



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 74 of 2006**

**INNOCENT OBIRI MOMANYI t/a QUANTECH CONTRACTORS LTD...PLAINTIFF**

**VERSUS**

**NARU PILLING & GEOTECHNICAL CONTRACTORS LTD. ....DEFENDANT**

**R U L I N G**

In a plaint dated 15.2.06 and filed on 27.2.2006 the plaintiff herein is claiming Kshs.1,807,882.45 being the amount due and owing to the plaintiff by the defendant for services of quantity surveying consultancy fees. The plaintiff also claims compensation for breach of contract by the defendants. The foundation of the plaintiff's claim is an agreement whereby the plaintiff was to offer and indeed offered to the defendant consultancy services on Olkaria II Geothermal Power Project OG-105 at an agreed fee of 2.5.% of the approved claim. The plaintiff raised a fee note of Kshs.1,882,882.45 of which the defendant paid Kshs.75,000.00 leaving a balance of Kshs.1,807,882.45 which is being claimed herein. The plaintiff has further averred that the defendant has admitted his claim but has willfully neglected and or refused to pay the plaintiff.

In the defence filed on 20.4.2006, the defendant avers that the sum of Kshs.75,000.00 it paid was strictly on account but the claim for Kshs.1,882,882.45 is denied. The defendant also avers that no claim for general damages for breach of contract can stand in law. Whereas the defendant in paragraph 3 denies the agreement pleaded in the plaint in paragraph 6 the agreement is admitted save that the plaintiff was to be paid once the claim was approved and honoured by the main contractor. It is next averred that the main contractor M/S Zakhem Construction (Kenya) Limited has not honoured the claim and the defendant has filed HCCC No.44 of 2006 claiming Kshs.45,248,930.00 and USD 4063.60 in respect of expenses incurred and Kshs.17,308,161.00 in respect of variation to be undertaken by the defendant. In the premises the defendant avers that the plaintiff's claim is premature and is not payable as its claim has neither been approved nor has it been paid by the main contractor.

The plaintiff filed his reply on 3.5.2006 in which it joins issue with the defendant's defence save where the defence consists of admissions. The plaint further avers that its agreement with the defendant was independent of the main contractor's agreement with the defendant and he was to be paid immediately after finalization and submission of the contractual claims. Further, payment of his fees was not conditional upon payment by the main contractor.

At the close of the pleadings the plaintiff has brought this application seeking that the defence be struck out as it discloses no reasonable defence, it is frivolous and vexatious, it is contradictory and inconsistent and it is otherwise an abuse of the process of the court especially as the defendant has acknowledged the plaintiff's claim and does not dispute it. The plaintiff further seeks that judgment be entered in his favour as prayed in the plaint. The application is supported by an affidavit sworn by the plaintiff and two annexures to the same affidavit.

The defendant has filed no replying affidavit or Grounds of Opposition. The application was therefore heard ex-parte on 26.10.2006 as neither the defendant nor its advocates attended the court.

I have considered the pleadings, the application, the supporting affidavit and the submissions of the plaintiff's counsel. Having done so I take the following view of this matter. As the plaintiff abandoned

his claim for general damages for breach of contract the remaining claim is for a liquidated demand of Kshs.1,807,882.45 being balance of amount due to the plaintiff from the defendant for quantity surveying consultancy fees. Against this claim the defendant's written statement of defence is in reality an admission. The averment in paragraph 6 of the defence puts this beyond controversy. In that paragraph the defendant admits that it verbally agreed that the plaintiff would provide consultancy services to it and would be paid 2.5% once the claim was approved. This averment is inconsistent with paragraphs 3 and 4 of the same defence. Yet it is not pleaded in the alternative. The averments in paragraphs 7 and 9 of the defence read with annexure "OM 1" exhibited in the supporting affidavit show that the defendant owes the plaintiff the sum claimed in the plaint.

What I have said above in effect means that I agree with the plaintiff that the defence is not serious. The contract between the defendant and its main contractor and payment of the plaintiff's fees could not be conditional upon payment by the main contractor to the defendant. A defence which is not serious is also frivolous and vexatious and does not disclose a reasonable defence. It is also an abuse of the process of the court. The above findings, coupled with the fact that no replying affidavit or grounds of opposition have been filed by the defendant, leaving the evidence contained in the plaintiff's supporting affidavit uncontroverted incline me to accede to the plaintiff's application which I hereby allow. The defence is struck out. Judgment is entered for the plaintiff for the sum of Kshs.1,807,882.50. Costs of the suit and this application to the plaintiff.

Orders accordingly.

**DATED** and **DELIVERED** at **NAIROBI** this 27<sup>th</sup> day of November 2006.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:- Mr. Odongo for the plaintiff.

**F. AZANGALALA**

**JUDGE**

**27/11/06**