

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

Civil Case 568 of 2008

TERRAZO ENTERPRISES LIMITED PLAINTIFF

VERSUS

PAVEMENT CLUB “N” CAFÉ 1ST DEFENDANT

BLUE ELEPHANT LIMITED 2ND DEFENDANT

SHAILESH PATEL 3RD DEFENDANT

RULING

Application dated 1/4/2009 by Notice of Motion brought under **Order XXXV Rule 1, Civil Procedure Code, Order L Rule 1, Civil Procedure Code, Order VI Rule 13 (1) (b), (c), (d) Civil Procedure Code** seeking to strike out the defendant’s/respondent’s statement of defence dated 17/11/2008 and that the court do enter summary judgment in the sum of Kshs.16,598,988/= against the defendant as prayed in the plaint on the grounds set out in the application.

The application is supported by the affidavit sworn by Gopal Patel which shows that he is a director of the plaintiff. The plaintiff contracted to carry out alterations and extensions to the defendants business premises. Certificate was issued for the work done in the sum of Kshs.30,139,188/= as shown in exhibited “GP1”. Payment was made totaling to Kshs.12,550,000/= leaving a balance of Kshs.17,589,188/=. The proposal as to how to pay balance was made as shown in exhibit “GP 3 (a) and (d)”. The proposals were rejected. The 3rd defendant has acknowledged the debt as shown in exhibit “GP5”.

In the replying affidavit the 3rd defendant swears that the statement raises triable issues mainly whether a suit against the party that no longer exists and lie, whether the amounts disputed can only be established by way of cross-examination, whether the plaintiff has a reasonable cause of action and particulars of work done are not shown.

The counsel for defendant did not file any submissions as he had agreed and moreover did not attend court on the date fixed for submissions. The plaintiff’s counsel therefore submitted that no triable issues are disclosed in the joint statement of defence. Relying on the case of **Gobil vs. Wamai [1983] KLR 486** quoted in **Charles Githinji Muturi vs. Julius Nderitu Kahara [2008]** where the court observed that the burden in on the defendants to satisfy the court that he is entitled to leave to defend the suit.

They must show that they have good ground of defence. I have perused the exhibits produced and exchanged between the parties. It is clear there is no defence as to the existence of the debt. The defendants intend to delay the matter and this is to the prejudice of the plaintiff. I find no triable issue which can shift the liability to pay the plaintiff’s claim from the defendants. I find the statement of defence to be a sham and I strike it out.

Consequently, the application is allowed and judgment is entered for the plaintiff as prayed in the plaint with interest at court rates. The costs are awarded to the plaintiff.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of October 2009.

JOYCE N. KHAMINWA

JUDGE