

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 118 of 2005

WILFRED KAMAU GITHU..... PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

Before me is the plaintiff's notice of motion made pursuant to the provisions of **Order XXXV Rules 1, 2 & 8** and **Order XII Rule 6** of the **Civil Procedure Rules** seeking summary judgment to be entered against the defendant for the sum of Kshs.50,187,065.80 together with the accrued interest at commercial rates. The plaintiff claims that the amount was due to him in respect of invoices that he had presented to the defendant for payment. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Wilfred Kamau Githua, the plaintiff. It is the plaintiff's contention that the defence filed by the defendant was sham and did not disclose any reasonable defence against the plaintiff's claim for which the defendant was well and truly indebted to the plaintiff. The plaintiff states that the defendant had unequivocally admitted the said amount demand and any delays in payment to the plaintiff was unjustified, unfair and amounted to economic injustice. He was of the view that the defence filed was therefore frivolous, vexatious and an abuse of the process of the court calculated to delay the fair and expeditious disposal of the suit.

The application is opposed. Margaret Akiring Osilli, the deputy treasurer of the defendant swore a replying affidavit in opposition to the application. She denied that the defendant owed the plaintiff the said sum of Kshs.50,187,065.80. She deponed that the plaintiff was not entitled to be paid the sum claimed because he had breached the terms of the contract that required him to render certain services to the satisfaction of the defendant before he could be paid. She swore that for the court to arrive at the proper amount to be paid to the plaintiff, oral evidence has to be taken to determine the work actually done by the defendant. It was her view that the court is ill suited at this stage of the proceedings to determine the quantum of the work done by the plaintiff to entitle him to be paid the said claimed amount. It was her further contention that the fact that the plaintiff is claiming a colossal sum of Kshs.859,615,827.66 is more the reason why the court should hear and determine the matters in dispute in a full trial. She urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival submissions made by Mr. Mutisya for the plaintiff and Mr. Omotii for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a just case for the entry of summary judgment. The principles to be considered by this court in determining whether or not to allow an application for summary judgment are no longer in doubt. In **Giciem Construction Company vs Amalgamated Trades & Services [1983] KLR 156** at page 160 the Court of Appeal held that:

*"The proper principles to be considered in a case such as the present were set out in the locus classicus in East Africa on the subject, namely **Zola v Ralli Brothers [1969] EA p 691**, in which Sir Charles Newbold said at page 694:*

*‘Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. The mere right of the defendant to be indemnified by, or to have a claim over against a third party in respect of the defendant’s liability to the plaintiff by way of counterclaim, a sum of money which does directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining summary judgment. Normally a defendant who wished to resist the entry of summary judgment should place evidence by way of affidavit before the judgment showing some reasonable ground of defence. This is clear from the words of **Order XXXV, rule 2** which states:*

‘The court may thereupon, unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy it that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly.’

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff entered into an agreement with the defendant by which the defendant agreed to undertake certain survey works and demarcation of certain parcels of land that the defendant has interest in. According to the agreement executed on 10th March 1998, the defendant was required to undertake certain tasks before he could be paid for services rendered. It is the plaintiff’s claim that he has performed the services required of him by the defendant and therefore he should accordingly be paid. It is the defendant’s case that the plaintiff has so far not provided the contracted services to the satisfaction of the defendant.

Having perused the documents that the plaintiff relied on in support of his application for summary judgment, it was clear to the court that this court cannot reach a determination on whether the plaintiff is entitled to the amount claimed without taking evidence to determine the work done by the plaintiff. The defendant’s defence to the effect that the plaintiff failed to render satisfactory services to it to entitle the plaintiff to have summary judgment is a triable issue which ought to go to full trial. It is trite that where the defendant establishes even one triable issue the court will have no alternative but to order that the suit be disposed off in a full trial. Another triable issue is whether the plaintiff is entitled to be paid interest on the alleged principal sum at commercial rates. The court cannot reach such determination at this stage of the proceedings in regard to whether the agreement that is the subject of this suit provided payment of interest on unpaid invoices at commercial rates.

In the circumstances therefore, I hold that the plaintiff failed to establish an appropriate case for entry of summary judgment. His application for summary judgment is hereby dismissed with costs to the defendant. The defendant is granted unconditional leave to defend the suit. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2009

L. KIMARU

JUDGE