



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

Civil Suit 457 of 2005

KEPHAH MAINA WANGAI t/a KEPHAH CONSULTANCY.....PLAINTIFF

VERSUS

DONWOODS COMPANY LIMITED.....DEFENDANT

RULING

The defendant entered into a contract with the Government of Kenya through the Ministry of Roads and Public Works in which the defendant agreed to undertake three projects, namely, Mathare Nyayo wards, Administrative Police Training College at Embakasi and at Loitokitok Border Post.

The Government breached the aforesaid contract whereupon the plaintiff entered into an agreement with the defendant, in which the plaintiff agreed to render to the defendant quantity surveying professional services in relation to the contractual work that the defendant had carried out for the Government of Kenya.

The professional services that were undertaken by the plaintiff included studying the contract documents, visiting the sites, reviewing works performed by the defendant, preparation of periodic appraisals, preparing and updating contractual claims, carrying out negotiations and settling with the Ministry of the Roads and Public Works.

The plaintiff submitted that as a consequence of the plaintiff's aforesaid services the defendant entitlement from the Government was determined to be kshs 215, 275, 402. 75.

The plaintiff submitted that in accordance with the agreement between him and the defendant, the plaintiff was entitled to 5% of the kshs 215, 275, 402. 75, the amount payable by the Government to the defendant. The 5% of that figure is kshs 12, 330, 000/-.

Plaintiff argued that although this amount was demanded from the defendant the defendant failed to pay the same but had only paid kshs 1, 550, 000/- leaving a balance owing of kshs 11, 080, 000/.

The plaintiff filed the present for recovery of the said sum of shs 11, 080, 000/-.

The defendant in its defence denied indebtedness for the amount of shs 11, 080, 000 then stated in paragraph 3 of the defence that: -

“.....The defendant denies that the sum claimed by the plaintiff in paragraph 5 of the plaint are due as alleged or at all and states that the plaintiff is estopped from claiming any sum in excess of Kenya Shillings Three Million Nine Hundred and Eighty Thousand One Hundred and Seventy two

which sum was acknowledged by the plaintiff as the only outstanding, if any”.

The plaintiff filed an application by way of Notice of Motion brought under Order XXXV Rules 1 and 2 and Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The plaintiff seeks an order:

“That the defence herein dated 16th September, 2005 be struck out and judgement be entered for the plaintiff against the defendant as prayed for in the plaint herein”.

Plaintiff’s counsel argued that the defence is a sham and was bogus. That in an application such as the one filed by the plaintiff the burden was upon the defendant to show that it had an arguable defence. Plaintiff in support of that argument cited the case GUPTA – V – CONTINENTAL BUILDERS LTD K.L.R. [1978] where Madan J.A stated: -

“It seems illogical, as well as devoid of common sense, to say that a plaintiff should not be able to apply for immediate summary judgment of a liquidated debt or demand to which the defendant has no defence.....”

Plaintiff also relied on the case GICIEM CONSTRUCTION COMPANY – V – AMALGAMATED TRADES & SERVICES [1983] KLR where it was held:

“The object of order XXXV of the Civil Procedure Rules is to enable the plaintiff with a liquidated claim, in which the defendant has no reasonable defence to a quick judgement without being subjected to a lengthy unnecessary trial.”

Plaintiff other authority was the case of GOHIL – V – WAMAI [1983] KLR where it was held:

“The burden is on the defendant to satisfy the court that he is entitled to leave to defend to the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit, he must go further and show that the defence is genuine or arguable or raises triable issues.”

Plaintiff said that the defence raised an issue that the plaintiffs payment was dependant or conditional on the defendant receiving its payment from the Government. Plaintiff denied that his payment was conditional on defendant payment by the Government. He submitted that the two contracts were different.

Plaintiff further emphasised that the defendant had admitted being indebted to the plaintiff for the amount of kshs 3, 980, 172, but qualified this by saying that the agreement of that figure did not mean that the plaintiff did forego the whole claim.

The plaintiff sought that the court will find that the defendant’s defence does not raise any triable issues and that judgement be entered for the plaintiff as prayed in the plaint.

Defence opposed the application and began by stating that although the plaintiff sought the striking out of the defence and the entry of summary judgement that the application was essentially for summary judgement.

He said that the defence accepts that it has a burden to show that the defence raises triable issues and once such triable issues were shown the defendant was entitled to leave to defend.

Defendant submitted that the contract between the plaintiff and defendant was an oral agreement and therefore cautioned against entry of judgement. He cited the case of GICIEM CONSTRUCTION COMPANY – V – AMALGAMATED TRADE & SERVICES (supra) one of the holding as follows: -

“It is dangerous to give summary judgement in a case such as this where it involves an oral agreement and each party alleges different varied terms and conditions of the agreement, as this

automatically raises triable issues.”

Defence counsel submitted that the defendant did not deny that the plaintiff was engaged by the defendant nor was it denied that the plaintiff rendered services to the defendant. But he contended that the amount payable to the plaintiff was conditional to the defendant being paid by the Government.

Defence then referred to a letter signed by the defendant and the plaintiff dated 1st November 2004, which he said was proof that the parties agreed the amount payable to the plaintiff was kshs 3, 980, 172/- and that the plaintiff was not entitled to seek more than that amount.

I have considered the submissions by counsels and the affidavits filed herein. Indeed the correct principle is that when a party shows triable issue, the only thing left for the court to do is, to grant unconditional leave to defend.

The plaintiff pleaded that by an agreement he rendered quantity surveyor’s services to the defendant but the plaintiff did not annex a written agreement to that effect. It would be, in the court’s view every unsafe to enter summary judgement on claim of oral agreement, where the parties are not in agreement on the terms of that agreement. That as it may be I find and I hold that the defendant in its defence admitted being indebted to the plaintiff kshs 3, 980, 172/-. That amount is indeed also reflected in the letter dated 1st November 2004. That letter in part stated:

“RE PROFESSIONAL FEE IN RESPECT OF A.P.T.C EMBAKASI, LOITOKITOK AND MATHARE NYAYO WARDS SETTLEMENT BY MUTUAL AGREEMENT

We acknowledge receipt of your letters dated 23/9/2004 and 11.10.2004. Refer also to the subsequent reconciliation meeting of your account with our Mr Muli.

We wish to confirm that the following figures were arrived at during the said meeting:
.....

Total fees payable3, 980, 172

Further note that we affirm our undertaking as earlier agreed mutually to settle your outstanding account in instalments of kshs 300, 000 monthly....”

That letter was signed by the defendant and at the bottom was the following statement:

“I Mr Kepha Maina Wangai concur with the above calculation done jointly with Mr Muli on behalf of DON – WOODS CO. LTD.”

The plaintiff signed after that statement.

Having considered the pleadings hereof, the affidavit and the parties submissions I find that there was unequivocal admission of the plaintiff’s debt by the defendant for the amount of kshs 3, 980, 172 and accordingly the plaintiff is entitled to judgment for that amount. The balance of the plaintiff’s claim shall go to full trial. That amount will attract interest at court rate from the date of filing this claim until payment in full.

The order of this court is

- (1) That judgment be and is hereby entered for the plaintiff against the defendant for kshs 3, 980, 172 plus interest at court rate from the date of filing of this suit until payment in full.**
- (2) The balance of the plaintiff’s claim shall go to full trial.**

(3) The plaintiff is granted half the costs of the Notice of Motion dated 27th October 2005.

MARY KASANGO

JUDGE

Dated and delivered this 10th day of July 2006.

MARY KASANGO

JUDGE