REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 151 of 2005

JULIUS MATASYO…….....…….…….PLAINTIFF

VERSUS

PYRETHRUM BOARD OF KENYA…….....…….DEFENDANT

RULING

The Plaintiff/Applicant, **Julius Matasyo** T/A Inter-Arch Consultants filed the Notice of Motion which is brought under *Order XXXV Rules 1 (1) (a), 2 and 8; Order VI Rules 13(1) (a) (b) (c) (d) Order L. Rule 1 of the Civil Procedure Rules.*

The applicant is seeking for an order of summary judgement against the defendant/respondent Messrs Pyrethrum Board of Kenya for the sum of Kshs.4,870,015 with interest thereon as prayed in the plaint.

The application is premised on the grounds that the defendant is well and truly indebted to the plaintiff in the sum of Kshs.4,870,015/= together with interest at the rate of 25% from 28th September, 2001 until payment in full.

Secondly, the claim is in respect of architectural works which the defendant commissioned the plaintiff to undertake on the defendants godown (**igloo store).**

Thirdly, the plaintiff completed the work and submitted its fee note for Kshs.5,270,015/= out of whom the defendant only paid Kshs.400,000/=.

Lastly the defendant's defence is a mere denial it does not disclose any triable issues between the plaintiff and defendant and it is merely intended to delay the expeditious disposal of this suit.

These grounds are further expounded by the matters deposed in the applicant's supporting affidavit sworn on 2nd December, 2005.

Briefly, the applicant contends that on 20th July, 2001, his firm the Inter –Arch Consultants were instructed by the defendants to carry out:

i. Architectural drawings (which will eventually be submitted to the Local Authority for approval)

ii. Structural drawings

iii. Electrical Adjustments drawings

iv. Bills of quantities mainly for future tendering purposes.

The defendants letter also stated that they would prefer that a structural Engineer, Quantity Surveyor, and Electrical Engineer be part of the team and the consultancy fees will be as stipulated in the relevant Acts.

The plaintiff appointed **Messrs Feradon Auctioneers** to acts as consultants for Electrical and Mechanical works of the project. The said Feradon duly accepted their appointment by the letter dated 11th September, 2001 and by a latter dated 20th September, 2001 they submitted the drawings and the bill of quantities as well as their fee note for kshs.385,035/55.

On 28th September, 2001, the plaintiff submitted the Drawings for the project as well as their consolidated fee note of Kshs.5,270,015/=. The said letter stated that:

"We are in the process of submitting the Architectural drawings to the local authority for approval."

The plaintiffs were paid Kshs.400,000/= on 22nd December, 2001 being part of payment for the work done. According to the plaintiff, the balance remained unpaid despite demand and several meetings wherein the plaintiff agreed to reduce the bill by 5%. The defendants merely requested to be granted more time to make some consultation and thus the plaintiff filed the present suit.

The defendant filed a defence which does not provide a reasonable defence. The defendant admitted having commissioned the defendant in the application 29th June, 2005 especially the affidavit of **Kevin Infanta Mpaka** and also the defendant requested for more time which constitutes admission of liability.

On the part of the defendant, the application was opposed, they filed grounds of opposition which raised the following issues.

Firstly, Counsel for the respondent drew the attention of this court to an application dated 5th May, 2006 which is seeking for the leave of this court to amend the defence.

Mr. Kagucia counsel for the defendant argued that it would be prudent and in the interest of justice that the application for amendment is heard before the present application. The said application, if allowed the proposed amended defence raises triable issues. However this request was declined by the Court for reasons that the application which was fixed for hearing is the notice of motion dated 2nd December, 2005 which had been fixed for hearing on 16th January, 2006. The Court has therefore noted the existence of this application which is on record.

The second issue raised by Mr. Kagucia in opposition of the application was to do with the manner in which the Notice of Motion is brought to Court through what he termed as an omnibus provisions of the Civil Procedure Rule. He submitted that if the application is brought under **Order VI Rule 13(1) (a)** the said orders cannot be granted on affidavit evidence.

The other issue raised in the said grounds is that the payment of Kshs.400,000/= was made in full settlement of the services rendered. Furthermore the Chief Executive Officer could not bind the defendant, financially for more than Kshs.500,000/= . It was therefore, submitted that contract was fraudulently executed without the defendant's authority and/or approval for reasons amongst others that the applicant had no capacity to deliver work worth Kshs.5,270,015/= in two weeks.

I have carefully considered the submissions made by the parties and the authorities cited although same may not be reproduced herein, due consideration has been made of them. Under the Provisions of *Order XXXV Rules 1(1) and 2 of the Civil Procedure Rules.*

1. (1) In all suits where a plaintiff seeks judgement for

a) a liquidated demand with or without interest…

b) ……..

(2) Where the defendant has appeared the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest,…….

2. (1) The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

In this case the plaintiff's claim is liquidated and the summary judgement relates to the entire claim by the plaintiff and that is why counsel also invoked the provisions of Order VI Rule 13 which deals with the striking of the defence if it discloses no reasonable cause of action or defence. I am satisfied that the application is properly before me. The issue to resolve is whether the defendant has shown "***either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit."***

The defendant filed the grounds of objection and he also field an application seeking for leave to amend the defence.

I have gone through the claim by the plaintiff, it is trite law that inorder for a plaintiff to obtain summary judgement without trial, his claim should be clear and the defendant is unable to set up a bonafide defence of raise an issue against the claim which ought to be tried (***See Supreme Court Practice 1985 VI page 136).***

The plaintiff's claim involves the payment of bills for provision of consultancy services. I have gone through the documents in support of the application and I have not seen any admission which is clear and unambiguous. I notice, there were negotiations and discussions and the building plans were to be submitted for the approval of the local authorities. It is not clear whether the bills were agreed upon as being the fees chargeable under the relevant Acts, or whether the Architectural drawings were approved by the local authority simply put whether the instructions were fully carried out. There are issues also raised by the defendant in the proposed amended defence. As I stated earlier the provision of order 35 is wide and allows the defendant to show a defence in any way.

Thus this court can also look at the record to see what the defendant has filed. The upshot of the above analysis is that I am not satisfied that the plaintiff at this stage has a very plain and obvious case. It was held in the case of *(Hoitram -Vs Horti E.C. Nazali 1982 – 1988 1 KAR 437).*

"***A plain and obvious case even if established after substantial argument or analysis of documents entitled a plaintiff to judgement on admission…… For the purposes of*** *Order 12 Rule 6* ***admissions can be express or implied either on the pleadings or otherwise e.g. correspondence, admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgement being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning……."***

Having said that, I would disallow the application and order that costs be in the cause.

It is so ordered.

Ruling read and signed on 21st July, 2006.

MARTHA KOOME

JUDGE