



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT 685 OF 2004

WAMUYU DECORATORS COMPANY LIMITED.....PLAINTIFF

VERSUS

MUGOYA CONSTRUCTION & ENGINEERING LIMITEDDEFENDANT

RULING

The plaintiff filed its plaint on 22nd December 2004. A defence was filed on behalf of the defendant by the firm of Esmail & Esmail Advocates on 8th February 2005 after having filed a memorandum of appearance on 14th January 2005. Another defence was filed on behalf of the defendant on 14th February 2005 by the firm of Gichuki King'ara & Co advocate after having filed a memorandum of appearance on 27th January 2005.

The plaintiff has moved this court under section 3A of the Civil Procedure Act, Order III rule 1, Order VI rule 13 (1) (b), (c) and (d), Order IX rule 3 (1), Order XXXV rule 1 and 2 of the Civil Procedure Rules.

The defendant was the main contractor in the NSSF Housing complex of Embakasi phase I and II. The defendant engaged the plaintiff as a sub contractor to render the services of paintwork on the aforesaid complex. The plaintiff's claim against the defendant is for kshs 896, 528 being the consideration for the paintwork undertaken; by the plaintiff; and general damages for the defendant's breach of contract by unilaterally stopping the sub contract.

The plaintiff by its application seeks orders that: -

- The defendants defence filed in court on 8th February 2005 be struck out and judgment be entered in favour of the plaintiff;
- The defendant's defence filed on 14th February 2005 be struck out and judgment be entered in favour of the plaintiff.
- Summary judgment be entered for the plaintiff against the defendant.

I will begin by dealing with the 2nd defence filed by the firm of Gichuki Kingara & co advocates on 14th February 2005. It is clear that the rules do not envisage nor permit a defendant to file two different defences. The filing of the 2nd defence was obviously an abuse of the court process and the court has inherent power to prevent abuse of its process. The managing director of the defendant stated in his replying affidavit; **“That the firm of Gichuki Kingara & Company Advocates have no instructions from me or the company to act for the defendant.”** He however fails to state what action the defendant

has taken against this firm's action of filing a defence without its instructions. I think that lack of explanation as aforesaid is clear that the said firm filed the 2nd defence on the instructions of the defendant. That being my finding, and indeed accepting the argument of the plaintiff, that the 2nd defence is an abuse of the court process, I will order that it be struck out together with memorandum of appearance filed on 27th January 2005 with costs to the plaintiff.

Learned counsel for the plaintiff in support of the application argued that the defence filed, on 8th February 2005, raised no triable issue, which can go to trial. The defence in opposition filed two affidavits. One affidavit was filed by the managing director of the defendant, whilst the other was filed by Felix Nganga Karanja, the advocate having the conduct of this matter on behalf of the defendant. The plaintiff's counsel argued that the affidavit of defence counsel should be struck off because counsel swore to matters that are in contention and he failed in stating the source of his information. I believe this is a valid point raised by the plaintiff's counsel. Defence counsel in paragraph 7 of the said affidavit swore to matters that are very pertinent to the issues in this suit and indeed failed to disclose its source and at worse by paragraph 7 (a) seemed to contradict paragraph 2 of the defendant's defence. I will uphold the plaintiff's prayer and do hereby strike out the replying affidavit sworn by Felix Nganga Karanja filed in court on 10th June 2005.

There were contending submissions made before me in regard to the contract between the plaintiff and the defendant. I am however satisfied that the defendant by the letter annexed to the defendant's managing directors affidavit marked as "JI 1", the defendant admitted the plaintiff's liquidated claim. The said letter clearly quoted this case and the pertinent portion stated: -

"...we are prepared to pay Wamunyu Decorators company limited at a monthly rate of kshs 100, 000. The first such payment would be on 27th February 2005. The subsequent payment would then be every 27th of the month until the entire amount due is paid in full. Please negotiate on our behalf accordingly."

That letter suffices for this court to find that the plaintiff is entitled to summary judgment for kshs 896, 528.

The plaintiff claim for general damages cannot be the subject of summary judgment see OXXXV rule 1 (1) (a).

Accordingly the final orders of this court are

- (1) That the defendant's memorandum of appearance filed on 27th January 2005 and the defendant's defence filed on 14th February 2005 are hereby struck out with costs to the plaintiff.
- (2) The defendant's replying affidavit filed on 10th June 2005 is hereby struck out.
- (3) Judgment is entered in favour of the plaintiff for kshs 896, 528 with interest at court rate from the date of filing suit until payment in full and costs thereof, such costs shall be at the subordinate court rate.
- (4) This case shall be transferred to the chief magistrate's court for disposals.
- (5) The plaintiff's claim for general damage to proceed for hearing.

Dated and delivered this 18th July 2005.

MARY KASANGO

JUDGE