



Consulting Engineering Services (India) Private Ltd v Attorney General & another (Civil Suit E844 of 2021) [2024] KEHC 1568 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E844 OF 2021
FG MUGAMBI, J
FEBRUARY 16, 2024**

BETWEEN

CONSULTING ENGINEERING SERVICES (INDIA) PRIVATE LTD . PLAINTIFF

AND

THE HON ATTORNEY GENERAL 1ST DEFENDANT

**THE PRINCIPAL SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY
& REGIONAL DEVELOPMENT 2ND DEFENDANT**

RULING

Background

1. Before the Court is the applicant's Notice of Motion application dated 25th April 2022 brought under the provisions of Order 2 rule 15 (1), Order 2 rule 15(l)(a), (c) and (d) and rule 2 and Order 51 rule 1 of the *Civil Procedure Rules*, as well as sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*.
2. The application prays for striking out of the respondents' Statement of Defence dated 30th November 2021 on the grounds that it does not disclose a reasonable defence in law and as a consequence the applicant further prays that this Honourable court be pleased to enter judgment for the applicant against the respondents as prayed in the plaint.
3. The application is premised on the grounds on the face of it and supported by the affidavit sworn by SHITAL Chinchwade, a director of the applicant company on 20th April 2022. The applicant confirms its claim for payment of outstanding invoices in the sum of USD 3,017,908.00 (plus interest) for services rendered to the 2nd respondent through its predecessor, Ministry of Regional Development Authority.



4. The applicant's claim arises from a contractual relationship with the respondents evidenced by a contract dated 31st May 2010. According to the applicant, the 2nd respondent through the then Ministry of Regional Development Authority awarded the applicant company a contract for provision of services in the nature of feasibility study and detailed design report for the construction of a dam project on River Mwache (Mwache Dam Project).
5. Upon completion of the work the applicant raised nineteen (19) invoices as per the agreed milestones and these were sent to the 2nd respondent for payment. The 2nd respondent paid eight (8) invoices leaving a balance of eleven (11) invoices which the applicant now claims.
6. As far as the applicant is concerned, the executed contracts, partial payments and admissions for the balance of the unpaid dues confirms the 2nd respondent's indebtedness to the applicant contrary to the mere denials pleaded in the Defence.
7. The application is opposed by way of Grounds of Opposition in which the respondents aver that the Defence raises triable issues of law and fact which ought to be subjected to judicial examination and determination on merit.

Analysis

8. Parties canvassed the application by way of written submissions which I have considered together with the pleadings, evidence and authorities submitted by rival parties.
9. The provisions of Order 13 rule 2 of the [Civil Procedure Rules](#) stipulate the process and powers that this Court has in respect to an application where an admission of facts is alleged. It provides as follows:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”
10. The applicant has cited authorities including [Synergy Industrial Credit Limited v Oxyplus International Limited & 2 Others](#), [2021] eKLR and [Scanad Kenya Limited v Independent Electoral & Boundaries Commission](#), [2021] eKLR in support of their argument that the respondent's admissions should be inferred from the pleadings as well as from letters outside the scope of the pleadings.
11. The applicants rely on the case of [Continental Butchery Limited v Samson Musila Ndura](#), Civil Appeal No. 35 of 1997 and [Margaret Njeri Mbugua v Kirk Mweya Nyaga](#), [2016] eKLR in persuading this Court to strike out the Statement of Defence filed by the respondents for being a sham and a waste of the Court's time.
12. The respondents have vehemently opposed the submission by the applicant. They instead state that the correspondence relied on by the applicant does not qualify to be unequivocal admissions. The basis of this submission is that the letters purportedly issued by the 2nd respondent as admissions to the debt were not sanctioned. As to the source of the emails, the respondents argue that the authenticity of the correspondence will require full enquiry at a trial.
13. The respondents have implored this Court based on the decision in [Blue Shield Insurance Co Ltd v Joseph Mboya Oguttu](#), [2009] eKLR not to strike out their defense as the striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham.



14. I have considered the disputed Statement of Defence in a bid to ascertain whether it raises ‘any triable issues’. Fortunately, the discourse on what constitutes a triable issue is well settled. I am cognizant from the holding in *Patel v EA Cargo Handling Services Ltd*, (1974) EA 75 that:
- “...a triable issue does not mean one that will succeed. A triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.”
15. The Statement of Defence dated 30th November 2020 filed by the respondents raises pertinent issues that the Court cannot determine at this point of the proceedings. The averment by the 2nd respondent that the 2nd respondent did not initiate or undertake any procurement and tendering process as alleged by the applicant and further that the applicant was not awarded any tender for the provision of services as alleged are issues that go to the root of the dispute between the parties.
16. The Court will also be called upon to determine whether the said contract (if it does exist), is void pursuant to the provisions of the *Public Procurement and Asset Disposal Act*, 2015 as alleged by the respondents.
17. I am also cognizant that the applicant pleads ostensible authority of the officers that dealt with them, representing the respondents. As to whether there was such ostensible authority is an issue that can only be determined at a full interrogation of the facts and evidence.
18. In my view this demonstrates that the Defence filed by the respondents is not frivolous. I am reminded that even if there was only one issue raised in defense, so long as it constitutes a genuine defense which is not necessarily a successful defense, that would warrant a full hearing. All factors considered, I am not convinced that the respondents should be driven from the judgment seat.

Determination

19. As such, the application dated 25th April 2022 is devoid of merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

