

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 17 OF 2017

KATSRAN LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MACHAKOS COUNTY GOVERNMENT.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff, in this matter filed a suit against the defendant seeking a liquidated sum of Kshs 20m/- being the unpaid contract certificates, interest and costs of the suit. In the plaint the plaintiff stated that the defendant awarded a contract to the plaintiff to upgrade the Makutano-Kithimani Road and that the work was done and the defendant duly informed of the completion. The defendant had not paid the amount by the time of filing the suit.

2. The defendants filed a defence that disputed the amount which prompted the plaintiff to file the application dated 1.11.2017 that was brought under Order 2 Rule 15 seeking that the defendant's defence dated 29.8.2017 be struck out and judgement entered for the plaintiff and in the alternative the defendant be ordered to deposit the claimed sum of Ksh 20m/- in a joint interest earning account. In support of the application was an affidavit deponed by Henry Mutua Katambo who averred that the defence is scandalous and that the defendant paid Ksh 30,936,991/- and had refused to pay the balance of Ksh 20m/-. It was averred that the defence disclosed no reasonable defence in law and that in addition to the Kshs 20m/- there was overdue interests, taxes collected but not remitted hence the amount as owed ought to be paid as claimed.

3. In reply to the application is a replying affidavit deponed by Michael Maina Muturi who averred that the value of the work done was Kshs 44,830,040. It was averred that the defendant did not owe the plaintiff the amount claimed and that the defendant was not responsible for the negative listing of the plaintiff.

4. The application was canvassed vide written submissions. The plaintiff relied on the case of *Kivanga Estates Ltd v National Bank of Kenya Limited (2017) eKLR* where the court held that a pleading may be struck out for being frivolous and vexatious. Counsel urged the court to allow the application.

5. The defendant in placing reliance on the case of *Highland Plaza Ltd v Safaricom Ltd & 3 Others (2017) eKLR* submitted that the court ought to refuse the invitation to try a case by affidavits. Counsel also cited the case of *Transcend Media Group Ltd v IEBC (2015) eKLR* where it was found that a disputed contract was a triable issue.

6. Having considered the application, the issue for determination is whether the court may allow the same.

7. According to **Odgers Principles of Pleading and Practice, 22 Edition** at page 136,

“It is not sufficient for a defendant in his defence to deny generally the allegations in the statement of claim, or for the plaintiff in his reply to deny generally the allegations in a counterclaim. Each party must traverse specifically each allegation of fact, which he does not intend to admit. The party pleading must make it clear how much of his opponent's case he disputes.”

8. I have considered the plaintiff's application as well as the rival affidavits. I have also considered the submissions of both learned counsels. The issue for determination is whether the court can grant the orders sought. From the outset the plaintiff seeks to have the defendant's defence struck out and judgement entered in his favour as prayed for in the plaint. It is trite that striking of suits is a draconian measure unless it is shown that the offending pleading is so hopeless and unsustainable. It is not in dispute that the parties herein entered into a contract. The plaintiff claims that it performed its part of the bargain while on the other hand the defendant claims to have paid the sums in question. The plaintiff now wants the defendant denied an opportunity of bringing the evidence since as far as it is concerned the defendant has none disclosed in the statement of defence. I have looked at the plaint and defence and note that each side has made their rival claims. I am aware that during the stage of filing plaints and defence parties are not obliged to present the entire evidence in support of their respective cases as that is to be complied with once the pre-trial directions are taken. Looking at the defence and the rival affidavits iam satisfied that there are triable issues which require a trial. During the trial the rival documents will be subjected to scrutiny. Vide a ruling of this court dated 23.1.2019 it was noted that the defendant's defence dated 29.8.2017 raised triable issues namely; that no contract had been awarded and if it was then the sums owed had been settled, that no taxes had been withheld or that the defendant orchestrated the adverse listing of the plaintiff with the Credit Reference Bureau. These issues have been raised in the defendant's replying affidavit herein. The plaintiff seeks an alternative prayer for the deposit of the sums owed in a joint interest earning account in the names of both Advocates pending the determination of the suit. This fact was pointed out in the ruling aforesaid that the plaintiff appeared to appreciate that there was need to adjudicate the matter. As the plaintiff disputes the sums owed I find it will not be fair to order the same to be deposited at this stage pending determination of the matter. Iam of the considered view that the defendant ought to be accorded its right to a fair trial in line with the provisions of Articles 48 and 50 of the Constitution. It is proper to subject the issues raised to a trial where the documents are thoroughly scrutinized and witnesses taken through cross examination so as to enable the court reach a balanced determination. No prejudice will be suffered if the parties take such a direction.

9. In the result it is my finding that the application dated 1.11.2017 lacks merit. The same is dismissed with no order as to costs. Parties are now directed to proceed and set down the matter for directions and or hearing as a matter of priority.

It is so ordered.

Dated and delivered at **Machakos** this **6th** day of **February, 2020**.

D. K. Kemei

Judge