REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 6 OF 2020

YANG GUANG PROPERTY DESIGN

& MANUFACTURING LIMITED..PLAINTIFF

-VERSUS-

CHINA WU YI COMPANY (K) LIMITED............................DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **18 February 2020**. It was filed by the plaintiff/applicant pursuant to **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law for orders that:

> **[a]** Spent
>
> **[b]** This Court be pleased to order audit of the entire project by independent consultant of the work done during re-designing and construction of KVDA Plaza Project situated in Eldoret Town pending the hearing and final determination of this suit.
>
> **[c]** Costs of the application be provided for.

[2] The application is premised on the grounds that the plaintiff and the defendant entered into various sub-contract agreements for the re-designing and construction works at the KVDA Plaza Project situated in Eldoret Town; and that, whereas the plaintiff fulfilled its contractual obligations and supplied the defendant with invoices for works done, the defendant only made partial payment, leaving an outstanding balance of **Kshs. 29,051,342/=** which the defendant disputes. It was consequently the contention of the plaintiff that it is in the interest of justice that the orders sought be granted to ascertain the actual costs incurred on the works.

[3] The application was supported by the affidavit annexed thereto, sworn on **18 February 2020** by **Lejia Chen,** the plaintiff's Manager, in which it was averred that the plaintiff has suffered great financial crisis due to the stalemate over the outstanding balance; and that it stands to suffer irreparable harm should the application be declined. The applicant relied on the List and Bundle of Documents filed along with the Plaint to support its averments.

[4] The defendant opposed the application and relied on its Grounds of Opposition dated **3 March 2020**. It took the stance that the application is misconceived and incurably defective in so far as the orders sought are not anchored in the Plaint.

[5] The application was canvassed by way of written submissions, following the directions given herein on **9 March 2021.** Accordingly, counsel for the plaintiff, **Mr. Jamal Bake**, filed his written submissions on **14 April 2021**. He however seemed to have addressed himself more to the main suit and the issues entailed thereby as opposed to the interlocutory application dated **18 February 2020**. He consequently proposed the following issues for determination:

> **[a]** Whether there exists a valid contract between the plaintiff and the defendant;
>
> **[b]** Whether the defendant breached the contract; and
>
> **[c]** Whether the plaintiff is entitled to general and special damages.

[6] Mr. Bake concluded his submissions by stating thus, at paragraphs 39 and 40 of his written submissions:

"39.…the Defendant has blatantly refused to satisfy the said balance but instead alleges that the balance due and owing to the Plaintiff is Kshs. 69,284.48 instead of Kshs. 29,051,342/- as claimed by the Plaintiff…this calls for a fresh audit of the works done by the Plaintiff on the entire project as prayed in the suit herein.

40. In conclusion, we urge this Honourable Court to find that the Plaintiff has met the threshold required for the proof on its case. It is only fair and just that the Application herein is allowed with costs in favour of the Plaintiff.

REASONS WHEREOF, the inexcusable and inexorable surmise is that this is a classical case for breach of contract; we urge your Lordship to kindly so order in line with the prayers in the Application and the suit herein…"

[7] On her part, **Ms. Wamanga,** counsel for the defendant proposed only one issue for determination, namely, whether the application is misconceived and incurably defective on the basis that the prayers sought thereby are not anchored in the main suit. She relied on **Order 2 Rule 6(1)** of the **Civil Procedure Rules, 2010,** to support her submission that it is untenable for the plaintiff to raise the issue of audit in an interlocutory application yet the same has not been substantively prayed for in its Plaint dated **18 February 2020.** She relied on **Sunrise Properties Limited vs. Fifty Investments Ltd & Another** [2007] eKLR and **Margaret Rachel Mbogo & Another vs. Robert Njoka Muthaura & Another** [2021] eKLR in urging the Court to dismiss the application dated **18 February 2020** with costs.

[8] A technical point of law having been taken by counsel for the defendant, it is imperative that it be dealt with *in limine* ahead of any merit consideration of the application dated **18 February 2020**; and so the question that must be grappled with at the outset is whether the application, as filed, is tenable. The point raised by **Ms. Wamanga** is that, whereas the plaintiff seeks an order for an audit of the entire KVDA Plaza Project to be undertaken by an independent consultant, pending the hearing and determination of the suit, there is no such substantive prayer in its Plaint dated **18 February 2020**. She relied on **Order 2 Rule 6(1)** of the **Civil Procedure Rules,** which provides that:

"No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit."

[9] This procedural imperative was discussed by the Court of Appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others** [2014] eKLR, in which the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC** 91/2002 was quoted with approval thus:

"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

[10] And in **Raila Amolo Odinga & Another vs. IEBC & 2 Others,** [2017] eKLR the Supreme Court of Kenya quoted, with approval, the following excerpt from the decision of the Supreme Court of India in **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari & Another**, Civil Appeal Nos. 5710-5711 of 2012 [2014] 2 S.C.R.*:*

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…'"

[11] The Supreme Court then proceeded to hold that, inter alia, that for scrutiny of votes to be allowed as an interlocutory measure, the material facts *and full particulars in support of a recount must have been pleaded* in the Petition itself. Thus, the principle to glean from the foregoing authorities is that, in the case of interlocutory applications, it is to be expected that they be attuned to the primary pleadings filed by the parties.

[12] Against the foregoing backdrop, I have perused the plaintiff's Plaint dated **18 February 2020** and confirmed that no prayer for audit was pleaded therein. Hence an analogy can be drawn between the instant application and interlocutory applications for injunction in respect of which it is now well settled that for a litigant to seek temporary injunction as an interim relief, the applicant must have included a substantive prayer for permanent injunction or similar relief in the plaint. There are of course instances where departure would be excusable, to prevent the ends of justice from being defeated, under **Section 63(c) and (e)** of the **Civil Procedure Act** or **Order 40 Rules 1 and 2** of the **Civil Procedure Rules.**

[13] Thus, in **Sunrise Properties Ltd vs. Fifty Investments Ltd & Another** (supra), **Hon. Nambuye, J.** (as she then was) held that:

"By virtue of this it is the finding of this court that the relief in prayer (d) cannot stand alone. It springs from the contract. The facts which support it are woven around the contract. The two are therefore intertwined. Separation of the two for separate consideration will amount to nothing but mutilation of the reliefs. It should be noted that this preservation order too is not stated in the plaint. Being intertwined with the claim in prayer C, the alternative prayer is also found to be falling

under sub rule 2. It therefore requires that the same be anchored in this statement of claim in the plaint and where this has not been done this disentitles the applicant to the relief…The net effect of the findings on prayer (c) and (d) of the interlocutory application is that the entire application has been knocked out."

[14] In the same line of thought, **Hon. Emukule, J.** held thus in **John Kubai M'eringa vs. Fredrick Ntongai M'eringa** [2009] eKLR:

"Considering those words in the case of WINSTONE VS WINSTONE [1959]3 ALL ER 580 Winn J. said:

> **"in my view these words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for injunction is made"**
>
> **Simpson J as he then was adopted the same reasoning in Shah vs Shah [1981] K.L.R 374. In this case, as shown above, there is no relationship between the prayer in the Chamber Summons (the interlocutory pleading) and the Plaint (the principal pleading). The summons breaches both Order VI rule 6 (1) and Order XXXIX Rule 1 of the Civil Procedure Rules. It is incurably defective. It has no basis. For those reasons the same does not lie and is dismissed with costs to the Defendant/Respondent. It is so ordered.**

[15] It is manifest then, that, by parity of reasoning, it is imperative that an interlocutory prayer for an order for audit be anchored in the Plaint itself, failing which such an order would be untenable. There being no such anchoring in the instant matter, it follows that the interlocutory prayer for audit amounts to a complete departure from the plaintiff's claim as set out in its Plaint; and is therefore barred by **Order 2 Rule 6(1)** of the **Civil Procedure Rules.**

[16] The foregoing being my view of the matter, it is my finding that the application dated **18 February 2020** is incompetent. The same is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE 2021

OLGA SEWE

JUDGE