



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

Civil Case 158 of 2007

DEWDROP ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

R U L I N G

The Applicant herein, Dewdrop Enterprises Limited, filed suit against the Defendant, City Council of Nairobi by a plaint dated 23rd March, 2007 and filed in court on 27th March 2007. The Plaintiff's claim against the Defendant is based on a sub-contract which the Plaintiff claims it entered into with the Defendant for structured cabling of City Hall on or about 22nd December, 2005. The Plaintiff seeks Shs.6,533,748/25 for breach of the contract entered between the parties and for costs. The Plaintiff eventually amended its plaint and in it seeks an alternative prayer for Kshs.2,298,445/12 together with loss of profits on outstanding works in sum of Kshs.4,235,303/13 with interest at commercial rates.

The application under consideration is the Chamber Summons dated 22nd February, 2008 expressed to be brought under Order XXXV rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks summary judgment to be entered in favour of the Plaintiff against the Defendant as prayed for in the amended plaint, with costs.

There are eight grounds upon which this application is brought as follows:

- a. THAT the Defendant sub-contracted the Plaintiff to carry out structured cabling of the fire gutted City Hall at a tender sum of Kshs.7,499,999.50.
- b. THAT pursuant to the said contract the Plaintiff delivered installation items worth Kshs.2,298,445.12 to the appointed site 19th April 2006 and 24th August 2006.
- c. THAT the said amount of Kshs.2,298,445.12 is attracting interest at commercial bank rates of 1.78% per month until payment in full.
- d. THAT the Defendant neglected to complete the contract by 28th June 2006 and as a result the Plaintiff has suffered loss and damage.

- e. THAT the Plaintiff claims Kshs.6,533,748.25 being balance of the contract amount.
- f. THAT in the alternative the Plaintiff claims Kshs.2,298,445.12 together with loss of profits on the outstanding works valued at Kshs.4,235,303.13
- g. THAT is fair and just to grant this application.
- h. Other grounds at the hearing.

There is a supporting affidavit sworn by **EDWARD THIONG'O WACHIRA** dated 22nd February, 2008 with annexures thereto and a further affidavit by the same deponent dated 14th May 2008 with annexures thereto.

The application is opposed. The Respondent has filed a replying affidavit sworn by **C.M. CHIURI** the Defendant's City Engineer dated 28th April 2008.

Both parties were represented in this application with **Mrs. Kinuthia** representing the Applicant and **Mrs. Mulekyo** representing the respondent.

I have considered the submission by both Counsel together with the authorities relied upon. I have also considered the application together with all the pleadings as filed herein.

The gist of the application is that the amended defence as filed raises no triable issues, is a sham and that summary judgment should be entered in favour of the Plaintiff as prayed for in the plaint.

The facts of the Plaintiff's case in brief are that on invitation by the Defendant, the Plaintiff, in August, 2005, successfully tendered for a sub-contract with the Defendant. The Plaintiff case was that it was awarded the tender for the sum of Kshs.7,499,999/55. The Plaintiff states that it was a part of the contract that the Plaintiff would be paid the total value certified by the IT Engineer. The Plaintiff contends that pursuant to the contract, it delivered to the Defendant's appointed site, various goods at different dates. It contends further that it was only paid for part of the goods leaving a balance of Kshs.2,298,445.12 as at 24th August, 2006.

The Defendant's case on the other hand is that there is no privity of contract between the Plaintiff and the Defendant and that the Plaintiff was itself in breach of contract and therefore the claim does not lie.

It is an established principle of law that summary judgment can only be entered where the Plaintiff's claim is clear, plain and undoubted and the defence is a sham and raises no triable issues. It is also trite that once a Defendant demonstrates an arguable defence or shows triable issue whether of fact or law even if only one issue is shown, the Defendant should be given leave to defend.

See **Kenya Horticultural Exporters (1977) Limited vs. Pape (Trading as Osinia Estate) 1986 KLR 705.**

The only variation is that where the court is of the view that the defence may prove to be a sham, even though a triable issue is shown, the Defendant may be given a conditional leave to defend.

Applying the above principles to the instant case, one major argument between the parties was whether or not there was privity of contract between the parties. The Plaintiff's position is that it was a sub-contractor of the Defendant. The Defendant's position was that the Plaintiff was a sub-contractor of a Main Contractor.

I am mindful that at this stage, I am not required to make any conclusive findings of the case. That is a matter for the trial court. Regarding the privity of contract issue, I do find that the Plaintiff admitted that the part payment received by it, in regard to the sub-contract and tender in issue in this case, was paid to it

through the main contractor. The Plaintiff did not raise any queries as to why it was not paid directly by the Defendant. That acceptance of payment through a third party, the Main Contractor, seems to add credence to the Defendant's position that there was absence of privity of contract between it and the Plaintiff. The issue of privity of contract is a triable issue and is one which should entitle the Defendant to unconditional leave to defend the suit, even standing on its own.

I have also considered the Plaintiff's claim in this matter. Prayer (a) claims Shs.6,533,748.25. At paragraph 7 of the amended plaint, the Plaintiff explains how the sum claimed is arrived at and avers as follows:

“The Plaintiff's claim against the Defendant is for Kshs.6,533,748.25 being the contract amount for breach of contract and in the alternative for Kshs.2,298,445.12 being the value certified as at 24th August 2006”.

Prayer (a) though liquidated is a claim in special damages for breach of contract. In the Court of Appeal decision of **Habib Zurich Finance (K) Limited vs. Muthoga and Anor. [2002] 1 EA 81, Omolo, Tunoi and Bosire JJA** held:

“General damages cannot be awarded for a breach of contract because damages arising from a breach of contract are visually quantifiable and are not at large”.

Regarding special damages, it is trite that they must not only be specifically pleaded but must also be specifically proved. See **Karauri vs. Ncheche [1995-98] 1 EA 84.**

Taking into consideration the legal position regarding breach of contract claims, the Plaintiff's claim in prayer (a) is a special damages claim which should go to trial and cannot be allowed in a summary procedure.

Regarding prayer (b) where the Plaintiff claims the value of certified works. Again, the Plaintiff admits that it was paid in part for services rendered to the Defendant. Taking into account that the entire services rendered by the Plaintiff in this matter was the subject of a tender, which is one single contract; considering that there was part payment for the services rendered and that the payment was effected through a third party, the prayer (b) of the Plaintiff's claim is not plain and clear or obvious. It ought not to be dealt with in a summary procedure as the one under consideration in this application. It is a matter that should go to trial.

Having considered this matter at length, I am convinced that there are triable issues raised in the Defendant's defence which entitle it to unconditional leave to defend. Further and alternatively, the Plaintiff's claim is not plain and obvious. It is not suitable for disposal in a summary procedure. Part of the Plaintiff's claim needs to be specifically proved in evidence.

Having come to the conclusion I have of this matter, I do find that the application dated 22nd February 2008 is not merited for reasons given.

The same is dismissed with costs to the Defendant.

Dated at Nairobi this 13th day of June, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Masika holding brief for Mr. Kinuthia for the Applicant

Ms. Adhiambo holding brief for Mrs. Mulekyo for the respondent.

LESIIT, J.

JUDGE