



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 48 OF 2000**

**COAST PROJECTS LIMITED ..... PLAINTIFF**

**VERSUS**

**M.R. SHAH CONSTRUCTION (K) LIMITED ..... DEFENDANT**

**R U L I N G**

The plaintiff filed suit on 31.1.00 claiming a liquidated sum of Kshs.7,051,106/70 arising allegedly out of an amount in retention fees due on a building contract. The Defendant entered a Defence on the 3.5.00 denying that a contract did exist between the parties and that any payment was due as claimed. A reply to the Defence was filed on 15.5.00 and matter listed for hearing on 21.11.01. However on that set hearing day, the parties took out the matter on grounds that negotiations for an out of court settlement were going on but instead of a settlement the plaintiff filed a chamber application dated 11th February, 2002 under the Provisions of Order 6 rule 13(1)(b) and (c) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application which is the subject of this ruling seeks the following orders:

1. That the Defence herein be struck out.
2. That judgement be entered for the plaintiff as prayed in the plaint
3. That the Defendant do pay the costs of the application"

In support of the application is an Affidavit sworn on 11th February, 2002 and a further Affidavit sworn on 12th June, 2002 both by PAOLO FRANCESCON the managing Director of the plaintiff Company.

On their part, the Defence filed a replying Affidavit sworn on the 11th June, 2002 by ASHOK SHAH the Director of the defendant Company.

Counsel for the plaintiff Mutula Kilonzo's arguments in a nutshell were that the defence was unsustainable, frivolous and vexatious and the defence as filed was causing prejudice to the plaintiff who was being kept away from his lawful funds. He referred extensively to the numerous annexures running to 251 pages to show that there indeed existed a contractual relationship between the parties and that an amount of Kshs.7,051,106.70 was due to the plaintiff under the terms of the said contract.

Counsel for the Defence Mugu on his part strongly opposed the application on the grounds that the plaintiff had failed to satisfy that the defence ought to be struck out under the Provisions of Order 6 rule 13(1), (b), (c). He however did concede that some contractual relationship did exist between the parties but the Terms therein are unclear. He further said, the suit in any case has been overtaken by the law of limitation.

To arrive at a conclusion in this matter I consider the following as the relevant issues to be considered.

1. Was there a contractual relationship between the parties?
2. Can the court arrive at a decision based on the available documents and Affidavits on the issue of limitation?
3. Are there any triable issues between the parties?

4. Can the orders sought issue in this case?

As to whether a contractual relationship did exist, the plaintiff has annexed various correspondence between the parties showing an intention to enter into a written contract. A copy of the proposed contract drawn by the Defendant was forwarded to the plaintiff vide their letter dated 28.1.94 but for reasons that are not disclosed by either party the same was never executed. There is also another correspondence by letter dated 19.11.93 which refers to the delay in finalizing the issue of the agreement. According to the plaintiff the terms and conditions of the agreement were to be basically the same as those in the agreement entered into between the Defendant and Messrs Pwani Development Limited. However, even the copy of the said agreement annexed to the Affidavit in support by Paolo Francescan is not executed. In the circumstances there is no doubt that no written contract existed between the parties. However from the correspondence and by admission by the defendant some contractual relationship did exist but the terms and conditions as envisaged by the parties cannot at this stage can not be said to clear. I say this because although the plaintiff claims the whole amounts due on retention fees, the Defendant says this was not part of the agreement. This is certainly an issue that can only be determined at a full hearing.

The issue of limitation was raised in the Defence and in reply thereto the plaintiff puts the Defendant to strict proof. Mutula Kilonzo argued that time herein started to run from the completion date which is agreed as being the 30th September, 1996. The Defendant disputes computation of time from the said date for purposes of limitation and says that the plaintiff had in fact left this site long before the completion date. This again is an issue that needs to be ascertained but the evidence before the court is not adequate to so decide at this stage.

The Third issue was whether there exists any triable issues between the parties. I have already shown that the first two issues are matters that can only be adequately addressed at a full trial and especially so when the defendant says in its defence that all monies due have been paid and the further that the terms of the contract between the parties are not clear at this stage.

This brings me to the final issue for consideration, and that is whether the orders sought by the plaintiff can in the circumstances issue order 6 rule 13(1) (b) and (c) reads:

*“(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that*

*(b) It is scandalous, frivolous or vexatious or,*

*(c) It may prejudice, embarrass or delay the fair trial of the action”*

The party seeking to gain from the Provisions of this order must show that the defence is not only scandalous but also frivolous and vexatious. The plaintiff has not shown how the matter is scandalous and I shall not dwell on the point. They did however show that it is frivolous and vexatious to some extent but not to the extent it clearly would be an abuse of the court process to allow the Defence to remain. I have already pointed out the issues raised in the defence that clearly show there are issues raised that are worth consideration. Pier Jenne, P in YOUNG –VS- HALLOWAY, (1985) page 90 said:

*“The pleading must be so clearly frivolous that to put it*

*forward would be an abuse of the process of the court”*

On the second limb in sub-rule 13(1) © and again the plaintiff needs to show that the court ought to exercise its discretion in its favour as the Defence is intended to embarrass, delay and is an abuse of the process of the court. I have considered the decision in C.A.NO. 50 of 1996 RACHBIB SINGH CHATTS –VS- NATIONAL BANK OF KENYA LTD. (UR) NRB in which AKIWUMI J.A. considered an appeal arising out of a similar application. In that case the defence raised was a mere general denial one and the Appellant had failed to show that the particulars of payments made were vouchered. In this case the defence denies any contract did exist between the parties on the same terms as a contract between the Defendant and a Third party Pwani Development Ltd. I have already pointed out that none of the two agreements are executed by the relevant parties and therefore inadmissible in evidence, but that some contractual relationship whose terms are not clear from the evidence and documents currently available to the Court did exist.

In paragraph 4, the defendant says:

*“In answer to paragraph 4 of the plaint and without prejudice to paragraph 2 and 3 above the defendant says that*

*(a) If there was a contract between the plaintiff and the Defendant (which is denied) the alleged contract was not performed by the plaintiff.*

*(b) That the project was completed by the defendant.”*

Paragraph 4 of the plaint states:

*“The amount payable to the plaintiff which was the amount*

*payable to defendant as the original contractor on valuation was agreed to be paid less 10% which was to be retained by the client 1 namely Pwani Development Ltd. subject to a limit of 7.5% of the total contract value which monies would then be paid to the Defendant herein who in accordance with the terms of the agreement entered into by the parties hereto forward the same to the plaintiff on the completion of the contract.”*

The issue as to whether the plaintiff did perform the contract to its full term cannot be said to be a general denial nor can it be said to be an abuse of the court process. The same cannot either be said to be evasive and obscure. Jescal M.R. in THORP V-S- HOLDSWORTH (1976) 3 ch 637 of 640 which was referred to by Akiwumi J.A. in the RAGHBIR SINGH CHATTE –VS- NATIONAL BANK OF KENYA LTD. said the following:

*“When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, he must deny that he received that sum or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but a fair and substantial answer must be given”.*

The circumstances and contents of the defence in this case does raise in my opinion some fair and substantial answer to the two main issues of whether a contract did exist and whether amounts claimed are owing.

There are notable hanging questions that arise such as whether the plaintiff was on site as at the handing over date. There is a letter from the defendant to the plaintiff dated 15th July, 1995 forwarding copy of a site meeting held on 7th July, 1995 and the plaintiff is notably absent. The Defendant is asking for amongst other details a Revised programme of works and from then on the only other correspondence annexed as between the parties is on the issue payments. There is notably no letter by the plaintiff also demanding the payment of the retention fees and yet it is clear from available correspondence that virtually every issue was reduced into writing as between them. This issue is raised in paragraph 4(b) of the defence but in reply the plaintiff says the same is nothing but a mere denial. It says:

*“4 (b) That the project was completed by the defendant”*

This is a point that the court cannot from the evidence before it ascertain. The court on being satisfied that the plaintiff has satisfied the provisions of order 6 rule 13(b) and (c) in a case as in the present one is to enter judgement summarily after striking out the defence. The words of Danckwerts L.J. in MAGLE –VS- FIELDEN (1966) 2 QB at 648 are applicable and need to be considered in arriving at a decision in case of this suit. He said:

*“The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.”*

In conclusion therefore I find this is not a proper case for determination through a summary procedure and in the circumstances the application fails with costs to the Defendant.

Dated and Delivered at Mombasa this 23rd day of August, 2002.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**