



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 430 OF 2019

SHANDONG CONSTRUCTION CO. LIMITED 1ST PLAINTIFF

TITUS NGUGI 2ND PLAINTIFF

VERSUS

KENYA FORESTRY RESEARCH INSTITUTE DEFENDANT

RULING

1. Kenya Forestry Research Institute (**KFRI or the Defendant**) seeks to have the interlocutory Judgment entered against it on 7th January 2020 set aside and leave to defend the suit. Although worded differently, that is the essence of the Notice of Motion dated 23rd January 2020.

2. Emerging from the evidence contained in the affidavits of Philip Kichana sworn on 23rd January 2020 and 12th February 2020 is that summons to enter appearance as well as the Plaint were indeed served on KFRI. In the earlier affidavit, KFRI avers that the documents were inadvertently misfiled and so were not acted upon on time.

3. In the latter affidavit KFRI introduces another aspect. That upon the Plaintiff's advocates making a demand for the claim that comprises the Plaintiffs' cause of action herein, it responded through a letter of 13th August 2019 concluding with the following statement:-

“By copy of this letter, we are instructing the Hon. the Attorney General to defend any suit(s) that you may file on behalf of your client”.

4. KFRI then makes the argument that the pleadings should have been served on the Hon. Attorney General and not on it directly. An argument that the Judgment entered in default of appearance and Defence was irregular as the service was improper.

5. This argument can hardly be a serious one. This is because neither the Defendant or the Attorney General advised the Plaintiffs or the Plaintiffs' advocates that the Attorney General would be accepting service of summons in the event the Plaintiffs filed suit. The letter of 13th August 2019 simply advised the Plaintiffs, through their counsel, that the Attorney General would be defending the institute in the event of litigation. It did not ask or direct the Plaintiffs to serve any summons on the Attorney General.

6. The service of summons on the Defendant directly was therefore proper service and cannot be faulted. The consequence is that the interlocutory judgment entered on 7th January 2020 upon KFRI failing to enter appearance and/or to file Defence is a regular Judgment.

7. It is a common statement of law that where there is regular judgment, the Court will not usually set it aside unless it is satisfied that there is a Defence on merits (**See for example Patel –vs- E.A Cargo Handling Services Ltd [1974] E.A 75**).

8. Annexed to the affidavit in support of the motion is the Defendant's draft defence. Does that draft reveal a defence on merits? Being one which may not necessarily succeed but raises a prima facie defence which should go to trial for adjudication.

9. It is common ground that KFRI awarded the 1st Plaintiff tenders to construct water pans at Lenkism site and Kuku site for the contractual prices of Kshs.13,901,569 and Kshs.13,780,597 (see paragraphs 8, 9 and 10 of the Plaintiffs' Plaint read with Paragraph 5 of the Draft Defence.)

10. The Plaintiffs aver that the 1st Plaintiff completed the works on 8th October 2018 but that the Institute failed to pay it the balance of the contractual sum as set out in the final payment certificate of Kshs.3,758,410.80 for Lenkism site and Kshs.3,797,720.74 for Kuku site. Further that the Defendant has failed to pay it 10% retention sums after the end of the defects liability period. The amounts claimed are Kshs.1,253,896.20 for Lenkism and Kshs.1,266,393.19 for Kuku.

11. The Plaintiffs then point to clause 46.1 of the tender document which they allege formed part of the contract and contend that it expressly obligated the Defendant to make payments to the 1st Plaintiff within 28 days from the completion date (8th October 2015) failing which interest would start accruing at the prevailing commercial rates.

12. There is then another aspect of the Plaintiffs' case. That because of the Defendant's failure to pay demobilization costs, the 1st Plaintiff has not demobilized its machinery from the two sites leading to loss of use of machinery computed at Kshs.89,544,000.00.

13. In addition, the Plaintiffs allege breach of contract on the part of the Institute and seek damages thereof.

14. The Draft Defence disputes the Plaintiffs' claim in its entirety. But let me point out some specifics. It avers that it has not signed the final payment certificate. It contends that the contract sum included the mobilization costs which were paid to the Plaintiffs upon mobilization.

15. As to the loss of use of the claimants' plant and machinery, the Defendant avers that the items are speculative and have no contractual basis. And that further the Plaintiffs ought to have mitigated its damages, if any.

16. The Defendant points to clause 61.1 of the contract and asserts that just like it, the Plaintiffs had an equal and corresponding right to terminate the contract due to a fundamental breach.

17. As to compensation for breach, it is the Defendant's case that the only items for compensation are those set out in clause 62.1 of the contract.

18. In response to the Defendant's Motion of 23rd January 2020, the 2nd Plaintiff sworn a replying affidavit of 4th February 2020.

19. It turns out that the Defendant has on various occasions admitted part of the 1st Plaintiff's claim. On 17th March 2019, the Defendant admitted owing the contractor Kshs.7,556,131.50. On 13th August 2019, the Institute partly stated:-

"...KFRI has paid your client 60% of the agreed contractual amount. The outstanding amount due to your client being 40% of the contract amount is Kshs.10,084,261.60."

20. In his further affidavit Mr. Kichana depones:-

"That the Defendant is indeed indebted to the 1st Plaintiff's in the amount of Kshs.10,084,261.60."

He then explains why payment has not been made. He states:-

"8. That the National Environment Management Authority (NEMA) was designated as the National Implementation Entity (NIE) of the Integrated Programme to Build Resilience to Climate Change and Adaptive Capacity of Vulnerable Communities in Kenya, a programme funded by Global Adaptation Fund.

9. That it was the responsibility of NEMA to disburse programme funds to the Executing Entities (E.E) the Defendant being one such.

10. That NEMA suspended the use of disbursed funds on allegation that the Defendant had overshot the budget agreed upon by both parties."

21. Clearly, in respect to the admitted sum of Kshs.10,084,261.60, the amount is due to the 1st Plaintiff and the contractor is not to blame for the reasons why it has not been paid to date. There seems to be some unfinished business between NEMA and the Defendant in respect to disbursements of the money to be paid to the 1st Plaintiff but the Defendant does not attribute this to the 1st Plaintiff. Further the Defendant has not demonstrated any provision in the contract that made payment of the contract sums subject to disbursement of funds from NEMA or any other third party (state agent or otherwise).

22. The Plaintiffs' claim includes a sum of 10% retention amount. The Defendant denies that sum and puts the Plaintiffs to strict proof (See Paragraph 10 of the Draft Defence). The amount, said to be the retention amount, has not been admitted by the Defendant. Indeed in the letter of 13th August 2019 it says as follows of that claim:-

"KEFRI has neither failed, refused or ignored to pay your client 10% retention amount alleged to be owing since 8th April 2019 after the end of the defects liability period. Your client was not entitled to the said amount.

The final certificates never having been signed by KEFRI Acting Director owing to the suspension of the project.”

23. In the witness statement accompanying the Plaintiff the 2nd Plaintiff points to clause 17 of the Contract Data Sheet as providing for the end of the defect liability period but for some reason that sheet which is part of the contract is not shown to Court. Again only part of the Tender document which is part of the contract is before Court (Pages 35-40 of the affidavit of the 2nd Plaintiff's sworn on 4th February 2020).

For that reason the Court is unable to tell, on the material before it, the conditions that needed to be fulfilled before the retention amount was payable. In the circumstances, the Defendant's contention that the retention amount is not payable cannot be trivialized considering as well that the final certificates were not paid. On this latter observation I note that the Plaintiffs have not displayed signed final certificates.

24. Let me turn to more substantial loss of Kshs.85,544,000.00 on account of damages for loss of use of the 1st Plaintiff's plant and machinery. The basis of this claim is that the Defendant failed to pay the contractor demobilization costs upon completion of the contract and so the contractor was unable to demobilize. The Institute's Defence is that the mobilization costs were already paid to the Plaintiff. Confronted with this proposed defence, the Plaintiffs did not place any material to disprove this. This again is a triable issue and makes the bulk of the claim a triable claim.

25. This is besides the challenge to the 1st Plaintiff that it did not mitigate its losses. This is not a frivolous defence given that nonpayment for demobilization cost of Kshs.1,200,000.00 was somehow allowed to balloon to a loss of Kshs.89,544,000.00. This requires some interrogation through trial.

26. Now, summons herein were served upon the Defendant on 6th December 2019. The ex parte Judgment was entered on 7th January 2020 and about 16 days later, on 24th January 2020, the Defendant filed the current application. The Defendant moved rather quickly and that counts in its favour. And as to why it never acted on time, I find that the better explanation is that the summons were misfiled. Although there was no concrete evidence of this, the fact that the time between the time of service, entry of Judgment and filing of the current application is not inordinate (is perhaps short) this Court is willing to excuse the oversight on the part of the Defendant.

27. So this Court will allow the application but on some conditions because part of the claim is admitted. That is the sum of Kshs.10,084,251.60. These are the orders of Court:-

27.1 The application of 23rd January is hereby allowed to the extent of the orders below:-

27.1.1 The Judgment of 7th January 2020 is hereby set aside save for Judgment in the sum of Kshs.10,084,261.60

27.1.2 The Defendant shall file and serve its Defence within 14 days.

27.1.3 Costs of the Motion shall be in the cause. **Dated, Signed and Delivered in Court at Eldoret this 2nd Day of June 2020**

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Renee for Plaintiffs

No appearance for the Defendants