

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI COMMERCIAL DIVISION – MILIMANI

CIVIL CASE NO.404 OF 2004

LIFELINE ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

RULING

In a Plaintiff filed on 19th July 2004 the Plaintiff claims against the Defendant a liquidated sum of Kshs 14,344,460.50 for breach of a contract of maintenance services by which agreement the Plaintiff was to execute, complete, maintain and install lighting in the Central Division of the Defendant at a consideration of Kshs 24,973,490.50. It is averred that the Plaintiff executed up to about 80% of the works but had sourced and imported street lighting fittings worth Kshs 7,305,000 by the time the Defendant breached the agreement. It is further averred that as a result of the Defendant's breach the Plaintiff has suffered loss and damage in terms of loss of the value of the imported materials, interest on delayed payments, loss of anticipated profits, direct expenses, costs, additional preliminaries and retention money. Particulars of the claim are given.

On 16th August 2004, the Defendant filed a defence. The Defendant avers that the Plaintiff failed to perform its part of the contract and stopped work after it was paid a substantial sum of money by the Defendant. The Defendant further denies that the Plaintiff performed or executed 80% of the works as alleged. The breach and particulars of loss are also denied. There is also a challenge to the jurisdiction of the Court.

It is against that background that the Plaintiff by its Chamber Summons dated 25th October, 2004 moves the Court to strike out the defence on the ground that the defence is an abuse of the process of the Court and that judgment be entered as prayed in the Plaintiff. The Chamber Summons is supported by an affidavit sworn by one Parminder Panesar the Managing Director of the Plaintiff. The Application is opposed and there are Grounds of Objection. The Application was canvassed before me on 18th May 2005 by Mr. Kabaka, Learned Counsel for the Plaintiff and Mr. Mussilli, Learned Counsel for the Defendant. I have considered the Pleadings, the Application, the Affidavit in support of the Application, the Grounds of Opposition and the Submissions of Counsel. I have come to the conclusion that this is not a matter for summary adjudication under order 6 Rule 13 (1) (d) of the Civil Procedure Rules.

First, the Plaintiff has stated that it has executed 80% of the works and was paid for the same. This statement is in the grounds set out in the body of the Chamber Summons. In the Supporting Affidavit, however at paragraph 5 the Plaintiff's Managing Director deponed that the Plaintiff performed 80% of the works and was partly paid for the same. What immediately becomes an issue to be resolved and which the Plaintiff is not candid about is how the Plaintiff arrives at the percentage of 80% executed works. Secondly, even if the Plaintiff had shown how the percentage of the works performed had been calculated or evaluated it is not clear from its own papers whether the Defendant paid for the completed works or only part thereof and if only part was paid for how much of the executed works was paid for by the Defendant.

Thirdly, the Defendant has pleaded that the Plaintiff failed to perform its part and instead stopped work after it was paid a substantial sum of money by the Defendant. The Plaintiff in its reply insists that it was within its contractual rights to suspend or stop performance of the contract if and when the Defendant

refused and/or delayed in honouring the payments of the interim certificates. The issues that spring from these averments are whether or not the Plaintiff was entitled to suspend or stop performance, whether or not the Defendant delayed in its payments and if there was delay how much loss did the Plaintiff suffer and at what rate?

The Plaintiff has also pleaded that it imported materials from Britain to accomplish the works but the Defendant has refused to pay and the materials are still in stock and cannot be utilized by the Plaintiff elsewhere. The issues that emerge from this pleading are: whether or not the said materials could only be sourced in Britain; whether or not they cannot be utilized by the Plaintiff elsewhere and what is the resultant damage of this aspect of the Plaintiff's claim.

The Defendant in its Grounds of Opposition has also challenged the validity of the documents relied upon by the Plaintiff. This challenge, raises substantial issues of Law in respect of the validity of the contract. What I have said above shows that the material availed disclose bona fide triable issues and it would not be right in the circumstances to strike out the defence on the ground that it is an abuse of the process of the Court or on any other ground under the provisions of Order VI Rule 13 (1) of the Civil Procedure Rules.

In the end, the Plaintiff's Chamber Summons dated 25th October, 2004 is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-