REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 536 of 2005

MAVJI CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA BUREAU OF STANDARDS…..... DEFENDANT/RESPONDENT

R U L I N G

Before me is a Notice of Motion expressed to be brought under Order 35 rules 1, 2 and 9, Order 6 rule 13(1) (b) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant at the hearing of the motion abandoned prayer 1(a) and (b) of the motion and urged prayers 2, 3 and 4. Arguments were therefore narrowed down principally to the prayer for summary judgment for the plaintiff. The application is stated to be based upon the following principle grounds:-

1) That the defendant is truly indebted to the plaintiff in the sum of 76,074,240.00 as at 29.6.2005.

2) That the defendant's defence filed herein does not raise any bona fide defence to the plaintiff's claim.

3) That the defendant's defence filed herein does not raise any triable issues.

4) That the defendant's counterclaim has no basis in law and/or in contract.

The application is supported by an affidavit sworn by one Rayma Atieno Oloo, the General Manager of the plaintiff on 26.1.2006. The same General Manager also swore a supplementary affidavit on 21.5.2006. The application is opposed and there is in that regard a replying affidavit by one Joel K. Kioko the defendant's Nairobi Regional Manager. He has also sworn a further affidavit which was filed on 29.5.2006. I allowed the parties to file written submissions which they did and on 7.2.207 their respective counsels highlighted the same.

I have now considered the pleadings and the application including the affidavits on record and the Submissions of the Advocates. Having done so, I should determine whether or not on the material before the court the plaintiff is entitled to judgment summarily. I am alive to the principle that summary judgment cannot be entered unless the court is satisfied that there isn't even a single bona fide triable issue. The plaintiff therefore has the duty or onus to show that the defendant is indebted to it as claimed and the defence filed is not an answer to its claim. On the other hand if the defendant shows by affidavit, or by oral evidence or otherwise that it has triable issues and in my view even a single triable issue, it is entitled to leave to defend unconditionally.

The plaintiff's claim against the defendant is for the sum of Kshs.76,074,240.00 together with interest

thereon which claim is stated to be actual expenses incurred by the plaintiff in carrying out works as contracted by the defendant and certified by the defendant's architects. The claim is predicated upon a contract dated 16.5.1996 made between the plaintiff and the defendant vide which the plaintiff was to develop or construct Radiation Laboratories on the defendant's land in Nairobi. The Architects for the contract were M/s Tectura International and the Quantity Surveyors were M/s Shaque and Associates. On 25.5.2005, the said architects issued certificate No.924856 in respect of works carried out by the plaintiff but the defendant has without justification and in breach of the said contract refused to pay the plaintiff the sums owed and certified by the said architects to be due and owing to the plaintiff.

The defendant has filed a defence and raised a counterclaim. In the defence, the contract is admitted but the plaintiff's claim is denied. On the contrary the defendant has averred that as per a valuation or assessment carried out by the Ministry of Roads and Public works the final contract sum was Kshs.98,897,490.80 and the value of the work actually done by the plaintiff was Kshs.88,612,490.80. Yet the plaintiff had been paid Kshs.154,161,745.10 hence the plaintiff had been overpaid by Kshs.65,547,254.30. That is the sum the defendant counterclaims from the plaintiff.

The plaintiff filed its Reply and defence to counterclaim on 11.11.2005 in which it joints issue with each and every allegation in the defence and counterclaim. The plaintiff further reiterates the contents of the plaint and denies the breach of contract alleged in the defence and counterclaim and specifically avers that the defendant suspended the project due to its failure to pay the plaintiff and the subcontractors on the certificates raised by the said architect. There is also an averment that, the Ministry of Roads and Public Works were only observers and had no contractual role to play in the project and its valuation of the project is not binding upon the plaintiff. The overpayment alleged in the counterclaim is denied.

At the heart of the plaintiff's case is the issuance of various certificates by the project architects M/s Tectura International in respect of work done by the plaintiff culminating in Certificate No.22 for Kshs.78,682,126.17. According to the plaintiff that was a final certificate which is conclusive in respect of all works done by the plaintiff under the contract and creates a debt due and payable by the defendant to which the defendant does not have a tenable and bonafide defence. With respect to the interest claimed it is the plaintiff's contention that it was a term of the contract that unpaid certificates would attract interest at commercial bank lending rates in force during the period of default and as the defendant is in default, such interest has accrued.

The defendant's position is that the plaintiff wrongfully exceeded the contract sum by KShs.65,549,254.30 which it claims by way of counterclaim. In its view the final contract sum was KShs.98,897,490.80 and the plaintiff carried out work valued at Kshs.88,612,490.80 and having been paid KShs.154,161,745.10 an overpayment of the said sum of Kshs.65,549,254.30 has occurred. It contends that no final certificate has been issued to-date. And further that variations if any were effected may have been so effected unprocedurally and in contravention of the terms and conditions of the contract. The defendant further challenges the interest rate applied by the plaintiff and the period of delay taken into account. In the premises the defendant is of the view that its defence raises several bonafide triable issues.

The Agreement dated 16.5.1996 between the plaintiff and the defendant indicates the contract sum as KShs.195,799,895.50. But Certificate No.22 dated 25.5.2005 reflects the total sum as KShs.238,841,825.07. It would appear therefore that there were variations to the contract. The plaintiff argues that it relied upon representations by the defendant including the defendant's architect's subsequent instructions to modify the building specifications pursuant to Clause 11 of the contract and accordingly undertook substantial expenses in carrying out the work as specified. The material furnished by the plaintiff is not in my view sufficient at this stage to conclude that the requirements of Clause 11 of the contract were complied with.

With regard to Certificate No.22 dated 25.5.2005 which in my view is the foundation of the plaintiff's application, I have on a prima facie basis found as follows. The certificate was issued when the contract was terminated. Each party has its own view on when the contract was terminated. Correspondence on the subject stretches from mid 2003 upto mid 2005. In my view the certificate cannot be described as a

"***Final Certificate"*** as envisaged in Clause 30(6) of the contract. As to whether or not it will otherwise qualify as a true Final Certificate will depend on how the court will appreciate the diverse positions taken by the parties. I should say no more on this aspect of the application to avoid prejudicing the trial. The facts analysed herein distinguish this case from the case of **Darshan Singh Jagdish Singh Bansal T/A Oriental Steel Fabricators and Builders** [HCCC NO.1124 of 1999] UR. In that case a summary of Final

Account was signed by a representative of the defendant and the court specifically found that the sum in the certificate had been agreed. That is not the position obtaining in this case. The case of **Nairobi Golf Hotels (Kenya) Limited –vs – Lalji Bhimji Sangani Builders & Contractors [CA No.5 of 1997] UR** is also distinguishable from our case. In that case the Final Certificate was issued in accordance with the terms of the contract. It was the kind of certificate that would be issued under Clause 30(6) of the Agreement in this case.

It is illustrative that the document described as the final certificate in this case was not issued under that clause. Indeed the determination of the appeal in the **Nairobi Golf Hotels (Kenya) Limited** case depended on the court's finding that a Final Certificate had been issued under the contract. The Learned Judges of Appeal observed as follows at pages 3 and 4 of the judgment:-

"Conditions 1 and 2 confer on the architect a power to issue certificates. The principal purpose of certificates is to secure payment to the contractor of sums ***properly due to him under the contract*** or to express approval of work that has been done …….

The effect of a final certificate in a contract for works of construction will naturally depend on the terms of each contract." emphasis mine_

As I have already pointed out elsewhere on a prima facie basis the certificate relied upon by the plaintiff in this case was not a final certificate as envisaged by Clause 30(6) of the contract between the plaintiff and the defendant. The position in this case is therefore in my view different from the position the court of Appeal was faced with in the Nairobi Golf Hotels (Kenya) Limited case.

The decision in **Jones and Others –vs – Sherwood Computer Services Plc [1992] 2 All ER 170** is also distinguishable from this case. In that case the parties had specifically agreed that a third independent expert's determination of certain matters under a contract would be final and binding for all purposes save for fraud collusion or mistake. I have not been referred to any such provision in the contract exhibited by the partes in this case. In any event the contract herein at Clause (8) provides with regard to the finality or conclusiveness of any certificate under the contract as follows at page 32 of the agreement:

"**(8) Save as aforesaid no certificate of the architect shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this contract."**

It would appear therefore that in the present case a certificate of the architect would not be final and binding for all purposes as was the case in the **Jones and Others – vs – Sherwood Computer Services case (Supra).** The other cases relied upon by the plaintiff enunciated the correct principles of law but the facts in the same are clearly different from the facts in this case.

As the Court of Appeal held in the case of **Industrial and Commercial Development Corporation – vs - Daber Enterprises Limited [2000] 1 EA 75, *"summary procedure is applied to enable a plaintiff to obtain quick judgment where there is plainly no defence. Where the defence is a point of law and the court can see at once that the point is misconceived or if arguable plainly unsustainable, summary judgment will be given. Summary procedure should not be used for obtaining an immediate trial; the question must be short and dependent on few documents"*** I adopt those findings. It cannot be said that the defendant in this case has plainly no defence. It has also in my view another valid issue regarding the rate of interest applied by the plaintiff, I am afraid, I have not been able to determine the same from the material available to the court.

The document exhibited by both parties as "***Statement of Final Account Summary",*** indicates interest accrued on delayed certificates upto 28.2.2005 as KShs.51,107,516.36. The rate applied is not given. The period under consideration is only indicated as upto 28.2.2005 but commencement date from when it is charged is not given. Whereas the matter of interest is spelt out in the contract at Clause 30(1) (b), the plaintiff has to show the actual commercial bank lending rate it has used and for what period. It may have applied the legitimate rate and for valid periods of delay but in my view at this stage there isn't sufficient material to conclusively determine the matter now.

In the end I am unable to hold that the defence on record and the issues identified in the affidavits are not bonafide. The defendant may or may not succeed to establish the issues identified at the full trial. For now however having raised the issues I consider triable, it is entitled to its day in court.
This application for summary judgment is rejected with costs to the defendant.

DATED AND **DELIVERED** AT **NAIROBI** THIS **27TH** DAY OF **FEBRUARY, 2007.**

F. AZANGALA

JUDGE

27/2/2007

Read in the presence of: