



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO 51 OF 1999**

**VISHVA BUILDERS LTD.....APPLICANT**

**VERSUS**

**MOI UNIVERSITY.....RESPONDENT**

**RULING**

This is an application by the plaintiff pursuant to O XXXV rules 1 (1) and 2 of the Civil Procedure Code in which it has applied for orders that:

- (a) Summary judgment be and is hereby entered for the plaintiff against the defendant as prayed in the plaint.
- (b) In the alternative to (a) above, summary judgment be entered for the plaintiff for the sum of Kshs 185,305,011.30 and the issue of interest be submitted to hearing.

Three grounds on which this application is based are that the plaintiff seeks judgment for a liquidated demand with interest thereon; that there is overwhelming documentary evidence that the defendant is truly indebted to the plaintiffs as per the plaint; and that, the defendant has acknowledged its indebtedness to the plaintiff in writing. The applicant gives a further ground that the plaintiff’s case is a clear one.

In addition to the above stated grounds, Ramji D Vekaria, a director of the plaintiff swore an affidavit in support of the application on the 25th April, 2002, to which a number of annexures are attached. Mr Paul Gicheru, the learned counsel for the applicant heavily relied on the said affidavit and the annexures. In his argument counsel stated that the construction contract between the applicant and the respondent comprised of two agreements which were supplementary, namely, the initial agreement which is exhibited as annexure RDV1 and the Bill of Quantities – annexure RDV12. The contractual value, if successfully completed was agreed at Shs 476,371,024/=.

In terms of the contract, counsel said that interim certificates would be issued in accordance with the work progress and upon being presented to the respondent, payment therefore had to be tendered within 14 days. He cited clause 29 (a) of the agreement and the appendix thereto. Counsel referred to the bundle of interim certificates exhibited as annexure RDV3” which show the quantity of work completed by certain dates stated therein and the valuation for payment:

Shs

(i)	19.07.90	.....	14,812,767.00
(ii)	11.10.90	.....	3,990,005.10
(iii)	06.11.90	.....	10,235,543.85
(iv)	11.12.90	.....	16,341,416.45

(v)	16.01.91	.....	5,448,200.95
(vi)	11.02.91	.....	3,284,476.65
(vii)	08.04.91	.....	3,157,686.10

**Sub-Total Sh 57,270,686.10**

It was argued for the applicant that payments received from the respondent did not conform to the contractual terms and were grossly delayed such that they ought to attract interest as per clause 29 of the Bill of Quantities (BQ).

Annexure “RDV13” is a bundle of further interim certificates which were also issued for payment and which counsel submits contained all costs incidental to the work on site:

			Shs
(viii)	06.10.92	.....	8,692,548.20
(ix)	27.03.95	.....	45,155,722.55
(x)	24.07.96	.....	40,337,799.55
(xi)	23.09.97	.....	40,091,730.32
(xii)	23.09.97	.....	5,873,590.20
(xiii)	30.04.99	.....	45,153,620.50

**SUB-TOTAL SH. 185,305,011.30**

It is the case for the applicant that these latter certificates have not been honoured by the respondent and yet they were issued by the architect acting as its agent and thereby created a debt which the applicant is entitled to recover by summary procedure. He buttressed his argument with a number of decided authorities which I have duly considered. Further, counsel submitted that the validity or otherwise of an issued certificate is a matter between the architect or quantity surveyor as agents on the one part, and their employer, the principal, on the other party, but that as against the contractor (respondent), the agents thereafter become *functus officio* (Nai CA No 5 of 1997 *Nairobi Golf Hotels (K) Ltd vs Lalji Bhimji Sanghani Builders & Contractors*). Counsel did point out a number of documents in which the respondent acknowledged debts arising out of certificates viii-xiii without at all raising issue with interest, loss and expenses and went further to intimate its efforts in sourcing for funds to discharge the debts. It was pointed out to this court that at no time did the respondent deny its contractual liability an applicant’s claims against it. The purported cancellation of the certificates 3 years after this suit had been filed was not only a deliberate step to defeat the applicant’s claim in the suit, but was not even provided for in the contract. The architect had no authority in law to so cancel the certificates.

Addressing himself to the replying affidavit further counsel submitted that the issue of cancellation of the certificates is not pleaded in the statement of defence which itself has not counterclaim that the certificates be set aside. Dr Sang’s request that no interest be levied by the applicant was not made part of the agreement which superseded the request. Counsel described the defence as a sham because although the respondent is in it questioning the validity of contractual claims by the applicant, the respondent did not see it fit to refer any disputed certificate to arbitration without any delay as provided for in clause 32 of the agreement, not even after 5 years.

The applicant also states that had it failed in its obligations, the respondent should have given particulars thereof in the replying affidavit and that even in the defence, there is no claim for damages which is provided for in the agreement-work is said to have stalled not due to desertion by the applicant from the site but because the respondent’s inability to honor the payments schedule. Relying on the authority in *Kea N Barua & Anothr vs Town Construction Co Ltd* Civil Application No Nai 325 of 1998 (UR), counsel submitted that any dispute over the amount claimed by the contractor once not raised during contractual period, if brought up for the first time as a defence to a suit, the same is to be considered as frivolous. In the instant case, the defence is raised 5 years after the date of issuance of the certificates and 3 years after filing suit, and so cannot stand. On the issue of limitation, counsel submitted that a fresh

admission of the final certificate dated 5th May, 1999 validated the previously time-barred claim on the certificate number viii. For this he relied on KAK HCCC No 65 of 1993 *R A Onditi vs KCF Ltd* and Eld HCCC No *Savings & Loans (K) Ltd vs A K Maiyo*. Since the respondent did not cite any authority which could challenge the ones on the effect of a certificate, and, having satisfied the principles applicable to summary judgments, counsel for the respondent urged this court to allow the application as prayed.

In reply, Mr Kuloba, counsel for the respondent, relied on the replying affidavit dated 3rd June, 2002 by Mr Macharia. Among the triable issues which he observed that should go to trial include, principally, the validity of the certificates on which the claim of the applicant is founded. The invalidity of the certificates, according to counsel, arose from inclusion in them by the 'DR' additional expenses and interest which were neither provided for in the agreement nor within the ambit of the 'DR's authority. In his argument, counsel was submitted that "other items provided for in clause 13 (c) could not be interpreted to include "other contractual claims" and did limit the "DR" to giving directions and instructions only as work progressed. While relying on the annexure "SMM1" which is a letter by Dr Sang to the applicant urging that interest would not be charged, counsel termed this as a condition precedent to the agreement between the parties. Suffice it if I state at this juncture that the letter preceded the actual signing of the agreement by a few months but its terms were not incorporated therein. Mr Gicheru took a valid point on the inefficacy of the letter as a defence, which I, with respect, fully agree with. Counsel further submitted that the architect (DR) though appointed by the respondent, was an independent individual and was not its agent for purposes of certifying work done. The certificates which he issued were interim and were subject to amendment and could be disregarded if issued without jurisdiction (*Halsbury's Laws of England*) 4th Ed. Vol 4 pages 572-620). Relying also on the book, *Building Contracts Law, 1st edition* he argued that where a certificate is issued outside jurisdiction, it may be ignored. Payment of interest was in doubt due to a conflict between the agreement and the BQ as only the latter clearly provided for payment of interest. In those circumstances the respondent is entailed to defeat an application for summary judgment. On why the respondent did not resort to the arbitration clause in the agreement, counsel argued that, that course of action was no longer tenable after the suit was filed in court. He submitted that the certificates Viii – Xiii were cancelled by 'DR' due to their invalidity so as to issue a final certificate.

Counsel took issue with the certificate viii which he submitted is time barred, having been issued 7 years ago. He denied that there was any acknowledgment thereof as purported in the applicant's annexure No "RDV11". In his view, there is no clear that the colossal amount of public money claimed is owing, the respondent may be prejudiced if the suit is determined by way of a summary judgment.

Counsel distinguished *Gupta's* case (*supra*) in two ways. Firstly, that the certifier therein was specifically made the agent of the employer. Secondly, final and not interim certificates were at issue. Had similar views with regard to *Nairobi Golf Hotels (supra)* and *Ata Ul Haq vs The City Council of Nairobi* [1962] EA 18-31 on which the applicant relied to assert that the 'DR' herein was the respondent's agent and that he cannot cancel the certificates. Urging this court to allow the hearing of the suit on the merits, counsel argued that it is necessary to take evidence in order to determine whether or not the 'DR' had powers to revoke or amend interim certificates which he had issued, and, that his oral evidence on the reasons for revocation is necessary. In his final address, Mr Gicheru for the applicant submitted that *Gupta's* case involved interim certificates like in the instant's. He pointed out that clause 1 in the agreement expressly made the 'DR' the employer's agent. Counsel stated there were clauses both in the Agreement and in the B.Q which showed that the two documents were to be read as one. While in the agreement there is a provisions for payment of loss and expenses, clause 29 BQ provides that interest shall be certified by the 'DR'. Since this was not a claim paid on schedule but after 7 years or so, loss and expenses were due and payable.

I think that the above resume of the facts as presented before me by the rival arguments of counsel clearly set out the issues in this application. They have also depicted in brief what the case for the plaintiff is and the defence of the defendant. It is now time to apply the law relevant to the facts. As far as it concerns as here, I will reproduce the provisions of o XXXV rules 1(1) and (2) and 2 of the Civil Procedure Rules:

1. (1) In all suits where a plaintiff seeks judgment for –

- (a) a liquidated demand with or without interest: .....
- (b) .....
- (2) Where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, .....

2. (1) The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.
- (2) Any set-off or counterclaim may entitle a defendant to defend to the extent of such set-off or counterclaim.

It is not in doubt that the applicant has a liquidated claim against the respondent and is therefore entitled to apply for summary judgment. There are numerous decided authorities of this court and of the Court of Appeal which have now made it trite that when the plaintiff makes such an application, the defendant must demonstrate to the court that it should have leave to defend the suit. In the instant case, a defence has been filed, and in addition to the affidavit evidence, this court must be satisfied that the defence so filed raises *prima facie* triable issues and that it is not a mere sham (*Gupta vs Continental Builders Ltd* [ 1978] KLR 83).

In the instant case, the respondent admits the existence of the construction contract but claims that whatever was due to the applicant, namely, Shs 57,270,096/10 was paid to it in full. Its defence to the subsequent claim of Shs 185,305,011/30 is that the amount comprises of certificates which department representative (DR) issued without jurisdiction as other charges as loss and expenses together with interest were included. That these had not been provided for in the written contract and that the applicant had undertaken not to charge any interest for delayed payments. These certificates having cancelled by the 'DR' so the defence states, the contested items should go to a full trial.

In the agreement between the parties, the respondent conferred powers and authority upon the DR to prepare and issue certificates to the applicant. In doing so, it cannot, by any stretch of imagination be said that he acted independently, even if he did so impartially as he was bound to. He clearly acted as the respondent's agent without the applicant playing any role. On the authority of *Nairobi Golf Hotels* (Supra), whether the certificates were invalid or in breach of whatever terms, and in the absence of a collusion or fraud being proved, the issue of invalidity and breaches must remain matters between the respondent and the 'DR' and the applicant has no role in them. The defence that the certificates were invalidly issued is a mere sham. I am reinforced in this finding by three main reasons. At no time prior to the filing of this suit were the certificates disputed by the respondent. Its reasons for not making good the certificates for a period in excess of 5 years were the lack of funds and that efforts were being made to procure the same and effect payment. During a meeting between the parties on the 8th November, 1999, several years subsequent to the submission of the certificates, among the issues discussed when considering the mutual termination of the contract was item no. 03.04.(b) whereby the applicant was given a specific time frame within which to submit all contractual claims. Both the Public Works and the 'DR' were present. There was no dispute at all raised regarding certificates viii – xiii which were then pending for payment (see annexure "RDV11). The second reason why the defence that the certificates were invalid is untenable is that within the contractual terms, a party who had a dispute concerning issues appertaining to the contract was required to forthwith refer the same to arbitration. It will noted that whereas certificate no viii was issued on 6th January, 1992 and no. xiii on 30th April, 1999, there were no steps taken by the respondent towards initiating arbitration over the certificates. The invalidity of the certificates has been raised late in the day and, no doubt, specifically to defeat the applicant's claim and to deny it the fruits thereof.

Thirdly, in the pre-contract correspondence by the respondent to the applicant dated 28th June, 1990, it was requested in part:

"As indicated to you, please note that there may be delay in honouring interim payments on this project. When such delays occur, you will be expected to proceed with the works diligently without stoppage and you will not be expected to charge interest on delayed payments....."

However, when the contract itself was subsequently executed by the parties, no such restriction was inserted. There is no dispute that the BQ formed part and parcel of the contractual terms. In it, interest is specifically provided for. The aforesaid letter of 28th June, 1999 (annexure “SMM1”) does not afford any *bona fide* defence to the respondent as far as the levying of interest on late payments is concerned. Indeed in the “DR’s letter dated 30th November, 2001 written more than 2 years after this suit had been filed and which purported to cancel the certificates Nos viii – xiii (annexure SMM2”) at paragraph 2, he states:

“Under these circumstances, and in view of the stand taken and clearly stated in the letter of award of the contract to M/S. Vishva Builders Ltd., to the effect that payment of interest on delayed payments will not to be expected, which ignores the provision in the Bills of Quantities pages 2/ 5 clause 29 – certificates and payments, to the effect that interest will be certified against the contingency sworn written in the contract, it is clear that the interim certificates Nos. 8-3 were issued in the error and we hereby set them aside until the employer and the contractor are notified of our decision”. The emphasis is mine. Clearly the DR in his letter had misgivings regarding the validity of the annexure “SMM1” and he was right taking into account that the annexure “SMM1 terms were expressly excluded from contract documents. At least, they were not incorporated and became of no effect.

In my view, the purported cancellation of the certificates by the DR may have been instigated by the respondent in its preparation for its defence. This is bone out by the turn-about in conduct of the respondent prior to and after the suit was filed. The cancellation was mischievous and of no effect. The authorities which counsel cited in this case are in favour of the applicant in situation like the instant. I already referred to the case of *Nairobi Golf Hotels* (supra) wherein the employer’s agent was in breach of mandatory provisions in the contract when he issued the certificate that is not even comparable to our case wherein the BQ clearly provided for what is alleged not be due. The court in that case held that the employer was liable and any loss to it was recoverable from the architect, its agent. With respect, that is the correct position in law and I hold likewise.

The only pending issue for determination is the defence that the applicant is in breach of contract and having abandoned it, is not entitled to payment. That defence is also not *bona fide*. Several correspondences which were exhibited before this court had demonstrated that all along, after the contract stalled, it is the respondent which was pleading lack of funds to continue with the contract and eventually approached the applicant to have it mutually terminated as it was finally done. I find no substance in that defence. Likewise, the defence that certificate no. viii is time barred is untenable because it was subsequently acknowledged within the statutory period. I need not burden myself further with regard thereto in light of overwhelming affidavit and documentary proof adduced before me.

The upshot of my findings and ruling in this application is that the applicant has satisfied the provisions of o XXXV rules 1 and 2 of the Civil procedure Rules. On its part, the respondent has not convinced this court that it has a *prima facie bona fide* defence which entitles it to defend the suit. I consequently grant prayer (a) in the motion with costs of this application to the applicant.

It is so ordered.

**Dated and delivered at Eldoret this 16<sup>th</sup> day of October, 2002**

**G.E.O TUNYA**

**JUDGE**