Shiv Construction Company Limited v Kisumu Real Estates Limited (Civil Case 26 of 2015) [2023] KEHC 3659 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3659 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL CASE 26 OF 2015

JN KAMAU, J

APRIL 24, 2023

BETWEEN

SHIV CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF

AND

KISUMU REAL ESTATES LIMITED ..... DEFENDANT

RULING

1. In its Notice of Motion dated 24th September 2015 and filed on 6th November 2015, the Plaintiff herein sought that the Defendant's Statement of Defence dated 30th July 2015 be struck out and judgment be entered against the Defendant in its favour for the sum of Kshs 26,657,105.28. In the alternative, it sought that judgment on admission be entered against the Defendant in its favour for the sum of Kshs 9,345,528/= together with interest thereon certified as due and payable by the Defendant's Quantity Surveyor and as per the Interim Certificate No 941000 issued by the Defendant's Project Architect on 29th September 2014.

2. Dilip Sutar, a Director at the Plaintiff's Company, swore an Affidavit on 24th September 2015 in support of the said application. The Plaintiff pointed out that by a contract made on 24th September 2014 between the Defendant and itself, in consideration for the payment of the sum of Kshs 204,834,723/=, it agreed to construct and complete fifteen (15) four-bedroomed maisonettes with artic (sic) and associated works on property KSM/Mun/Kapuonja/1531(hereinafter referred to as the "subject property") situated at Kapuonja, Kisumu County. It stated that the date for site possession was set for 8th August 2014.

3. It averred that prior to the formal execution of the construction contract aforesaid various meetings were held and site visits conducted by both parties where it was discovered that the scope of work covered in the construction contract did not include the site clearance works as a lot of preparatory work had to be undertaken on the ground before the actual works could be commenced.

4. It further stated that it undertook substantial work on site on 15th September 2014 and submitted its application for valuation No 1 to the Project Quantity Surveyor for the purposes of the issue of an interim valuation which was subsequently issued and submitted to the project Architect. It added that on 29th September 2014, the project Architect issued an Interim Certificate no 1 in the sum of Kshs 9,345,528/= and the same was duly presented to the Defendant on 30th September 2014 for settlement.

5. It averred that under Clause 34.1 of the Contract it was required to submit to the Quantity Surveyor an application for payment with a copy thereof to the Defendant and the Project Architect. It asserted that on receipt of such an application and after verifying the amount, the Quantity Surveyor would prepare an interim valuation of work done and the material on site during the relevant period within seven (7) days and forward the same to the Architect who upon receipt would issue an Interim Certificate to it within seven (7) days the same being copied to the Defendant.

6. It was its contention that it would then be entitled to payment on presentation of the Interim Certificate so issued to the Defendant within fourteen (14) days from the presentation thereof and that such certificate would attract interest at the prevailing commercial rates from the date of default until payment in full.

7. It further averred that upon receipt of the said Certificate of invoice from the Project Architect, it prepared the relevant invoice and submitted the same to the Defendant for settlement but that the Defendant frustrated its contractual obligations by failing to settle the due amount within the stipulated period despite numerous demands.

8. It added that the Defendant also refused to provide other necessary details for the carrying out of the works. It asserted that pursuant to the Defendant's persistent failure to perform its obligations, it submitted its contractual claims which were tendered at various stages and on diverse dates such as 5th December 2014, 21st December 2014, the updated claim at 6th February 2015 and the revised assessment of claim dated 28th May 2015 in the sum of Kshs 26,657,105.28.

9. It pointed out that it was left with no option but to suspend all the works it was carrying until the Defendant provided all the requirements that it was obliged to perform under the Contract but that upon meetings with the Defendant, it was resolved that it would continue with the works with scaled down activities until the National Environment Management Authority (NEMA) resolved pending environmental issue on the site.

10. It added that it encountered several challenges in the course of executing its obligations under the contract which it documented in the correspondence exchange between them and NEMA which it pointed out, suspended the works at some point.

11. It was categorical that the Defendant had not terminated the said Contract and that there was therefore no dispute that it was entitled to the sums liquidated amount of Kshs 26,657,105.288 comprising of prolongation costs and claims of Kshs 17,311,577.28 in addition to unpaid Certificate No 1 in the sum of Kshs 9,345,528/= which claim continued to accrue interest as provided under the contract.

12. It pointed out that the Defendant filed a Memorandum of Appearance but failed to file a Defence.

13. Wickliffe Abok, a Director of the Defendant Company, swore a Replying Affidavit on 19th January 2016 in opposition to the Plaintiff's application. The same was filed on 22nd January 2016.

14. The Defendant averred that the application was unnecessary, frivolous, a blatant abuse of the court process, lacking in merit and was grounded on patently false, baseless and/or fictitious allegations and ought to be struck out.

15. It was categorical that the Plaintiff was openly making false allegations on information that it knew was untrue since it filed a Defence on 31st July 2015 and served the same upon the Plaintiff's Advocates on 11th August 2015 whereafter which the Plaintiff filed a Reply to the Defence. It asserted that its Defence was good in law and had raised numerous triable issues which could not be dispensed by way of summary judgment as had been alleged by the Plaintiff herein.

16. It was emphatic that at no time did it expressly or impliedly admit to being indebted to the Plaintiff in the sum of Kshs 26,657,105.28 or any part thereof or at all and that such purported admission only existed in the Plaintiff's mind. It asserted that having filed its Reply to its Defence on 6th November 2015, the Plaintiff joined issues with it and hence it ought to be estopped from denying that the Defence raised triable issues to be determined at the full hearing.

17. It asserted that the purported Certificate No 941000 allegedly issued by the project Architect on 29th September was illegal and baseless since no work had been commenced or undertaken by the Plaintiff or approved and as such the same was unenforceable and further that the claim of Kshs 9,345,528/= was not only fictitious but that the same was also null and void.

18. It was emphatic that no amount was due or payable to the Plaintiff and added that the alleged claim of Kshs 26,657,105.28 as purported revised compensation for prolonged costs was not only based on speculative and imaginary works but also was grossly overstated to unjustly enrich the Plaintiff at its detriment after the Plaintiff abandoned the site and withdrew all the machinery after receiving a Notice from NEMA.

19. It further averred that the Plaintiff had not provided any specific proof on the alleged claimed amount or part thereof. It pleaded with court to be given an opportunity to defend and oppose the Plaint on its own merit. It urged the court to dismiss the Plaintiff's application and direct that the matter proceed on trial on its merit.

20. The Plaintiff's Written Submissions were dated 7th September 2016 and filed on 8th September 2016. The Defendant did not file any Written Submissions. This Ruling is therefore based on the Plaintiff's Written Submissions and the Defendant's Replying Affidavit only.

Legal Analysis

21. The Plaintiff placed reliance on the case of *Dawnays Ltd v F G Minter Ltd & Another* [1971] All ER 1388; 1392 where it was held that an interim certificate was to be regarded virtually as cash, like a bill of exchange and it had to be honoured. It further cited the cases of *Mugunga General Stores v Pepco Distributors Ltd* [1987] KLR 150, 153, *National Bank of Kenya v Daniel Opande Asnani* [2002] eKLR and *Kenya Commercial Bank v Santra Investment Bank Ltd* [2015] eKLR where the common thread was that a mere denial was not a sufficient defence and that a vague defence would normally be struck out.

22. It reiterated its averments in its supporting affidavit and relied among several other cases the cases of *Nairobi Golf Hotels (Kenya) Limited v Lalji Bhimji Sanghani Builders & Contractors* [1997] eKLR and Dawnways Ltd v F.G. Minter Ltd (Supra)where it was held that the principal purpose of certificates was to secure payment to the contractor of sums that were properly due to him under the contract or to express approval of work that had been done. It argued that its claim was derived from the Interim Certificates that were certified by the Defendant's agent and hence the amounts were due and owing to it from the Defendant.

23. It asserted that in its Statement of Defence, the Defendant had not set out any set-off or counter claim against it and that its allegations that the works were unapproved had not been proven as the

burden of proof lay on the Defendant. It pointed out that the vide letter dated 7th August 2014, the Defendant granted it possession of the site with a view to commencing the works on 8th August 2014 and that nowhere did the said communication state that the commencement of works was subject to the obtaining of certain approvals or permits as the Defendant alleged in its defence.

24. It referred the court to the Acknowledgement dated 10th December 2014 by the Defendant and the correspondences from the Project Architect and the Defendant's agents and argued that both the Defendant and its agents admitted to its claim without raising any issue as to whether the work it did was authorised or not. It asserted that the Defendant's denial of the existence of the contract between them was in bad faith and that its Defence did not constitute a reasonable defence as was held in *Magunga General Stores v Pepco Distributors Limited*(*Supra*).

25. It further submitted that the jurisdiction to grant judgment on admission was set out in Order 13 Rule 2 of the *Civil Procedure Rules*. In this regard, it relied on the case of *Agricultural Finance Corporation v Kenya National Assurance Company Limited (In Receivership)* [1987] eKLR where it was held that if there was an admission on the pleadings which clearly entitled the plaintiff to an order, then the intention was that he should not have to wait but might at once obtain any order which could have been made on an original hearing of the action.

26. It urged the court to consider the nature of facts upon which judgment on admission could be founded. In this respect, it relied on the case of *National Bank of Kenya v Daniel Opande Asnani*(*Supra*) where it was held that the admission upon which a court of law will act to strike out a defence and enter judgment must be clear and unambiguous. It contended that by not denying the allegations it supported by relevant proof, the Defendant was deemed to have admitted the said allegations under Order 2 Rule 11 of the *Civil Procedure Rules*.

27. It was emphatic that the Defendant's averments its Defence and Replying Affidavit were evasive in that they did not address the main subject from where its claim was derived as was held in the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd*(*Supra*). It urged the court to allow its application with costs.

28. Notably, Order 2 Rule 15 (1) and (2) of the *Civil Procedure Rules. 2010* provides that:-

    1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

        a. it discloses no reasonable cause of action or defence in law; or

        b. it is scandalous, frivolous or vexatious; or

        c. it may prejudice, embarrass or delay the fair trial of the action; or

        d. it is otherwise an abuse of the process of the court,and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

    2. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

29. Further, Order 13 Rule 2 of the *Civil Procedure Rules* states that:-

> "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."

30. It is important to note that striking out of a suit or defence or a pleading for that matter is a discretion, which should be exercise sparingly. Indeed, striking out pleadings is a draconian act which ought to be resorted to in plain cases as was held in the case of *GBM Kariuki v Nation Media Group Limited and 3 Others* [2012] eKLR.

31. Courts must restrain themselves from shutting our parties summarily without hearing their disputes on merit. Unless the plaint of defence is a sham, vexatious, frivolous and an abuse of the court process, a party to a civil litigation ought not be deprived of his right to have his day in court and have the suit determined in full trial. The court should therefore act cautiously and carefully consider all facts of the case without rushing to embarking on striking out a defence which raises triable issues.

32. With this in mind, this court perused the Defendant's Statement of Defence dated 30th July 2015 and filed on 31st July 2015 and noted that Defendant denied the Plaintiff's claim in specificity and particularity all the way from Paragraph (3) to Paragraph (25) therein. There was no indication whatsoever in the said Statement of Defence that the Defendant admitted to being indebted to the Plaintiff. It vehemently denied breaching any agreement as had been alleged by the Plaintiff. It did not also make any admissions in its Replying Affidavit in response to the present application.

33. The question of whether or not it authorised the Plaintiff to take possession of the site it raised in its said Statement of Defence. It also denied the existence of the contractual relationship between it and the Plaintiff herein, the existence of the alleged Interim Certificates and/or that it breached the terms of the Contract. It also asserted that the Plaintiff did not obtain the necessary approvals or undertake any and or any substantial works on the site.

34. It was apparent to this court that the Defendant's Statement of Defence could not be termed as a mere denial, sham, an abuse of the court process, vexatious or frivolous. The issues that it raised were triable and substantive and they were not of the nature that could not be determined summarily or by way of affidavit evidence.

35. Instead, it found and held that the Plaintiff did not provide it with sufficient proof that the Defendant's Statement of Defence was scandalous, frivolous or vexatious or that it was likely to prejudice, embarrass or delay the fair trial of the suit herein or that it was otherwise an abuse of the process of the court and/or that the Defendant had admitted its claim lending to it being struck out and judgment on admission being entered against it (the Defendant) in its favour.

36. This court took a firm view that it would be best that the dispute between the parties herein be best determined on merit rather than the matter being struck out on technicalities. Indeed, if the suit herein proceeded to full trial, no party would be prejudiced as they would both have a fair trial as enshrined under Article 50 (1) of the Constitution of Kenya, 2010 resulting in substantive justice being done to them.

Disposition

37. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 24th September 2015 and filed on 6th November 2015 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

38. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL 2023

M.S.SHARIFF

JUDGE