



**Set and Sit Contractors Limited v Canonico (Civil Suit E561 of 2015)
[2024] KEHC 5383 (KLR) (Commercial and Tax) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E561 OF 2015
FG MUGAMBI, J
MAY 13, 2024**

BETWEEN

SET AND SIT CONTRACTORS LIMITED PLAINTIFF

AND

PAOLO BARBERIS CANONICO DEFENDANT

JUDGMENT

Background

1. The plaintiff instituted this suit, through a plaint dated 10th November 2015, seeking to recover \$216,500, from the defendant, a sum arising from various loans advanced to the defendant on diverse dates between 5th November 2013 and 7th December 2013. Despite the defendant being served with a summons on 8th October 2016, they neither appeared nor filed a defense.
2. The plaintiff successfully applied for interlocutory judgment and a judgment in default was entered against the defendant on 2nd November 2016.
3. The defendant responded by filing an application on 25th November 2016, to set aside the interlocutory judgment. Later, on 28th March 2017, the defendant successfully requested a stay of proceedings in this suit, pending the outcome of arbitration proceedings between the plaintiff and the defendant's company, Mare Nostrum Limited (MNL). These proceedings ultimately resulted in an award of \$1,258,231 in favor of the plaintiff, which remains unpaid.
4. After the arbitration concluded, the plaintiff resumed prosecuting this suit. On 13th October 2022, the Court allowed an application dated 16th August 2022 by the defendant's advocates to cease acting.



The Evidence

5. At the hearing of the suit on 30th October 2023, the plaintiff called its director George Momanyi Aruru who adopted his witness statement dated 10th November 2015 as his evidence and produced the plaintiff's list and bundle of documents as PExh1. The defendant did not appear, despite being served with the hearing notice via email on October 3, 2023.

The Submissions

6. The plaintiff filed written submissions dated 31st October 2023 urging the Court to enter judgment as prayed since the claim was undefended. The plaintiff relied on the Court of Appeal's decision in Malindi Civil Appeal Number 27 of 2013, *Mariano Dinacci v Angelo Lattineli*, [2015] eKLR. The plaintiff also submitted that there has been a deliberate effort by the defendant to delay and prevent prosecution of this suit

Analysis and Determination

7. I have carefully considered the pleadings, evidence and written submissions as filed. The issues that lend themselves for determination are whether the plaintiff has proven its claim against the defendant and whether it is entitled to the remedies sought.
8. Although the claim is uncontested, it remains this Court's duty to ensure that the plaintiff has satisfactorily proved its claim on a balance of probabilities, as required under sections 107 and 109 of the *Evidence Act*. This burden does not change in the absence of rebuttal from an opponent. If the evidence falls short, the Court must dismiss the claim. This position aligns with the precedent set in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another*, [2014] eKLR.
9. As this case concerns loan recovery, the amount disbursed must be established before any action is taken to redeem it, held in *Erick Barasa Makokha & 2 Others v Neema Ya Mungu Investment Co Ltd*, [2021] eKLR.
10. The defendant's case has been that the plaintiff entered into a contract with MNL whereby the plaintiff was engaged as an independent contractor to construct a world class tourist resort. Although the defendant admitted that he was a director of MNL, he denied having a direct relationship with the plaintiff with respect to the obligations in the contract.
11. Due to the plaintiff's failure to complete the construction as agreed, the agreement was terminated. MNL invoked the arbitration clause and referred the dispute to a sole arbitrator, Mr. Malonza Simon Saili. The defendant decried that the amount claimed in this suit was also the subject of the proceedings before the arbitrator. This same position was restated in the defendant's application dated 28th March 2017, to stay further proceedings in this case pending the determination of the arbitration between the plaintiff and MNL.
12. In the ruling of Hon. Ochieng J (as he then was) dated 2nd March 2018, in respect of the defendant's application to set aside the interlocutory judgment, the Learned Judge observed as follows:
 - “43. I also find that the defendant has alluded to an arguable defence. I so find because it appears, on a prima facie basis, that the issues raised in the plaint are similar to the issues raised in the arbitration between Mare Nostrum Limited and the plaintiff.



44. From the documents annexed to the plaint, it does appear that there is a clear nexus between the money allegedly loaned to the defendant, and the construction of the Msambweni Saruni Luxury Resort. In particular, there is a document dated 20th January 2014 which cites the sum of US Dollars 100,000, which was said to be in respect to; “Architectural Drawings and Structural Drawings for the Msambweni Saruni Luxury Resort”.
 45. One issue ought not to be adjudicated before two or more forums simultaneously. Therefore, the existence of another case, at which a similar issue was being addressed, may give rise to an arguable defence.”
13. Against this backdrop, Hon. Kasango J. (Rtd) in a ruling dated 30th October 2018, further observed that:
- “ 10. The plaintiff in order to prove that that amount, in the suit, bears no relation to the arbitration, filed the bank money transfers that it had made. I have gone through them and I will proceed to analyse them.
 11. The bank transfer of 5th November, 2013, for Usd 25,000 is shown to have been made by the Plaintiff to the Defendant. The remittance information given to the bank by the Plaintiff at the time of the transfer of those funds was that the amount was in respect to reimbursement of legal fees.
 12. There is no bank transfer for 11th November 2013, as claimed in the Plaint. There is however a bank transfer of 12th November 2013 made by the Plaintiff to the Defendant for Usd 5,000 and the reason the Plaintiff gave to the bank for making that transfer was that it was a refund.
 13. There is no bank transfer to the Defendant which relates to the Plaintiff’s claim of Usd 2,500 of 11th December 2013.
 14. There is also no transfer to the Defendant for 16th December 2023 for Usd 5,000. There is however a bank transfer in favour of the Defendant of Usd 5,000 dated 18th December 2013.
 15. There is a transfer to the Defendant dated 31st January 2014, for Usd 100,000 which is reflected as being architectural and and (*sic*) engineering services.
 16. There are no bank transfers to the Defendant of Usd 2,500 dated 27th January 2014; of 13th February 2014 for Usd 2,250; of 1st March 2014 for Usd 3,000; of 24th April for Usd 4,000; of 22nd May 2014 for Usd 2,250; of 9th July 2014 for Usd 2,250; of 5th September 2014 for Usd 2,250; of 5th September 2014 for Usd 6,000; of 17th December 2014 for Usd 12,000; of 17th December 2014 of Usd 20,000; and 17th December 2014 for Usd 20,000.
 17. The above transfers are missing from the bundle the Plaintiff annexed to the Replying Affidavit where it was deponed that the bundle contained the transfers made to the Defendant by the Plaintiff.
 18. The above transfers should be understood in the backdrop of this court’s finding by Justice F. Ochieng by his ruling dated 12th March 2018...



19. That Mwambweni Saruni Luxury Resort is the structure the Plaintiff was contracted by MNL to construct before the dispute arose and the same was referred to Arbitration.
20. That finding by Justice F. Ochieng has not been appealed against. It therefore follows that because Justice F. Ochieng is a Judge of the High Court, as I am, I cannot violate the rule of coordinate jurisdiction and cannot therefore go against the finding by Justice F. Ochieng.
21. Having considered the evidence presented before me and bearing in mind the finding of Justice F. Ochieng, I am of the view that the matter before this Court is also before the Arbitrator and consequently in keeping with section 6 of Cap 21 this suit shall be stayed.
22. Accordingly, the orders of the Court are:-
 - a. This suit is hereby stayed pending the final determination of the arbitration between the Plaintiff and Mare Nostrum...”

14. There is an acknowledgment by the plaintiff that the arbitral proceedings which have since been concluded resulted in an award to the plaintiff of \$1,258,231 against MNL. The amount is yet to be recovered.
15. It is also clear from the two rulings captioned above that this Court already pronounced itself on the nexus between the money allegedly loaned by the plaintiff to the defendant and the construction of the Msambweni Saruni Luxury Resort, which was the subject of the arbitral proceedings.
16. This Court also stayed the proceedings in this suit on the basis that it was sub judice to the arbitral proceedings. There has been no appeal or review of the aforementioned rulings.
17. The plaintiff now seeks entry of judgment against the defendant as prayed in the plaint. I align myself with the findings of by Kasango J. (Rtd), that this Court cannot go against its own findings as this would violate the rule of coordinate jurisdiction. I am therefore bound by the earlier decisions of the Court.
18. That being the case, there is nothing more to say but to acknowledge that this suit is res judicata, having been premised on sums relating to the construction of the Msambweni Saruni Luxury Resort, the subject of the arbitral proceedings between the plaintiff and MNL.

Disposition

19. In conclusion, the plaintiff's suit against the defendant is dismissed for want of merit. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

