



REPUBLIC OF KENYA

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

Civil Case 125 of 2005

THE DEVCON GROUP LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

UNIVERSITY OF NAIROBI.....DEFENDANT/APPLICANT

R U L I N G

This is an application (by chamber summons dated 5th August, 2005) in which the Defendant, UNIVERSITY OF NAIROBI, seeks orders that the plaint be struck out and “judgment be entered accordingly”. I don’t know what judgment the Defendant wants entered since there is no counter-claim. In the circumstances of this

case what would follow an order striking out the plaint would be an order dismissing the suit. See sub-rule (1) of Rule 13 of Order 6 of the Civil Procedure Rules. The application is brought under paragraphs (a) & (d) of the said sub-rule which give this court power to order any pleading to be struck out or amended on the grounds, respectively, that it discloses no reasonable cause of action or defence or that it is otherwise an abuse of the process of the court.

The grounds of the application are stated to be:-

- (a) that the plaint does not disclose any reasonable cause of action;
- (b) that paragraphs (9) & (10) of the defence have not been traversed and are thus deemed admitted by the Plaintiff;
- (c) that the plaint in the face of the said defence is an abuse of the process of the court;
and
- (d) that it is only fair and just that the suit be struck out.

The application is opposed by the Plaintiff upon the grounds of opposition dated 17th October, 2005. Those grounds, though thirteen (13) in number, amount to the following:-

- (i) that the application is misconceived and incompetent or otherwise lacks in merit;
- (ii) that issues raised in paragraphs 9 and 10 of the defence are properly addressed in paragraph 12 of the plaint and did not therefore require any rebuttal; and

(iii) that the plaint discloses a reasonable cause of action and is not an abuse of the process of the court.

I have considered the submissions of the learned counsels. The Plaintiff's case as pleaded is based upon a building contract dated 20th November, 2003 whose total value was Kshs.57,746,119/=. The Plaintiff pleads that the Defendant is in breach of various clauses of that contract and claims Kshs.35,988,000/= as money owed to it under the contract. In paragraphs 9 and 10 of the defence it is pleaded, in effect, that it was the Plaintiff who was in breach of the contract. The Plaintiff's claim is therefore denied. As the Plaintiff had already pleaded that it was the Defendant who was in breach, the Defendant, by pleading that it was the Plaintiff who was in breach thereby joined issue with the Plaintiff regarding that particular aspect of the case. I so hold. It was thus not necessary for the Plaintiff to specifically traverse paragraphs 9 and 10 of the defence.

Looking at the entire plaint a reasonable cause of action is clearly disclosed. In response to the plaint the Defendant filed a defence of fourteen (14) paragraphs. Nothing has been placed before the court as would lead to a finding that the plaint is an abuse of the process of the court. This application lacks merit. It is hereby refused with costs to the Plaintiff. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF NOVEMBER, 2005.