REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 120 of 2005

KARURI CIVIL ENGINEERING (K) LTD …..….....…….…...PLAINTIFF

VERSUS

BUNGOMA MUNICIPAL COUNCIL …….....….……DEFENDANT

RULING

By an application dated 6th April 2005, the plaintiff is asking this court to grant it summary judgement. It is the plaintiff's case that the Defence herein was a mere denial, a sham which was frivolous; and does not therefore raise any triable issues.

Basically, the claim herein is in relation to the unpaid balance of fees which were charged by the plaintiff, for work which it had rendered to the defendant.

In order to have a better understanding of the case, it is important to note that in 1992, the Defendant entered into a contract with the Plaintiff, for the construction of the Bungoma Sewerage Project. As the work was being carried out, certificates were being issued to the plaintiff to confirm the work already done, so that the value therefore could be paid for. In that regard, there were a total of nine certificates.

It is the plaintiff's case that the defendant paid for eight of the certificates, but failed to settle the certificate number 8. That certificate was said to be in the sum of Kshs.7,442,082/73, hence the claim for that sum.

When canvassing the application, the plaintiff submitted that it was a term of the contract between the parties herein that the plaintiff would raise statements of account after each certificate was issued by the defendant. In line with the terms of the contract, the plaintiff says that it issued a statement of account. However, although the plaintiff intimated that the relevant statement of account was annexed to the affidavit of Mr. John Kariuki, as Exhibit "JK3", upon my perusal of that exhibit, I did not find any statement of account.

The absence of the statement of account, by itself, would not however, derail the application herein. I say so because if there is sufficient evidence to sustain the plaintiff's claim, the fact that the statement of account was not annexed could not, by itself, defeat the claim.

Now, the plaintiff has exhibited a letter which it wrote to its bankers on 5th July 2000. The said letter was actually written on the plaintiff's behalf, by their advocates, M/s Amolo Gacoka.

By that letter, the plaintiff was asking its bankers if their account had been credited with a payment of Kshs.7,442,083/73. In response, the plaintiff's bankers wrote back on 17th July 2000, indicating that they had no evidence that the sum in issue was ever received by the bank, for the plaintiff's account.

Following that response, the plaintiff says that it approached the defendant as well as the Ministry of Local Government, seeking payment. It is said that the defendant and its agents then wrote to the project financiers, requesting them to remit the money that was due to the plaintiff. Notwithstanding those letters, the plaintiff says that it did not receive payment. In those circumstances, the plaintiff reiterates its demand for payment in respect to the certificate No. 8, and asks the court to grant it judgement as prayed in the Plaint.

In **GOHIL –VS- WAMAI [1983] KLR 489 at 496,** the HON CHESONI AG. J.A. held as follows;

"The basis of an application for summary judgement under order XXXV is that the defendant has no defence to the claim *(Zola & Another –vs- Ralli Brothers Ltd. & Another [1969] EA 691).* Rule 2 (1) of Order XXXV requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely state 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. He must show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice."

In this case, the plaintiff has exhibited a contract No. WW/LA.762, which is between the plaintiff and BUNGOMA MUNICIPAL COUNCIL. The said contract was for the construction of the "Bungoma Sewerage Scheme".

The defendant now contends that the virtue of the provisions of Section 12 of the Local Government Act, it is distinct from the body corporate envisaged by statute. Section 12 (3) of that statute stipulates as follows;

"Every municipal council shall, under the name of "The Municipal Council of …..", be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time), and shall by such name be capable in law of suing and being sued, and of acquiring, holding and alienating land."

From the foregoing statutory provisions, the body corporate who was capable of suing and being sued was "THE MUNICIPAL COUNCIL OF BUNGOMA", as opposed the "BUNGOMA MUNICIPAL COUNCIL",

Does that give rise to a triable issue?

I do not think so. First, at paragraph 2 of the Defence, it is expressly stated that the defendant admits, inter alia, the description which it was given in paragraph 2 of the Plaint. The said description is to the effect that;

"The Defendant is a Municipal Council duly instituted under the Local Authorities Act."

Having admitted that description of itself, I cannot understand how the defendant can now make its status, an issue for determination at the trial.

Secondly, even in the replying affidavit of Mr. Aineah O. Indakwa, the deponent states that he is the Town Clerk to the Defendant. Thereafter, he goes ahead to acknowledge the fact that in the year 1992, a contract was executed, for purposes of having the plaintiff herein, **"construct waste stabilisation ponds for sewerage treatment and sewer lines within the areas of the jurisdiction of the Defendant i.e. Bungoma Municipality."**

Given those express admissions by the defendant, I find that no triable issue arises herein as regards the legal status of the defendant.

However, I hasten to add that if the defendant had, in its defence, challenged the plaintiff on the issue as to whether or not the defendant was competent when sued as Bungoma Municipal Council, I would have come to a different conclusion on that issue.

The other issue raised by the defendant was the fact that there was in existence, another suit, between the same parties herein.

It is to be noted that in the Plaint, the plaintiff had averred that;

"there is no other suit pending and/or that there have been no previous proceedings between the plaintiff and the defendant over the same matter."

It now transpires that there was another case, being: **HCCC NO. 1410 OF 2000, KARURI CIVIL ENGINEERING LTD. –VS- BUNGOMA MUNICIPAL COUNCIL.**

As I understand it, the plaintiff is saying that that case had been concluded, following the settlement of the money claimed thereby. Following the conclusion of that other case, the plaintiff says that it cannot be barred from prosecuting this suit.

The defendant however says the said other suit had not been concluded. However, neither of parties placed any material before the court, from which I could make a conclusive finding as to whether or not the suit had been concluded. If anything, the plaintiff appears to be unclear as to the status of the case, because, whereas their advocate submitted that the suit had been "concluded", the plaintiff's Managing Director swore an affidavit, stating that the suit had been "abandoned".

To my mind, abandonment is not synonymous with conclusion. Abandonment implies that the case continued to be in existence, although the plaintiff therein was no longer interested in pursuing it. On the other hand, once a case was concluded, the same would have been determined or brought to an end.

As the plaintiff's advocate has made his statement under oath, I will accept his word on that aspect of the matter. Therefore, that would imply that there were two ongoing cases, involving the same parties.

A perusal of the Plaint in HCCC No. 1410 of 2000 reveals that it was in respect of the "amount of final payment". And, in the breakdown of the figures which eventually give rise to the said "amount of final payment," the plaintiff cites, inter alia, the issue of delayed payments on certificates numbered 04 to 08.

Bearing in mind the fact that at paragraph 9 of the Defence herein, it is asserted that the case relates to the same subject matter as in HCCC NO. 1410/00; and bearing in mind the citation of certificate No. 8 in that other case, I find that that gives rise to a triable issue. The plaintiff would have to demonstrate, at the trial, how and why this suit is deemed to be dealing with a subject matter that was different from that in the other case, wherein certificate No. 8 was cited. The plaintiff would also need to explain how it was making a claim for a final payment; if it had not taken into account the payment of the certificate No. 8, which was one of the interim certificates.

Having made that finding, there would be no need for any further analysis of the submissions herein, because the existence of any one triable issue was sufficient to entitle the defendant to defend the suit at the trial. However, I feel that it is important to point out two more matters which also give rise to triable issues.

The first of those arises from paragraph 3 of the Defence. It raises the question as to whether or not the defendant would be liable to settle the sum claimed, simply because it was a party to the contract in issue. The defendant is said to have issued various certificates, including the one which is No. 8. The defendant has denied issuing the alleged certificate No. 8. The defendant has further denied any liability

in respect to that certificate. Therefore, the plaintiff would need to prove that the defendant issued the certificate, and that it is liable to the plaintiff for the same.

The need for the said proof stems from the defendant's contention that certificates are ordinarily issued by Engineers, and then authenticated by architects. If that is the position generally, and as the defendant has denied issuing the certificate in issue, the plaintiff would need to prove that the certificate was issued by the defendant.

Furthermore, in the light of the correspondence between the plaintiff on the one hand, and the Ministry of Local Government, and also the Ministry of Land Reclamation, Regional & Water Development, on the other hand, the plaintiff would need to prove that the defendant was not simply a beneficiary of the project. The reason for so saying is that the plaintiff did obtain payments directly from the Government or from the African Development Bank. Similarly, the plaintiff did make demands directly on the two ministries above-named.

That being the case, the question that would need to be answered is why the defendant was being asked to make payment for certificate No. 8, whereas for the other certificates, the plaintiff looked for and obtained payment from other persons.

The other issue arises from the Defence, which asserts that the suit was time-barred. By its own assertions, the plaintiff says that the work was done prior to 24th October 1995. If that be the case, it is probable that the claim herein would run foul of the provisions of Section 3(2) of the Public Authorities Limitation Act (Cap 39). That section provide as follows;

"No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued".

In this case, whether the plaintiff feels that its cause of action accrued in 1995 (by which date the plaintiff was already making demands for payment), or even if the plaintiff feels that the cause action accrued in July 2000 (when its own bankers notified them that the defendant had not remitted payment), the plaintiff would still need to justify the fact that this suit was filed on 8th March 2005. That therefore becomes yet a further triable issue.

In the light of the triable issues arising from the Defence herein, the defendant has discharged the burden of satisfying the court that it should be granted unconditional leave to defend the suit. This is certainly not a plain and obvious case, on which summary judgement should be entered. Accordingly, there is no merit in the plaintiff's application for summary judgement; the application is therefore dismissed with costs.

Dated and Delivered at Nairobi this 4th day of July 2006.

FRED A. OCHIENG

JUDGE