

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

Civil Suit 671 of 2005

MUGOYA CONSTRUCTION & ENGINEERING LTD..... PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....DEFENDANT

RULING

Before me is a notice of motion filed by the plaintiff pursuant to the provisions of **Order VI Rule 13(I) (b), (c) and (d)** and **Order XII Rule 6** of the **Civil Procedure Rules**. The plaintiff seeks to strike out the defence filed by the defendant and for the entry of judgment in its favour as prayed in the plaint. In the alternative, the plaintiff prayed for judgment to be entered against the defendant on admission for the sum of KShs.171,534,923/=. The grounds in support of the application are on the face of the application. The plaintiff contends that the defence is scandalous, frivolous and vexatious and at best intended to prejudice, embarrass or delay the fair trial of the suit. It was contended that the defence was otherwise an abuse of the process of the court. In the alternative, the plaintiff urged the court to enter judgment on admission against the defendant on the ground that the defendant had been notified of the work done but had failed to pay the plaintiff. The plaintiff contends that the defendant had no triable defence in so far as the said amount admitted was certified by its own quantity surveyor. The plaintiff stated that the quantification by the defendant's own agent with respect to the works undertaken in the project amounted to an admission. The application is supported by the annexed affidavit of Lawrence Muga, the personnel and administrative manager of the plaintiff. The application is opposed. Caroline Esendi Rakama, the legal officer of the defendant swore a replying affidavit in opposition to the application.

Before the hearing of the application, the parties to this application agreed by consent to file written submissions in support of their respective opposing positions. I have considered the pleadings filed by the parties in this application. I have also considered the said submissions made, including the oral submissions made before court. I have also considered the decided cases relied on by the plaintiff and the defendant in support of their respective cases. The issue for determination by this court is, firstly, whether the plaintiff established a suitable case for the striking out of the defence filed by the defendant. The other issue for determination is whether, failing to strike out the defence, judgment should be entered in favour of the plaintiff for the sum allegedly admitted by the defendant.

It is now trite that this court will not strike out a defence unless the said defence is so hopeless that it is incapable of raising any triable issues to the claim filed by the plaintiff. 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 **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 its suit against the defendant, the plaintiff is seeking judgment to be entered against the defendant for the sum of KShs.663,323,620/30 on the basis of an alleged unilateral termination of a construction contract by the defendant. The plaintiff claimed the said sum as the cost it incurred when it undertook works on the construction site before the contract was allegedly unilaterally terminated by the defendant.

In its defence to the claim, the defendant stated that the project that was the subject matter of the agreement was frustrated *inter alia*, when the Nairobi City Council failed to approve the drawings and the development plans prepared by the defendant's architect. It further stated that the project was frustrated when members of Karen/Langata Residents Association resisted the construction of a housing estate within its locality without a provision for a commercial centre. The defendant stated that due to budgetary constraints resulting from the change in the contract sum as a result of variation of the original plan to include a commercial centre, it was unable to proceed with the project as the same became financially unviable. The defendant stated in its defence that it notified the plaintiff of the cancellation of the project and had at the time of cancellation paid to the plaintiff the sum of KShs.91,232,450.55. The defendant denied that the plaintiff was entitled to the sum claimed in the plaint and therefore put the plaintiff to strict proof thereof. The defendant further contends that the plaintiff's suit was bad in law since it was statute barred.

From the documents annexed in support of the plaintiff's application for the striking out the defence, it is evidence that the basis of the plaintiff's suit was the valuation of the works that the plaintiff had undertaken at the site of the proposed housing project before it was terminated. There is a dispute concerning the manner in which the plaintiff arrived at the amount that it is claiming was the work done at the construction site before the contract was terminated. The plaintiff relied heavily on a report prepared on 13th April 2000 by Muambi Associates, quantity surveyors who assessed the amount to be paid to the plaintiff after the termination of the contract to be KShs.171,534,985.65. Although the plaintiff submitted that the said Muambi Associates were employed by the defendant as the quantity surveyors for the project, the defendant on its part stated that by the time the said firm of quantity surveyors quantified the works done by the plaintiff, they had ceased to be agents of the defendant.

I think the circumstances under which the valuation of the works undertaken by the plaintiff was assessed at the time the contract was terminated is a triable issue which can only be resolved after *viva voce* evidence has been adduced in a full trial. There is also dispute as to whether the defendant paid in full the works that the plaintiff had undertaken on the construction site before the contract was terminated. That is another triable issue which can only be resolved during the full hearing of the case. Upon carefully evaluating the facts of this case, it is difficult for this court to find in favour of the plaintiff at this stage of the proceedings without the benefit of oral evidence being adduced.

It is trite that where the defendant establishes even one triable issue, the court has no option but to grant the defendant unconditional leave to defend. In the present application, it is clear from the foregoing that the issues raised by the defendant in its defence are of such a weight that they can only be resolved in a full trial. The issue whether judgment can be entered on admission against the defendant for the allegedly admitted sum of KShs. 171,534,985.65 cannot be considered separately from the main claim made by the plaintiff. The defendant questioned the veracity of the entire claim in its defence. The two issues are therefore inseparable. The same shall be determined in a full hearing.

The upshot of the above reasons is that the plaintiff's application dated 6th October 2006 cannot be allowed at this stage of the proceedings. The same is hereby dismissed with costs to the defendant. The defendant is granted unconditional leave to defend the suit.

DATED at NAIROBI this 26th day of NOVEMBER, 2008.

L. KIMARU

JUDGE