



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 13 of 2005 (1)

MOHAWK LIMITED.....PLAINTIFF

VERSUS

DEVCON GROUP LIMITED.....DEFENDANT

RULING

This is an application for summary judgement. It was brought by the Plaintiff, pursuant to the provisions of Order 35 Rule 1 of the Civil Procedure Rules

In support of the application, the Plaintiff filed the affidavit of Mohamed Ilyas Chowdhry, a director of the Plaintiff. By way of background information, Mr. Chowdhry said that in March 2004, the Defendant was the main contractor in the project for the construction of ten Student Hostels at the University of Nairobi, Kikuyu Campus. The Defendant then engaged the Plaintiff, as a subcontractor to that project.

After some work had been carried out, the client (University of Nairobi) stopped the work. At that point in time, the parties to this suit met and evaluated the work which had been done by the Plaintiff.

It is the Plaintiff's case that the work it had done was valued at Kshs. 4,463,550/=. Out of which the Defendant then paid Kshs. 1,235,000/=. leaving a balance of Kshs. 3,228,550/=. Thereafter, the parties herein held further negotiations and eventually agreed to reduce the outstanding balance to Kshs. 3,100,000/=. It is that amount which the Plaintiff eventually sued the Defendant for

It was also the Plaintiff's case that once the client stopped further work on the project, the Defendant was obliged to arrange, with the said client, to collect the Plaintiff's tools and equipment, which were at the site. The Defendant did not arrange for the said tools and equipment to be collected, and the Plaintiff now claims the value of the said tools and equipment. Therefore, the Plaintiff also prays for judgement against the Defendant, for Kshs. 70,200/=. which is said to be the value of the tools and equipment.

Annexed to Mr. Chowdhry's affidavit is a "Notification of Appointment" dated 18th March 2004, which was from the Devcon Group to Mr. Farooq Chowdhry, of the Plaintiff company. The subject matter of that letter is the construction of 10 Student Hostels at the University of Nairobi, Kikuyu Campus. In the light of that document, I hold that paragraph 3 of the Defence is not sustainable at all. I say so because although the Defendant had denied that it had subcontracted the Plaintiff to construct the ten Student Hostels at Kikuyu Campus, that fact is amply demonstrated by the "Notification of Appointment."

Next, it is instructive to note that the Defendant did admit that the Plaintiff carried out the

construction work, pursuant to the subcontract in issue. However, by paragraph 5 of the Defence, it was denied that the work undertaken by the Plaintiff was valued at Kshs. 4,463,500/=. It was also denied that the balance owed by the Defendant was Kshs. 3,228,500/=:, although the Defendant admits paying Kshs. 1,235,000/= to the Plaintiff.

In response to that line of Defence, the Plaintiff put in evidence a letter from the Defendant, dated July 30th 2004. That letter is addressed to the Plaintiff, and the relevant portion of it reads as follows:-

“Re: 10 No. Students Hostels, Kikuyu Campus UON

FINAL PAYMENT

Thank you for your input in our project. Unfortunately as you are aware things did not go our way.

Following our discussions the value of the work completed is as follows:-

Value of work 4,463,550,000.00

Payments todate 1,235,000.00

Adjusted Total payment due to Mohawk Construction 3,100,000.00

Yours faithfully, B. K. Smith

Managing Director”

From the foregoing letter, there can be no doubt at all that the Defendant itself confirmed to the Plaintiff that the

“Adjusted total payment due to Mohawk Construction,”

was Kshs. 3,100,000/=:.

It is also significant to note that that letter was written on 30th July 2004, which was long after the Defendant’s cheque for Kshs. 3,000,000/=:, (and which was payable to the Plaintiff) had been dishonoured. The cheque for Kshs. 3,000,000/=: was dated 20th May 2004. It was presented for payment on the same date, and later re-presented on 6th October 2004.

On the face of the cheque, there is no clear indication of the reason for its dishonour. Thus, the court cannot, at this stage, tell the exact reasons for the dishonour. However, I believe that I can categorically state, and without any fear of contradiction, that it is highly improbable for the Defendant to have stopped payment of the cheque when it was presented in May 2004. I say so, because, to my mind, if the Defendant had been responsible for stopping payment of the cheque, it would defy all logic, for the defendant to thereafter write to the Plaintiff, and agree that the adjusted total payment due to the Plaintiff was Kshs. 3,100,000/=:.

On the other hand, if I were wrong, and the Defendant did actually stop payment of the cheque in May 2004, that would imply that by the time the Defendant wrote to the Plaintiff, on 30th July 2004, it must be deemed to have satisfied itself that the Plaintiff was entitled to the specified sum, of Kshs. 3,100,000/=: In the light of the foregoing I find no credible defence to the Plaintiff’s claim against the Defendant, for the sum of Kshs. 3,100,000/=: On the other hand, the Plaintiff has not placed before the court any material from which I could conclusively find that it was the Defendant’s obligation to obtain the Plaintiff’s tools from the site, at the University of Nairobi’s Kikuyu Campus. I say so because by its letter of 2nd August 2004, the Plaintiff could not, and did not purport to make it the defendant’s contractual obligation to the Plaintiff’s tools from the site. That letter reads as follows:-

“RE: 10 Number Students Hostels, Kikuyu Campus University Nairobi

Could you kindly make arrangements with the University of Nairobi, Kikuyu Campus, to release our tools and equipment which is on site.

We have been made to understand that tenders have been opened to award the completion of the works to another contractor, before this happens, we would like to collect our tools and equipment.

We thank you in advance for your cooperation.

Yours faithfully,

Farooq Chowdhry.”

The reasons why the letter could not create an obligation for the Defendant are as follows:

(a) The letter was written long after the contract had been entered into, and indeed performed to a large extent.

(b) One party cannot introduce a new term to a contract, without the concurrence of the other party.

(c) The Plaintiff did not even insist that it was the Defendant’s responsibility to get the tools and equipment from the site. All that the Plaintiff did was to request the Defendant to make arrangements with the client, for the release of the tools and equipment. By its own words, the Plaintiff indicated a wish to collect the said tools and equipment.

In the light of the foregoing, I am not satisfied that the Plaintiff’s claim in respect of the tools and equipment has been made out. In other words, I find that paragraph 6 of the Defence raises an arguable defence. Furthermore, I find that the Plaintiff would have to adduce evidence to prove the value of the said tools and equipment, so as to provide an answer to paragraph 7 of the Defence. In my considered view the list of items left at the Kikuyu Campus Site is not, by itself, proof of the value of the said goods.

The other line of Defence which was put forward by the Defendant was to the effect that the Plaintiff did not deserve to be paid, as it had performed a substandard job. Paragraph 8 of the Defence reads as follows:

“The Defendant in reply to paragraph 8 of the plaint avers that the Plaintiff was fully aware of the circumstances that led to non-payment of funds as the University of Nairobi was unsatisfied with the work done, and the work done was substandard and they stopped any payments regarding the said contract.”

In the light of that line of defence it is imperative to ask whether or not it was a term of the contract between the Plaintiff and the Defendant that the Plaintiff would only be paid if the client was satisfied with the standard of work.

At present, none of the parties has placed before the court, the complete document embodying the contract. I say so because the letter dated 18th March 2004, does not appear to be comprehensive.

The said letter reads as follows:-

“DGL THE DEVCON GROUP

18th March 2004

Re:NOTIFICATION OF APPOINTMENT

Dear Mr. Chowdhry;

This is to notify you that your offer to construct the remaining works of 10 Student Hostels at University of Nairobi, Kikuyu Campus on the basis of verified costs plus a 15% fee with a maximum price of Kshs. 26,044,000 (Kenya Shillings Twenty-Six Million Forty-four thousand Only) in accordance with our instructions is hereby accepted.

You are hereby instructed to proceed with the execution of the said Works in accordance with the Contract Documents.

With kind regards,

B. K. Smith

Managing Director

Accepted and Agreed

Farook Chowdhry cc.

Chairman, DGL “

From the foregoing document, it is clear that the Plaintiff was expected to, and did undertake to execute the works **“in accordance with the Contract Documents.”** It is solely for that reason that I find that the parties have not put before the court the document embodying the Contract. But I am alive to the fact that reference to **“Contract Documents”** means the documents embodying the contract between defendant and the client. It is my view that as the Plaintiff was required to execute works in accordance with the terms of the main contract, it was the Plaintiff’s duty to familiarise itself with that contract, so as to be able to comply with it.

That notwithstanding, the Defendant has not pleaded in its defence that the Plaintiff was in breach of any term or terms of the contract between it and the Defendant. Similarly, the Defendant has not pleaded, in its defence, that the Plaintiff breached any term or terms of the main contract, between the Defendant and the client. But, in the final analysis, if the Plaintiff had not executed the works in accordance with the Contract Documents, it cannot be assumed that they would nonetheless be paid for work done. In other words, although paragraph 8 of the Defence could have been more elegantly drafted, I understand it to mean that it was an implied term of the contract that the Plaintiff was to execute the contractual works in accordance to the specifications in the main contract. Failure to comply with the said specifications seems to be the grounds for non-payment.

Yet, on the other hand, the Defendant has not said so expressly, leaving it to the court to draw the inference.

But more significantly, the Defendant evaluated the work done, and agreed to pay the Plaintiff, for it. At this stage, if payment was dependant upon verification by the client, the Defendant could have said so. But they did not. That action suggests to me, that I am reading more into the contract than the parties thereto intended.

In **TAYLOR V. BOLUS [1981] KLR 536**, Hancox J. (as he then was) held that the trend in East Africa, on applications for summary judgement:

“is against giving leave to defend, unconditionally at least if the Plaintiff is obviously entitled to judgement and it is clear that the Defendant is adopting devious and delaying tactics.

The principles then are quite clear. If the Plaintiff’s claim is undoubted and clear and there is only a sham and spurious defence, the order will be granted. If on the other hand the defendant has a

fairly arguable case, never mind the likelihood of its success, or can show a triable issue, he must have leave to defend.

” In this case, the Plaintiff’s claim is for a liquidated sum. The claim is quite clear, as it is even confirmed by the defendant’s own letter, in which the defendant confirmed that the amount payable to the Plaintiff was Kshs. 3,100,000/=. A cheque for Kshs. 3,000,000/= was drawn by the Defendant, in favour of the Plaintiff. That cheque was dishonoured when it was presented for payment. Clearly, the conduct of the Defendant coupled with its own letter confirming the debt, makes the Plaintiff’s case very clear. However, in a Replying Affidavit, the Defendant has sought to explain the dishonour of the cheque. But the Plaintiff has cast doubt on the validity of the Replying Affidavit, on the following grounds:-

- (i) The deponent did not state that he had authority to swear the affidavit, and
- (ii) The author of the affidavit was not identified.

In **MICROSOFT CORPORATION V. MITSUMI COMPUTER GARAGE LIMITED (2001) 2 EALR 460**, Ringera J. (as he then was) held as follows:- **“I start with the issue of the competence, proprietary and admissibility of the Pearman affidavit. According to the provisions of Order III, rule (2) an affidavit by a corporation can only be made by an officer thereof who is duly authorised by the corporation to do so. I accept the submission by counsel for the First Defendant that this is a matter of substance, not form and that it is incompetent of any other person howsoever conversant with the averments in the plaint he may be to make an affidavit on behalf of the corporation.....**

As neither the Companies Act nor the Civil Procedure Act and Rules have assigned the term “officer” any special and exhaustive meaning, I find that Pearman is an officer of Microsoft within the contemplation of Order 111 rule (2) (c). However, while she may indeed be authorised to make the affidavit she does not depone to that fact. This is a substantial defect in her affidavit.”

Those words Ringera J. may not be binding on me, but they have persuaded me, and I therefore adopt them.

In this case, Mr. David Nduhiu Muthoga swore the Replying Affidavit. In it, he described himself as the chairman of the defendant company. However, he did not depone to the effect that he had been authorised by the defendant to make the Replying Affidavit. Therefore, regardless of whether or not he may have had the requisite authority, his failure to so depone was a substantive defect in his affidavit.

The second limb of the Plaintiff’s objection to the affidavit is the failure to disclose the drawer thereof. In **JOHANN DISTELBERGER v JOSHUA KIVINDA MUINDI & ANOTHER, MISC. CIVIL APPLICATION No. 1587 of 2003**, Nyamu J. had the opportunity to consider the effect of the failure by an affidavit to disclose its author. The question he grappled with was whether such failure was procedural or substantive. I find his decision persuasive, and do adopt his following words:-

“Returning to the question posed above as to whether failure to endorse an affidavit with the name and address of the drawer is a mere irregularity in form only and therefore excusable under Order 18 rule 7, it must be pointed out that the rules constitute subsidiary legislation and are therefore inferior to Acts of Parliament. Is a contravention of a provision of an Act an irregularity in form only? The answer is clearly “no” because as outlined above, Parliament intended to prevent unqualified persons from drawing legal documents as specified in the Advocates Act and also to prevent them from charging fees in respect of such documents. The overall object is to ensure that legal documents are drawn by qualified persons. The necessity to have the name and address endorsed is clearly aimed to stop or prevent the mischief of unqualified persons drawing documents.

It is for this reason that I find and hold that a document which fails to comply is not deficient in form only but it is statutorily deficient and incapable of being saved by the provisions of O. 18 rule 7.”

Having concluded that the Replying Affidavit was substantively defective, I have no alternative but to order that it be struck out. Accordingly, the explanations contained in the Replying Affidavit are not available to the defendant. That being the case, I need to now ask myself if the Defence on record raises any triable issues. The answer to that question has already largely been provided by the analysis earlier herein.

In my considered opinion, the defence does not raise any bona fide triable issues, save only on the question as to the responsibility for the Plaintiff's tools and equipment. For those reasons, the motion for summary judgement is granted. Accordingly, judgement is hereby granted in favour of the Plaintiff for Kshs. 3,100,000/= together with costs thereon. The judgement sum shall attract interest at court rates from the date of filing suit, until payment in full.

I also direct that the Defendant shall have unconditional leave to defend against the claim for the value of the Plaintiff's tools and equipment.

It is so ordered.

Dated and Delivered at Nairobi this 13th day of July 2004.

FRED A. OCHIENG

JUDGE