



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 23 OF 2000**

KENYA PORTS AUTHORITY ..... PLAINTIFF

VERSUS

AMARCO (KENYA) LIMITED ..... DEFENDANT

**RULING**

The application dated 19.1.2001 by the plaintiff was heard *ex parte* the defendant having been served with hearing notice but failed to attend court when the application was called out for hearing.

The applicant seeks orders under Order VI rule 1 (b) (c) and (d) that the written statement of defence dated 30.5.2000 be struck out and judgement be entered for plaintiff as prayed in the plaint with costs for this application. The grounds relied upon is that the statement of defence is frivolous vexatious and an abuse of court process and is merely calculated at delaying the fair trial of this suit. The supporting affidavit of the applicant shows that a contract was entered into by plaintiff and defendant a copy of the written agreement is exhibited by the plaintiff. The plaintiff states in the affidavit in support that there were breaches of the contract and that only “a negligible fraction” of equipment to be supplied was tendered valued at USD14785. Also that completion date was not complied with and there was no indication as to when the contract could be completed by the defendant. It became evident also that the defendant had no money to complete the project subject of contract but that by 15.12.1999 they were sourcing for funds from their bank.

This surprised the plaintiff seeing that they had paid the defendant initially more than 70% of the contract price. This was the last straw and the plaintiff moved to sue to recover USD 479,292 already paid for no consideration at all. In the statement of defence filed on 30.5.2000 the defendant alleges that the contract was breached by refusal by plaintiff to accept delivery of materials purchased and also frustrated by theft of defendant’s goods on transit to the plaintiff. To this statement the counsel of plaintiff replies that as this was a written contract any variation thereof would necessarily be in writing.

The plaintiff never instructed the defendant in writing not to deliver .any goods. On the issue of theft goods in transit the plaintiff said that it has never been informed of this issue until this defence was by leave of the court filed on 30.5.2000. Other items on the defence are general denials. There is a replying affidavit denying breach and blaming the plaintiff for breach. Further defendant swears that it is entitled to payment on quantum meruit. Plaintiff says no work was ever done and therefore no payment due. The defendant alleges a right to counterclaim but the plaintiff in his counsel’s submission only conceded the items delivered valued at USD 14,785.

After considering the replying affidavit together with the defence filed by defendant I find their excuses for failure to comply with the contract frivolous. They received USD 479,292 and rendered no service neither did they deliver the materials and items they were contracted to supply and install. To date they do not appear disturbed about their non compliance but they are ready to abandon the whole contract upon their being paid on quantum meruit basis. I am of the view that the plaintiff is entitled to judgement in the liquidated amount as prayed in the application. They have withdrawn the claim for general damages. The application is allowed and orders are granted as prayed in the plaint with costs of this application.

Dated this 28th day of June 2002.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**