



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 402 of 2006

KEWAL CONTRACTORS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

COASTAL ENTERPRISES KENYA LTD.....DEFENDANT/RESPONDENT

RULING

1. The application that is before me is the Plaintiff's Notice of Motion dated 12/03/2008 by which the Plaintiff seeks the following two principal prayers; that is to say:-
 1. *That Summary Judgment be entered for the Plaintiff as against the Defendant for Kshs.6,267,725/40 being part of the Plaintiff's claim as set out in the Amended Plaintiff.*
 2. *In the alternative, judgment on admission be entered for the Plaintiff against the Defendant for Kshs.2,500,000/= being part of the Plaintiff's claim as set out in the Amended Plaintiff.*
 3. The motion, which is expressed to be brought under Orders XXXV Rules 1 and 5, XII Rule 6 and L Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law is premised on grounds that:-
 - i. *The Defendant has variously admitted that the Plaintiff partly performed the sub-contract entered between them and that the cost of actual work done by the Plaintiff as at the time of termination of the contract was amounted (sic) to Kshs.9,096,315/00 or thereabouts but has refused, failed and or neglected to pay to the Plaintiff the said sum in full*
 - ii. *The Defendant has variously admitted that of the said sum of Kshs.9,096,315/00 a sum of Kshs.2,500,000/= was due to the Plaintiff but the Defendant has refused, failed and or neglected to pay the said admitted amount to the Plaintiff.*
 - iii. *The Plaintiff should be entitled to summary judgment for value of the said part performance or to judgment in respect of the admitted part of its claim without waiting for the determination of the whole claim.*
4. The application is also supported by the sworn affidavit of **PARMINDER SINGH** the Managing Director of the Plaintiff Company dated 12/03/2009. From the said affidavit, the Plaintiff's case is that:-
 - (a) *On 5/08/2008 the Defendant entered into an agreement with the Ministry of Roads and Public Works (the Ministry) under which the Defendant was contracted to improve and gravel the Mathatani –*

Kaseye – Kol Road at an agreed contract price of Kshs.146,656,248/00

(b) The Defendant entered into an agency agreement with the Plaintiff whereby the Defendant sub-contracted the Plaintiff to undertake and perform the said work for an agreed consideration of Kshs.137,656,248/00.

(c) Upon execution of the agency agreement, the Plaintiff mobilized and moved to site and commenced work but before long a dispute between the Plaintiff and the Defendant arose regarding alleged breach of the terms of the Agency Agreement by the Defendant.

(d) On 27/03/2006, the parties agreed to terminate the Agency Agreement

(e) As of 27/03/2006, the Plaintiff had carried out works and incurred expenses in carrying out the said works to the tune of Kshs.12,716,770/56 out of which the Defendant has paid to the Plaintiff Kshs.3,000,000/00

(f) The Defendant has disputed the value of the work carried out by the Plaintiff – and has quantified the work as follows:

(i) On 23/03/2006 – Defendant quantified the work done by Plaintiff at Kshs.9057400/00

(ii) On 7/04/2006 – Defendant quantified the work done by Plaintiff at Kshs.9,096,315/00.

(g) The Defendant, in its quantifications omitted to take into account the VAT element which is chargeable with every assessment of quantities of work done which is charged at the rate of 16% on the Defendant's said admitted assessment of works

(h) The Defendant has paid only Kshs.3,000,000/00 out of the admitted amounts for work done by the Plaintiff that is to say out of Kshs.10,551,725/= being value of works done plus 16% VAT.

(i) The Defendant is truly and justly indebted to the Plaintiff in the sum of Kshs.6,267,725/40 for work done and was so indebted at the commencement of this suit.

(j) In the alternative, the Defendant has variously admitted and offered to pay to the Plaintiff the sum of Kshs. 2,500,000/= for the works as follows:-

(a) By a letter dated 7/04/2006 the Defendant admitted owing the Plaintiff the sum of Kshs.2,500,000/=

(b) By a letter dated 10/04/2006, the Defendant admitted owing the Defendant (sic) the sum of Kshs.2,500,000/= which amount the Defendant offered to settle in 3 instalments.

(k) The Defendant has no defence to the Plaintiff's claim since it (Defendant) has unequivocally admitted owing to the Plaintiff the said sum of Kshs.2,500,000/00.

4. Mr. Parminder Singh has annexed to his supporting affidavit copies of the following documents:-

(i) PS1 – copy of the Agency Agreement between the Plaintiff and the Defendant dated 5/10/2005

(ii) PS2 – copies of correspondence exchanged between the Plaintiff and the Defendant over alleged breach of agency agreement by the Defendant, a breach that involved the supply of apparently substandard/defective machinery by the Defendant to the Plaintiff;

(iii) PS3 – copies of correspondence terminating the sub-contract, and providing inter alia, that the Engineers of both parties would visit the site to confirm the work done and quantities measured.

(iv) PS4 – copies of evidence of payment of the sum of Kshs.3,000,000/00 by the Defendant to the Plaintiff which includes a summary of statement for payment on account amounting to Kshs.6,049,458/00.

(v) PS5 – copies of quantities of work, among them a letter dated 10/04/2006 by the Defendant to the Plaintiffs in which the Defendants agree, *inter alia*,

“THAT M/S Coastal Kenya Enterprises Ltd. shall pay to M/s Kewal Contractors Ltd. a sum of Kshs.2,500,000/= (Kenya Shillings two million and five hundred thousand) to finalize the contract against total work done in three instalments of Kshs.800,000/= from certificate No. 3, Kshs.800,000/= certificate No. 4 and the last payment of Kshs.900,000/= from certificate No. 5 after the release of payments by Ministry of Roads & Public Works against our lodged certificates for work done.

PROVIDED THAT:-

M/S Kewal Contractors Ltd. shall hand over the site to main contractor M/s Coastal Enterprises Ltd. immediately.”

5. The Plaintiffs application is opposed. The Replying Affidavit is sworn by **SATWINDER SINGH BHOGAL**, the Managing Director of the Defendant Company. From the said Affidavit, the deponent:-

- a. Concedes the termination of the Agency Agreement and the terms of such termination
- b. Says that the Plaintiff rejected the offer by the Defendant to pay to the Plaintiff the sum of Kshs.2,500,000/= and that in fact the Plaintiff never responded to the Defendants letter of 10/04/2006.
- c. Says that for some 6 months after the Defendants letter of 10/04/2006 the Plaintiff held onto the site through an injunction obtained by the Plaintiff *ex parte* and through non-disclosure of material facts.
- d. States that the *ex parte* orders of injunction were discharged on 18/10/2006 but that the injunction application is still pending for *inter partes* hearing.
- e. Says that as a result of the Plaintiff having kept the machinery and equipment far beyond the agreed period, the Plaintiff is not entitled to any money under the contract
- f. Says that when the Defendant eventually took over the machinery and equipment from the Plaintiff, the machinery and equipment were found to have been neglected and that the Defendant had to spend Kshs.4,050,000/= on repairs
- g. States that in the circumstances of this case, the Defendant is under no obligation to pay any money to the Plaintiff under the contract
- h. Says that there is another suit pending being **Nairobi HCCC No. 207 of 2007 – Coastal Enterprises Kenya Limited v Kewal Construction Limited** in which similar issues of whether Plaintiff is entitled to Defendant’s payments are pending determination
- i. Asserts that the agreement to pay Kshs.2,500,000/= to the Plaintiff was made before circumstances changed for the worse, namely before the Plaintiff’s decision to keep the machinery and equipment for 6 months beyond the period when they should have returned them;
- j. Says that for reasons outlined above, this is not a matter for summary judgment

Mr. Satwinder Singh Bhogal is asking the court to dismiss this application and to allow the matter to be determined on its merits at a full hearing.

6. The facts of this case are not in dispute, I have already set them out as they were placed before the

court from the Supporting Affidavit sworn by Parminder Singh on 12/03/2008. The only point of dispute is whether the Plaintiff is entitled to any payments under the contract and if so, how much. In its Amended Plaint dated 22/08/2007 and filed in court on the 24/08/2007, the Plaintiff is asking for Kshs.42,684,987/31; interest thereon plus general damages for breach of contract, costs of the suit and any other relief as the court may deem fit to grant.

7. By its defence dated 2/11/2007 and filed in court on 7/11/2007, the Defendant denies the Plaintiffs allegations of fundamental breach of contract as alleged or at all and also denies termination of the Agency Agreement. The Defendant also denies that it paid the sum of Kshs.3,000,000/= to the Plaintiff. I think that in view of the evidence on record, the Defendant's denial of the payment of Kshs.3,000,000/= and the fact of termination of the Agency Agreement can properly be termed as being scandalous.

8. This application proceeded by way of written submissions. The Plaintiff is represented by M/s Odhiambo & Weda Advocates, while the Defendant is represented by M/s Mungu & Company Advocates. Each of the advocates in their written submissions reiterated the averments in their pleadings. Counsel for the Plaintiff asked the court to grant the orders sought while the Defendant's counsel urged the court to dismiss the application with costs to the Defendant. Mr. Odhiambo for the Plaintiff urged the court to exercise its wide powers under the cited orders to grant judgment for part of the claim. He also submitted that the Defendant's defence does not raise any triable issue; that the Plaintiff has demonstrated beyond any reasonable doubt that the Defendant is truly and justly indebted to the Plaintiff in the sum of Kshs.6,267,725/00, which amount the Plaintiff says arises from the Defendant's own quantification for work done. The Plaintiff also says that nowhere in its pleadings does the Defendant say that the said sum of money has been paid to the Plaintiff. In the alternative, the Plaintiff prays for judgment for Kshs.2,500,000/= on admission.

9. On the part of the Defendant, it is contended that the Defendant's defence raises triable issues that would warrant a full hearing for the determination of those issues. The Defendant sets out the following as the issues that need to be determined at the full hearing of this suit namely:-

- (a) *whether the Defendant was entitled to Shs.9,000,000/= on the contract and whether the consideration was ever paid in full or in part;*
- (b) *Whether the Plaintiff was in breach of the agreement between it and the Defendant, and if yes, what was the effect of such breach;*
- (c) *Whether the Defendant delivered to the Plaintiff plant, machinery and equipment that were in good working condition;*
- (d) *Whether the Defendant warranted to the Plaintiff that the plant, machinery and equipment were in good working condition;*
- (e) *Whether the Defendant delivered to the Plaintiff plant, machinery and equipment that were defective and needed major repairs;*
- (f) *Whether the Defendant was in breach of the agreement with the Plaintiff and whether the alleged breach led to the breach of agency agreement;*
- (g) *Whether the parties agreed to mutually terminate the agency agreement;*
- (h) *What amount was the Plaintiff entitled to, if at all?*

10. The Defendant argues that these issues are so critical that if the court grants the orders sought in the instant application, then the Defendant would have been condemned unheard. It is also argued on behalf of the Defendant that for the court to enter summary judgment on admission, the alleged admission must be clear and unequivocal and further that where one seeks summary judgment, the defence must be so hopeless that it does not raise any issues and is a mere denial.

11. I have now considered the pleadings and the submissions. As to the law, I find support in the case of **Titus Muiruri Doge v Kenya Cannery Ltd. [1982-1988]1 KAR 759**. In the case, the Appellant, a director and an employee of the Respondent, was given possession of a house and some land in one of the Respondent's estates on termination of the Appellant's services and upon termination, the Respondent filed suit for vacant possession and mesne profits and thereafter applied under Order 35 rule 1 for summary judgment and for the defence to be struck out. The Appellant specifically denied the contents of the plaint and counterclaim on the grounds that the property was a gift to him. No defence was filed to the counterclaim. The judge awarded summary of judgment to the Respondent but made no order on the second part of the motion.

12. On appeal, the Respondent contended that as the factual basis of the Appellants claim was disputed, the Appellants possession of the house would be independent of and not co-terminous with, his contract of service and therefore his claim to ownership of the house could not possibly stand up to analysis. It was held:-

1. *The counterclaim was not severable from the defence, which disclosed one or more triable issues.*
2. *If the counterclaim appears to be bona fide, then unconditional leave to defend should be given*
3. *The Appellant should be given an unconditional leave to defend as triable issues as to the rights of occupation of the house were disclosed in this case.*

13. The issue that arises here is whether the facts raised by the Defendant herein will not stand up during the viva voce hearing and will prove to be untrue. In the Doge case (above) Hancox JA referred to the words of Madan JA in Gupta v Continental Builders Ltd. [1978] KLR 83 at 89 where he said:-

“What happens is that the court merely does not accept the prima facie issues as genuine. This is exactly the task which the court is required to perform on an application for summary judgment.”

14. I have looked at the issues raised by the Defendant. While it is clear to me that the factual basis of the sum of Kshs.6,267,725/40 is disputed, the same position does not obtain with regard to the sum of Kshs.2,500,000/= which the Defendant admitted in no uncertain terms that it was payable to the Plaintiff, the only condition being that the Defendant was paid by the Ministry of Roads and Public Works. The Defendant has not stated anywhere, either in its pleadings or submissions that the Ministry of Roads and Public Works has not paid it under the contract. I can therefore safely assume that the contract sums due to the Defendant from the Ministry of Roads and Public Works was paid. The Defendant's letter dated 7/04/2006, by which letter the Defendant committed itself to pay the said sum of Kshs.2,500,000/=. I find and hold that Defendant's commitment to pay was unequivocal and the fact alone that the Plaintiff did not respond immediately does not change the situation. I am therefore persuaded that on this amount, there is no doubt that the Defendant made an admission of it and it is bound by that admission. In any event, the Defendant's defence does not say anything specific about this admitted amount save for general denials on the Plaintiff's claim in general. I would therefore enter judgment in favour of the Plaintiff on this amount.

15. As for the sum of Kshs.6,267,725/40 claimed by the Plaintiff, I see that there are still disputes as to whether the amount ought to include Value Added Tax (VAT) or not; whether such an amount is likely to be reduced by the sum of Kshs.4,050,000/= allegedly spent by the Defendant on repairing what it claims were dilapidated machinery and equipment on repossession from the Plaintiff. This dispute is best left for determination at the full hearing of the Plaintiff's case.

16. The upshot of what I have said above is that the Plaintiff's application succeeds on the alternative prayer. I accordingly enter judgment in the sum of Kshs.2,500,000/= being part of the Plaintiff's claim on the Amended Plaint. The Plaintiff shall have costs and interest at court rates. The rest of the Plaintiff's claim shall go to full trial.

It is so ordered.

Dated and delivered in Nairobi this 4th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Odhiambo (present) for the Plaintiff/Applicant

Mr. Mungu (present) for the Defendant/Respondent

Weche – Court clerk