



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 172 of 2000

KAYDEE CONSTRUCTION COMPANY LTDPLAINTIFF

VERSUS

COMPOSITE PROPERTY BUILDERS LIMITED1ST DEFENDANT

NARSHIBHAI B. PATEL2ND DEFENDANT

R U L I N G

The application dated 7th December 2001 as amended on 23/7/2004 seeks judgement against the two defendants jointly and severally for Shs.5,988,211/- with costs and interest thereon.

The Application Notice of Motion is grounded on three grounds:

- a) that the amount claimed is lawfully due to the plaintiff for construction work carried out for first defendant
- b) that the second defendant had given his assurance and undertakings to pay for the work in any event thereby inducing the Plaintiff to carry out the work even when the payments were not being made by the first defendant which the plaintiff would not have done and
- c) the Defendants have no defence to the plaintiff's claim.

The application is supported by affidavit of Popat Khimji Patel sworn on 7/12/2002 . Mr. Popat Khimji Patel is a director of the Plaintiff Company. He swears that the Defendants are severally and jointly indebted to the Plaintiff in the sum of Shs.6,288,211/- now reduced by amendment of plaint to shs.5,988,211/-.

The payments were in respect of builders and contractors work done by the plaintiff and certified by Architect certificates. From time to time the first defendant delayed payments and the plaintiff would stop work. However the second defendant would persuade the plaintiff to recommence the work upon the second personal undertakings and assurances that the payments would be made.

In August 1998 the first defendant stopped payments completely and the Plaintiff stopped further works. Thereafter an agreement was reached between the parties that the amount payable by defendants to the Plaintiff was Shs.9,000,000.00.

After this agreement the plaintiff was paid remobilization fee of Shs.1,500,000/- and the Plaintiff

recommended the builders work.

Architect certificates were issued:

On 23.9.98 Certificate 2695 Amount 1 Million

On 8.10.98 Certificate No. 2695/45 Amount 1 Million

On 30.11.98 Certificate No. 2695/52 Amount 2 million

These three certificates were presented to the defendant for payment but have failed to pay the total sum of 4 million.

Plaintiff stopped further work in February 1999. At this juncture the Architect engaged a valuer to assess the value of outstanding work as at February 1999. The valuation was exhibited as "PKP 6" and PKP 7

The final certificate was issued in the sum of Shs.2,288,211 but by then the first defendant had forcibly taken possession of the building. There was delay in the making of payments by the defendants as certified by the Architect.

The second defendant was under guarantee to pay loan taken by Defendant on the property under constructions to the bank and that was his interest in giving the plaintiff assurances and personal undertakings.

It is therefore submitted that the defendants have no defence to the plaintiffs liquidated claim. This Notice of Motion is brought under Order 35 rule 1 Civil Procedure Rules and as the rule require affidavits were filed by directors of the Defendant and second defendant way of replying affidavits sworn on 15/5/2002 aimed at showing that the applicant was not entitled to judgement as prayed. The hearing of this motion started on 5.12.02 before Hon. Commissioner Tutui.

Mr. Gor for plaintiff addressed the court referring to the doctrine of unjust enrichment he also said "it was the 2nd defendant in charge of the project and he was dealing with Popat Patel this witness said that after payment of Shs.1.5 million no other work was done and no other payment was made. The 1.5 Million was to enable the Plaintiff to return to site. He confirmed that 4 certificates were received by first Defendant. He also confirmed that the defendants used Police to obtain possession of the site. The witness confirmed that for a longtime the Plaintiff refused to hand over the site on the ground of non-payment. There was a list of outstanding work made by Pankaj. The witness took possession on 1.6.2000 and unfinished work was completed thereafter. On cross-examination he confirmed that it was agreed to pay plaintiff Shs.1.5 Million and he , the Plaintiff was to return to site.

Mr. Gor also cross-examined Mr. Narshibhai Bescharbhai and Patel his evidence contradicts his codirector. He asserted that he never dealt with Mr. Popat the director of Plaintiff alone but with all directors of the company. He testified that the minutes of meeting held in Pandya's office were not correct but he never raised any objection to the meeting.

He says agreement to pay shs.9 million to Plaintiff was done against their wish but that "We paid Shs.1.5 Million no certificate was paid but the payment was referred to as re mobilization payment."

This witness said that he paid shs.350,000/- but the Plaintiff failed to return to site. Certificate No. 2695 dated 23.9.1998 was paid (Shs.1 Million)

Assurances were given to the Plaintiff by all 3 directors collectively.

On cross-examination he agreed to have paid shs.1.5 Million to the Plaintiff. He called certificates issued by the Architect "fictitious".

On 13/7/04 further hearing of this application commenced before this court. Mr. Gor referred to the authority

1) Continental Butchery Ltd. Vs Samson Musila Nthwa where Justice Madan J.A. made strong comments on the various circumstances under which order 35 Civil Procedure Rules is invoked by defendants with assistance of their advocates. At page 6, he said "... what is difficult is to construe the time purport of the affidavits in reply which each time come up with new maneuvers, new logistics, new strategy and tactics with the object of obtaining leave to defend"

"There is no limit to the ingenuity of defendants, aided by their advocates in the offering of new material to get out of the provisions of order 35"

He continues "with a view to eliminate delays in the administration of justice which could keep litigants out of their first dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgement for the claim of the plaintiff under the summary procedure provided by Order 35 subject to their being no bona fide triable issue which would entitle defendant leave to defend"

Authority No. 4 is also specifically referred to. This is a case on enforcement of a guarantee. The defendant pleaded a collateral agreement not to enforce the guarantee. It was held by Court of Appeal that the mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend. The court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of defendants having a real or bona fide defence.

In the case of Gupta V. Continental Builders, Authority No. 6 Kenya Law Reports. This authority relates to a building contract. There was an agreement prepared but was never signed by the parties.

Nevertheless the court ordered the payment of the amount certified under Architect certificate after discussing in detail the defence put forward by defendants and finding it a sham.

In this present case the amended last statement of defence and counter-claim dated 27th July 2004 the defendants it is admitted that the contract between Plaintiff and defendants was verbal. To ascertain what was the terms of the agreement it was necessary to look into all the material placed before the court.

The agreement was in respect of the construction by the Plaintiff on the first Defendant's plot No. MBA/Block XX/52 A on 11-storey building called Vishnu Apartments. The Project Architect was Pankaj Pandya. The price of the project was between Shs.77 million and Shs.79 million.

The subcontractors were being paid directly by the defendants see Valuation Report last page the amount is 10,702,144.85. The plaintiff took over the site in the month of January 1997 according to the defendants. The payment made for the period of 28.10.96 to 2.4.97 is shown in the letter dated 23/4/97 by the defendants. In that letter the Defendants indicated that they had appointed a Quantity Surveyor and confirmed that 'we will definitely release payment every month on the basis of your progress and that recommended by Quantity Surveyor. It is in that letter the defendant stated that it was agreed that the subcontractors be paid direct "in order not to delay our works".

On 11/9/1997 the Quantity Surveyor was on site. Subcontractors were to be paid direct by Defendants. Also see letter dated 8/10/1997 attached to answer to particulars. This position remained throughout of the construction works. It is clear then the defendant was to pay the Main Contractor (Plaintiff) separately from the dues of the subcontractors. For reasons known to the Defendants said to be due to political and economic situation in the country the defendants decided to cut down the project after the works had covered 5 stories.

There was a dispute on payments and a meeting was held on 24/8/1998 attended by all parties except the subcontractors. The purpose of the meeting was to resolve "the only difference between the two parties was the final figure that Defendants were to pay the Plaintiff".

At this meeting it was agreed the final figure agreed by both parties to be payable to the Plaintiff was Kshs.9,000,000/- and the mode of payment was agreed and set out at the meeting and is the same as set out under paragraph 12 of the plaint.

It was agreed that the completion be by mid October that year.

Thereafter certificates were issued on 23.9.98, 8.10.98, 30.11.98. It is admitted that 1.5 million was paid after this meeting and another sum of Shs.350,000/- part payment of certificate dated 23/9/98 but no further payment was made.

In February 1999 the outstanding work was inspected by Architect in presence of Yasvant Patel and Kanti Patel of the first Defendant company. On 1/3/99 the defendants took possession by force and on 15.3.2000 the Architect and Quantity Surveyor Mr. Mandhry carried out valuations not completed by Plaintiff. Account was taken of the work carried out by Plaintiff and the Defendant and it was certified outstanding work was 1,211,789/- and thereafter a final certificate was issued on 27/3/00 to be paid to the Plaintiff for Shs.2,288,211.00.

I have examined the statement and affidavit in opposition. I find there are contradictions in the affidavits and the oral evidence given by the directors of defendant. I find there is no bona fide defence to entitle the defendants leave to defend. The certificates are alleged to be issued fraudulently but no particulars of fraud is shown. The certificates have not been set aside. The final amount payable on completion was already decided by the parties and the amount for the uncompleted work was ascertained and deducted from the final figure.

The list of unfinished work was made on presence of the defendant's representatives.

The certificates for payments were issued on different dates upon inspection of the works. I have perused the same and it is obvious the Architect visited the works and certified unfinished works and recorded on the certificate.

I find the allegation that plaintiff never returned to the site after the payment of Shs.1,500,000/- untrue. There is sufficient evidence to support plaintiffs claims that the subcontractors were paid directly by the defendants and therefore there is no claim by defendants in their respect.

Regarding the change in the contract, this was purely a decision of the defendants for reason of financial difficulties and the Plaintiff had nothing to do with it. The plaintiff has made a claim for break of contract which is not subject to this application. On the issue of 2nd defendant being liable for inducing the plaintiff to continue with work firstly it has been noted above and it is not disputed that the first defendant was in financial difficulties and was paying the plaintiff irregularly hence the delays, also the second defendant was a director of the first defendant and had an interest in the completion of construction so that the loan he had guaranteed to Giro Bank for first Defendant be repaid on completion of the building soonest.

In the case of Clere Corporation & Another Vs Laxman Keshra & others [1978] KLR 83 director of a company made assurance of payments when he knew or had confirmation that the defendant was not likely to meet the payments. Indeed the defendant company was without funds and was subsequently wound up. The East Africa Court of Appeal discussed the principle of unjust enrolment and come to a conclusion that a litigant should not be left without remedy against a party who has benefited at the expense of the other party.

In the present case there is correspondence that the 2nd defendant was promising payment to one of the directors see letter dated 30/6/1997. The plaintiff proceeded to provide labour and material on their promises but payments were made by first defendant irregularly.

There was threat that the bank could call in its loan if construction did not proceed. It is my finding that the second defendant is liable jointly and severally with first defendant to the plaintiff's claims.

Counsel for Defendant submits that the procedure under order 35 is not designed to give a quick trial on affidavits. This is true but it is also true that where there is no bona fide defence the court is empowered to enter judgement. It is no bar that there are bundles and bundles of documents and several affidavits or that the pleadings have been amended several times. The court has to examine material laid before it and apply the law.

The criteria to be applied is whether there are triable issues see case of:

Hasmani V. Banque Du Congo Belge E.A.C.A.87 where the court held that if there is one triable issue disclosed then the defendant is entitled to leave to defend. Again the case of Kundanlal Restaurant –vs- Devshi & Co. the court was of the same opinion where triable issues are raised defendant must be given leave to defend.

In the case of Provincial Insurance of E.A. Ltd. –vs- Lenny Kivuti Civil Appeal No. 216/1996 the court of appeal stated “when specific bona fide triable issues are raised unconditional leave to defend should be given.

I have considered the submissions and authorities offered by the Defendant’s Counsel. I have already said the affidavits are contradictory and also oral evidence elicited on cross-examination. It is my considered opinion that the defendant’s has shown no bona fide triable issues either by affidavits or the statement of defence filed.

Consequently, I find that the Plaintiff is entitled to judgment at this stage as prayed in the Notice of Motion against the Defendants jointly and severally. The application is allowed with costs. Orders granted as prayed.

Delivered and dated at Mombasa this 28th day of September 2005.

J.N. KHAMINWA

J U D G E

Mr. Okongo:

1. I ask for copies of proceedings and Ruling.
2. I ask for temporary Stay for 10 days to enable me to file a formal application pending appeal.

Court:

Let the copies of proceedings be supplied upon payment of copying charges.

Without any objection from Mr. Gor, Temporary stay is granted for 10 days to allow formal application to be made.

KHAMINWA, J