion of the said housing units, the defendant has been unable to pay in one lumpsum. He deponed that the defendant had paid to the plaintiff the sum of Kshs.1,650,000/= in part payment of the amount owed. He swore that since there was an arbitration clause in the construction agreement, the court should refrain from entering summary judgment in favour of the plaintiff, but instead refer the dispute for determination by arbitration. It was to that effect that the defendant filed an application dated 14<sup>th</sup> March 2007 seeking to have the present suit stayed pending reference for determination of the dispute between the plaintiff and the defendant by arbitration.

At the hearing of the application, I heard the submissions made by Mr. Kandere on behalf of the plaintiff and by Mr. Abedi on behalf of the defendant. I have carefully considered the said submissions made. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff laid sufficient basis for this court to grant its application seeking the entry of summary judgment against the defendant. Before this court can give reasons for its decision, it is important to point out the defendant's application seeking to have the matters in dispute in this case referred to arbitration for resolution, was dismissed by Khamoni, J on 27<sup>th</sup> September 2007.

The principles to be considered by this court in determining whether or not to enter summary judgment are well settled. In **Five Continents Ltd –vs- Mpata Investment Ltd [2003] 1EA 65**, the Court of Appeal held at page 67 as follows:

*“In **Dhanjal Investments Ltd – vs – Shabaha Investments Ltd [1997] LLR 618 (CAK)**, this Court stated:*

*“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandlal Restaurant –vs- Devshi and Company [1952] EACA 77** and followed by the Court of Appeal for Eastern Africa in the case of **Sonza Figuerido and Company Limited – vs- Mooring Hotel Limited [1952] EA 425** that, if the defendant shows a bona fide triable issue he must be allowed to defend without conditions ...”.*

And in **Provincial Insurance Company of East Africa Limited** now known as **UAP Provincial Insurance Ltd –vs- Kivuti [1996] LLR {CAK}**, the Court against stated:

*“In an application for summary judgment even one triable issue if bona fide; would entitle the defendant to have unconditional leave to defend”.*

Lastly, in **Kenya Trade Combine Ltd –vs- Shah [1999] LLR 2847 (CAK)**, the Court said:

*“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed”.*

In the oft cited case of **DT Dobie & Co. (K) Ltd –vs- Muchina [1982] KLR 1** at page 9 Madan JA held that:

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

In **Gohil –vs – Wamai [1983] KLR 489, Chesoni JA held at page 496** as follows:

*“The basis of an application for summary judgment under **Order XXXV** is that the defendant has no defence to the claim (**Zola and Another –vs- Ralli Brothers Ltd and Another [1969] EA 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 question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under **Order XXXV** then the court must dismiss the application. On the other hand, if the defendant establishes what he is required to do under **Rule 2 (1) of Order XXXV** the court should grant him conditional or unconditional leave to defend the suit and in that case the application of the plaintiff is not dismissed.”*

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff and the defendant entered into a construction agreement. The cost of construction was agreed at Kshs.172,678,759/=. It appears that the construction of the housing units stalled due to the defendant's inability to make the required payments envisaged in the agreement. The agreement was terminated by mutual consent. It was however agreed that the defendant would pay to the plaintiff all the outstanding completion certificates which had been approved by the project's architect.

According to a letter written by the defendant to the plaintiff and dated 30<sup>th</sup> March 2005, the defendant admitted owing to the plaintiff the sum of Kshs.15,042,403/=. In the said letter, the defendant enclosed four (4) postdated cheques of the said sum of Kshs.15,042,403/=. The said cheques were supposed to be in full and final settlement of the debt due from the defendant to the plaintiff. It was apparent that the defendant did not have funds in its account to make good the payment of the said postdated cheques. The correspondence exchanged between the plaintiff and the defendant, at the material time, disclose the frustration experienced by the plaintiff in cashing the said cheques. Some of the cheques which were banked by the plaintiff were returned unpaid. Although the defendant made proposals to make good payment of the said outstanding amount, it was evident that by the time the plaintiff filed suit, the outstanding amount had not been settled. At the time the plaintiff filed suit, the defendant had paid a small sum of the amount owed. In the present suit, the plaintiff seeks to be paid the outstanding sum of Kshs.11,725,027/=.

My evaluation of the evidence on record reveals that there was no dispute between the plaintiff and the defendant concerning the amount that was to be paid. It was agreed that the amount that was to be paid by the defendant to the plaintiff was Kshs.15,042,403/=. In the correspondence exchanged subsequent to the letter by the defendant of 30<sup>th</sup> March 2005, it was clear that the outstanding issue between the plaintiff and the defendant related to the manner of settlement of the debt. The complaint by the defendant to the effect that the amount due to the plaintiff had not been agreed on account of poor workmanship by the plaintiff does not therefore hold water. I therefore hold that the plaintiff has established, to the required standard of proof on a balance of probabilities, that it is indeed owed the said sum of Kshs.11,725,027/=. The defence of the defendant is a sham. It raises issues which are not germane to the dispute. The issue as to whether the plaintiff had completed the construction of the works at the defendant's housing estate was not a live issue at the time the plaintiff and the defendant agreed to terminate the contract.

The initial figure to be paid to the plaintiff of Kshs.15,042,403/= was agreed after the defendant's architect had certified the amount to be due and owing to the plaintiff. The plaintiff has established that, in part fulfillment of the agreement to pay the said outstanding amount, the defendant issued cheques equivalent to the said sum of Kshs.15,042,403/=. The cheques were not honoured. Although the defendant made effort to pay the said outstanding debt, by the time the suit was filed, the defendant still owed the plaintiff the sum of Kshs.11,725,027/=. I do not accept the argument presented by the defendant that it had paid to the plaintiff a further sum of Kshs.1,650,000/= after the filing of the suit. From the defendant's own documents, it was evident that the defendant issued cheques equivalent to the sum of Kshs.800,000/= to the plaintiff. In view of the defendant's past history in issuing 'rubber' cheques, this court is unable to reach a determination that the said amounts in the cheques were actually paid.

In the premises therefore, I enter summary judgment in favour of the plaintiff as against the defendant for the sum of Kshs.11,725,027/=. The defence filed by the defendant does not disclose any triable issue or reasonable defence to the plaintiff's claim. In actual fact, it was meant to delay the just determination of this suit. The plaintiff shall have the costs of the application and of the suit.

It is so ordered.

**DATED at NAIROBI this 27<sup>th</sup> day of MAY, 2009**

**L. KIMARU**

**JUDGE**