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

Civil Case 169 of 2006

MENTOR GROUP LIMITED…….....…..……..PLAINTIFF/APPLICANT

VERSUS

JOHN ROKI WAITHAKA ……..……DEFENDANT/RESPONDENT

RULING

By an application by way of Summons in Chambers lodged on 8.9.2006, the plaintiff seeks two main orders of the court: that the statement of defence be struck out and that judgment be entered for the plaintiff against the defendant for the sum of KShs.16,608,400.00 plus costs and interest as prayed in the plaint. The application is expressed to be brought under order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is based on the following grounds:

(a) That the defendant's statement of defence is an abuse of the process of the court.

(b) That the defendant is truly indebted to the plaintiff in the said sum together with interest thereon at commercial rates from 26.11.2005 until payment in full and was so indebted at the commencement of this suit.

(c) That the defendant had bound himself under contractual duty to pay the plaintiff the said sum being fees for professional services offered by the plaintiff.

(d) That the defendant has no defence to the plaintiff's claim.

(e) That the defendant's statement of defence is an abuse of the process of the court as it seeks to import into the contract matters which are outside the contract and the said defence is otherwise frivolous and vexatious.

(f) That the statement of defence may prejudice, embarrass or delay the fair trial of the action.

The application is supported by an affidavit of one Daniel Ojijo the Managing Director of the plaintiff. It is deponed in the affidavit inter alia that on 2.8.2005, the plaintiff and the defendant signed a Project Management Contract upon which the defendant paid KShs.200,000.00 as deposit. It is further deponed that pursuant to the Project Management Contract (***hereinafter***) referred to as "***the contract"***) the plaintiff diligently executed its duties and obligations and the fruits of its labour are the project currently in

development christened "***Hill Crest Park".*** It is also deponed that at all material times, the defendant held himself out to the plaintiff as the owner of the land on which the project stood and the plaintiff was not a party to subsequent maneuvers to register the land in a third party's name and if that has been done the same was concealed from the plaintiff and is a scheme to circumvent the defendant's obligations under the contract. It is also deponed that the same scheme is perpetuated in the statement of defence where on the one hand the defendant claims there was no contract and on the other that the contract was purportedly terminated. It is further deponed that infact the said contract has never been terminated but the plaintiff was prevented from completing performance of its obligations under the contract by the acts of the defendant thereby wrongfully repudiating the contract. It is then deponed that the defendant subsequently requested for the plaintiff's invoice which was duly forwarded but has not been settled hence the suit.

The plaintiff filed a further affidavit on 9.11.2006. In that affidavit, it is deponed inter alia that for reasons unknown to the plaintiff the defendant assigned ownership of the property on which the project stood to a third party called Archer Dramond Morgan Limited in a bid to avoid his obligations in the contract. It is also deponed that the defendant being the Managing Director of the said third party company cannot explain away his liability to the plaintiff using the third party and that a contract cannot be frustrated by the deliberate designs and actions of one of the parties thereof calculated to force such frustration. It is further deponed that the defendant held himself out as owning the said third party and routinely used its stationary as well as loosely and or casually interchanged his capacity in the course of his interactions with the plaintiff.

The defendant has filed a replying affidavit. In it he depones inter alia that in anticipation of investing in a real estate project known as Hill Crest Park he executed the said Project Management Contract whose foundation disappeared when the defendant failed to secure ownership and possession of the project site. It is further deponed that the said third party took over the defendant's concept and acquired the project site thereby frustrating the contract between the plaintiff and the defendant which fact was well known to the plaintiff. It is then deponed that the said contract was discharged and the defendant introduced the plaintiff to the said third party but no formal agreement was executed. In the end the said third party terminated the services of the plaintiff by which time the plaintiff was paid KShs.200,000.00 as consideration on a ***quantum meruit*** basis for services rendered by the plaintiff to the said third party. It is also deponed that the said payment constituted full remuneration of the plaintiff. It is further deponed that the plaintiff indeed doubted who was liable to them. In any event, so the defendant depones, it is not plainly clear how the plaintiff has computed its claim of KShs.16,608,400.00 and its loss for the alleged breach of contract must be judiciously assessed. It is further deponed that the plaintiff has not demonstrated that the statement of defence is scandalous, frivolous, vexations or that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court. It is also deponed that it is not true that the plaintiff has suffered any loss and damage as at the time of the said contract the cost of the proposed construction was not ascertained and the sum of KShs.966,000,000.00 stated by the plaintiff is speculative and not factual or actual.

When the application came up before me for hearing on 31.5.2007 neither the defendant nor his counsel attended despite the fact that the date had been taken by consent. So only counsel for the plaintiff was heard. Counsel relied upon the grounds on the face of the application and on the facts in the two affidavits sworn by the plaintiff's Managing Director already referred to above. I have above adumbrated the salient features in the said affidavits and I need not reproduce the same.

I have considered the pleadings, the application, the affidavits both in support of the application and in opposition thereto together with the annextures thereto. I have also carefully considered the submissions of counsel for the plaintiff. Having done so, I take the following view of this matter. Order VI Rule 13 (1) (b) gives the court discretion at any stage of the proceedings to strike out or amend any pleading on the ground that it is scandalous, frivolous or vexatious. Sub-rule 13 (1) (c) gives the court similar discretion on the ground that the pleading may prejudice, embarrass or delay the fair trial of the action while under Subrule 13 (I1) (d) the court has a discretion to strike out or amend any pleading on the ground that it is an abuse of the process of the court.

My perusal of the defendant's statement of defence, does not detect any averment that can be described as scandalous, frivolous or vexatious. I have also not detected any averment that may prejudice, embarrass, or delay the fair trial of the action. The plaintiff is of the view that the statement of defence tries to import into the contract matters that are outside the contract and because of that it is an abuse of the process of the court. I am not persuaded that that is the case here for reasons that will follow shortly.

The invoice exhibited by the plaintiff as "***DO 5***" in support of this application is addressed to one Archer Drammond Morgan. Archer Drammond Morgan is not a party to these proceedings. Further correspondence exhibited by the defendant, clearly suggest that the plaintiff dealt with the entity called Archer Dramond Morgan Ltd in respect of the same contract. Annextures JRW 4, 6, 8 and 11 annexed to the replying affidavit are all from or on behalf of the plaintiff to the same entity and are in respect of the same claim. In my view, the fact that the correspondence was marked for the attention of the defendant cannot change the fact that at some stage the plaintiff directed its claim for settlement by the said entity. It is the same entity, which the defendant alleges in its statement of claim that took over the defendant's concept and acquired the project site and thereby frustrated the fulfillment of the contract. It is also the same entity which is alleged to have paid the plaintiff the sum of Kshs.200,000.00. To my mind therefore, the defence does not contain matters that are irrelevant to the plaintiff's action. For those reasons I am not persuaded that the statement of defence contains any averment that may prejudice, embarrass or delay the fair trial of the action.

The plaintiff sought reliance on the case of ***Morjaria – vs – Kenya Batteries [1981] Limited & others: [2002] 2 EA 479*** for the proposition that the internal management of a company should not concern a third party. With all due respect to counsel for the plaintiff the facts of that case are clearly distinguishable from the facts herein. In that case the defendants who had been advanced money by the plaintiff contended that the internal rules and regulations of the company had not been complied with in that the borrowing was unauthorized and further that the agreement was not executed properly by the company. That is clearly not the position here where the defence put forth is that a limited liability company with separate legal existence took over the defendant's concept and acquired the project site and consequently frustrated the fulfillment of the contract.

There was further reliance upon the case of ***Mbaka Road Development Co. Ltd – vs – Abdul Gaful Kana t/a Anil Kapuripan Coffee House HCCC No.318 of 2000 (UR)*** in which Ringera J as he then was observed that two persons cannot plead in the alternative in respect of the very same cause of action as the defendant and the limited liability company of which he is a director as such pleading would be contradictory and unmaintainable. Ringera J was dealing with a tenancy relationship and the Learned Judge was in my view perfectly right to hold that there can be no concurrent tenancies in respect of the same premises and there can be no question of tenancies in the alternative. Obviously, those facts are distinguishable from the facts of this case.

In ***Murri – vs – Murri & Another [1999] 1 EA 212*** which was also relied upon by the plaintiff, the Court of Appeal held that "***Summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable."*** In that case an application to strike out a Winding Up Cause was struck out by the High Court on the basis that the petition was lodged for improper purpose. The Court of Appeal dismissed the appeal, stating that the High Court Judge relied on facts which were not disputed and those admitted by the petitioner. Those are clearly not the circumstances obtaining in this case and in ***Kinyanjui & Another – vs – Thande & Another [1995 – 98] 2 EA 159*** relied upon by the plaintiff the Court of Appeal in allowing an appeal against an order declining to strike out a defence held as follows:-

"**The Respondent's defence was a sham which tended to prejudice, embarrass, or delay the trial of the action because it was upon the vendors to obtain the deed plain and sub-division. Even if the purchaser's helped in obtaining the same, the contractual obligation to obtain the same remained upon the vendors. They could not rescind the contract unless they could show a breach on the part of the purchasers even then they had to serve the requisite condition 26 notice of rescission which they never did."**

Those circumstances are radically different from the circumstances obtaining in this case. In this case, the issue as to who is liable is alive. The issue of the cost of construction has to be resolved. Indeed the very issue of rescission is alive. These basic issues were not indefinite in the case of ***Kinyanjui & Another – vs – Thande & Another (Supra).***

As stated earlier in this ruling, the defendant's statement of defence cannot be struck out for being scandalous, frivolous or vexatious nor can it be struck out on the basis that it may prejudice, embarrass or delay the fair trial of the action. I have also not been satisfied that it is an abuse of the process of the court.

In the end even though there was no appearance for the defendant at the hearing of the plaintiff's application, I am of the view that the plaintiff's application is not appropriate in the circumstances of this case. The application fails and is accordingly dismissed with no order as to costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF SEPTEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of Mungai for the plaintiff/applicant and Wachira for the defendant/respondent.

F. AZANGALALA

JUDGE

7/9/07