



CIVIL PRACTICE AND PROCEDURE

- Striking out a defence under order 6 rule 13 (1) (b) (c) and (d)
- Judgement on admission
- Summary Judgement

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1070 OF 2001.

INTERCOUNTRIES IMPORTERS & EXPORTERS LTD.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL..... DEFENDANT

RULING

I have before me a motion on notice which seeks the striking out of the defendant's defence or in the alternative the entry of judgement in favour of the plaintiff on an alleged admission. The motion is expressed to be brought under order 6 rule 13 (1) (b) to (d); order 12 rule 6 and order 35 rule (1) (a) of the Civil Procedure Rules. The application is supported by an affidavit sworn by Sultanali Madhani, the Managing Director of the plaintiff company. It is opposed. There is a replying affidavit sworn by Godfrey Mate, the defendant Council's Town Clerk.

The application was argued at considerable length before me and if the ruling I am about to deliver is rather short, it is not due to disrespect of the efforts of counsel but due to the clarity in my mind of the essential issues and the unequivocal judgement thereon that I have formed.

In the plaint, special damages in the sum of Kshs.177,256,828/= are sought. The cause of action is stated to be conversion of land. The plaintiffs' pleadings also state the following. The plaintiff is the registered owner of a parcel of land known as L.R. No. 209/12 6623 (Grant No. I.R. 4786/9). It caused to be drawn and designed a project for the construction of 256 residential units thereon for sale. The expected profit was Kshs.350,000/= per unit. It spent a sum of Kshs.4,850,000/= on professional fees for the said project. The project was approved by the defendant. The plaintiff also incurred a sum of Kshs.9,500,000/= for the construction of an access road to its property under a part development plan issued by the defendant. It also relocated an administration block and a workshop and the costs of and incidental thereto are certified

and valued at Kshs.8,919,810/= which value the defendant accepted. After all those efforts, the defendant wrongfully "repossessed" and/or converted to its own use the entire land and undertook to compensate the plaintiff for the full market value thereof by way of allotment of an alternative plot of equal value and for the payment for the full value of works done thereon, interest and all expenses incurred by the plaintiff on the proposed project. The defendant has not done so and hence the suit.

The defendant's case as pleaded would appear to be this. It is admitted the plaintiff was and still is the registered owner of the suit premises. The commercial nature and profitability of the plaintiffs intended project on the said land is denied. The expenses paid in connection with the project are also denied. In the alternative, it is contended that the defendant approved the project in exercise of its mandate to approve such projects and it is not liable for expenses incurred by the plaintiff for the technical purpose of applying for such approval. It was practically necessary and mandatory for the plaintiff to construct an access road to the site of the project and accordingly the certified expense of Kshs.8,919,910/= was not at the instance nor for the direct benefit of the defendant. It is denied that the suit land was wrongfully repossessed and/or converted to the defendant's use. It is also denied that the defendant undertook to compensate the plaintiff for the purported loss of user of the suit premises. Finally, it is averred that the suit is a strategic circumvention of the plaintiffs difficulties in developing the suit land as a result of public protests.

I have considered that state of pleadings, the affidavits on record and the submissions of the advocates on record. They call for answers to three principal issues. First, is the defendant's statement of defence a mere denial which does not dispute the plaintiffs claim on any serious or sustainable grounds and/or is it merely intended to delay the fair and just disposal of the suit? Secondly, has the defendant admitted being indebted to the plaintiff in the sum of Kshs.8, 919,810/= as claimed? And, thirdly, does the proposed defence raise any bonafide triable issues?

On the first issue, I find that the plaintiff's claim is disputed on serious and sustainable grounds, namely, that (1) the feasibility studies, the design and the drawing of the plaintiff's project was for its own benefit and the defendant's approval thereof was in lawful execution of its mandate without assumption of liability, (ii) the construction of the access road and the relocation of the defendant's administration block and workshop by the plaintiff was necessary for access to the plaintiffs site and was therefore for its benefit, (iii) the defendant has neither repossessed, converted to its own use or cancelled the registration of the suit premises in the name of the plaintiff, and (iv) the defendant never unequivocally or unconditionally undertook to compensate the plaintiff for the full market value of the said land by way of allotment of an alternative plot of equal value and payment for the full value of the works done thereon. In those premises, the defence cannot be said to be frivolous or vexatious. And as it does not allege indecent, offensive, or improper acts, omissions or motives against the plaintiff which are unnecessary in the proof of the defence, it cannot be described as scandalous within the meaning of that word in procedural law. And on my own evaluation of the statement of defence, I find that the same is intelligible, it does not contain any contradictions and it fairly notifies the plaintiff of what case it will meet at the trial. In those circumstances, it cannot be said to be likely to prejudice, embarrass or delay the fair trial of the action. And when a defendant's defence discloses a reasonable cause of defence and it is articulated in a manner which does not offend any of the rules of pleadings, as the present defence is, it cannot be said to be an abuse of the process of the court. The defendant is using the court's process quite legitimately and properly for a fair adjudication of its dispute with the plaintiff. In short the answer to the first issue is in the negative. The statement of defence cannot be struck out under the provisions of order 6 rule 13 (1) (b) or (c) or (d) or a combination of all or any of them.

On whether or not the defendant has admitted being indebted to the plaintiff in the sum of Kshs.8,919,810/=, the plaintiff has not produced any written admission of the claim. The exhibits it is relying on show no more than that it had made a claim through its advocate and the defendant was considering such claim. The outcome of its consideration is not apparent from the correspondence. Furthermore, the defendant has asserted that the works executed, namely, the access road and the relocation of the defendant's administration block, were done for the purpose of facilitating access to the plaintiff's site and were therefore for the plaintiff's benefit. In those circumstances, it cannot be concluded that there is a clear and unequivocal admission of the plaintiff's claim in the amount sought so

as to justify a judgement on admission in accordance with the provisions of order 12 rule 6 of the Civil Procedure Rules.

The last issue is whether the defendant has shown by affidavit or otherwise that it has bona fide triable issues and is therefore entitled to defend the action at the trial. My answer to that is that from the pleading and the affidavit evidence the defendant has shown at least four bona fide triable issues, namely, (i) whether or not it is liable to compensate the plaintiff for the feasibility studies as well as the design and drawing of the proposed project and/or the execution of any works in connection with the said project, (ii) whether or not it has repossessed or converted to its own use the suit premises or cancelled the allocation and subsequent registration thereof in the name of the plaintiff, (iii) if the answer to (ii) is in the affirmative, whether or not the defendant unequivocally or unconditionally undertook to compensate the plaintiff for value of the said land and for the losses suffered by it in connection with the works done and the project intended to be constructed on the said land, and (iv) the quantum of the special damages pleaded. Having shown those triable issues, the defendant is entitled to have its day in court and the plaintiff's claim for the entry of summary judgement must be and is hereby rejected.

In the result, the plaintiff's omnibus motion is dismissed with costs to the defendant.

DATED at Nairobi this 12th day of March 2002.

A.G. RINGERA

JUDGE