



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 62 OF 2019**

**MONACO ENGINEERING LIMITE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MUNYWE INVESTMENT LIMITED.....DEFENDANT/RESPONDENT**

**AND**

**HFC LIMITED.....INTERESTED PARTY**

**RULING**

1. Before this court for determination are two (2) applications: the first is the Notice of Motion dated 4<sup>th</sup> March, 2019 (“the first application”) brought by the plaintiff/applicant and supported by the grounds set out in its body and the facts stated in the affidavit of Engineer Peter Macharia, in which the applicant sought for the orders hereunder:

***(i) Spent.***

***(ii) Spent.***

***(iii) THAT this Honourable Court do enter summary judgment and/or judgment on admission in favour of the plaintiff and as against the defendant for:***

***a) The sum of Kshs.29,964,789.60 being the agreed payment as at 31<sup>st</sup> August, 2017.***

***b) Interest on delayed payment as at 22<sup>nd</sup> November, 2018 in the sum of Kshs.4,326,438.04***

***c) Further interest on a) above at the commercial bank lending rates as per the CBK guidelines in force from 22<sup>nd</sup> November, 2018 until payment in full.***

***d) In the alternative to b) above, interest on a) above be calculated at court rates of 12%p.a. from 31<sup>st</sup> August, 2017 until payment in full.***

***e) Cost of the suit.***

***(iv) THAT the judgment amount referred to in (iii) above be settled forthwith by the defendant failure to which the property known as Maisonettes in Sigona Munywe Investment Ltd on Plot LR No. Sigona/422-Kikuyu be attached and sold forthwith to satisfy the said judgment sum.***

***(v) THAT this Honourable Court do issue any further direction as it may deem fit in the circumstances of the case.***

***(vi) THAT costs of and incidental to the application be borne by the defendant.***

2. James Maina Munywe put in a replying affidavit to challenge the aforesaid Motion, to which Engineer Peter Macharia rejoined with a further affidavit.

3. The interested party chose to rely on the averments made in the supporting affidavit of its Legal Officer Joseph Lule sworn on 15<sup>th</sup>

October, 2019 to its Notice of Motion bearing like date.

4. The second application is the Motion dated 29<sup>th</sup> May, 2020 similarly filed by the plaintiff/applicant and supported by the grounds laid out on its face and the facts stated in the affidavit of its Managing Director, Engineer Peter Macharia. Therein, the applicant sought for the orders hereunder:

***i. THAT the defendant's/respondent's director, Mr. James Wainaina Munywe, and the interested party's managing director, Mr. Michael Mugambi, be and are hereby cited for contempt of court for disobedience of the court orders issued on 7<sup>th</sup> August, 2019.***

***ii. Spent.***

***iii. THAT an order for committal be and is hereby made against the defendant's/respondent's director, Mr. James Wainaina Munywe, and the interested party's managing director, Mr. Michael Mugambi to prison for a period of six (6) months.***

***iv. THAT cost of the application be borne by the defendant/respondent and the interested party.***

5. This court has not seen the responses, if any, filed by the respondent or interested party, on the record.

6. This court heard the two Motions contemporaneously and directed the parties to put in written submissions. In respect to the *first application*, the applicant submits that it had entered into a valid and binding contract with the respondent pursuant to the elements of a contract stipulated by the Court of Appeal in the case of **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR** when it observed that:

***“It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration.”***

7. The plaintiff submits that whereas it completed its contractual obligations of constructing the proposed maisonettes in Sigona on the respondent's property and handing over the project, the respondent has to date not honoured its contractual obligation of paying the sums owing to the applicant and has also not honoured its obligation of issuing payment certificates through its architects, despite several requests from the applicant.

8. It is the submission of the applicant that it is entitled to compensation from the respondent for the works done.

9. In reply, the respondent argues that the property in question does not exist and in the event that it does, then it does not belong to the respondent hence terming the orders sought by the applicant as vain.

10. The respondent further argues that it filed a statement of defence to refute the applicant's claim and which defence raises triable issues that ought to be heard on merit, thereby urging this court not to enter summary judgment against it. In submitting so, the respondent draws the attention of this court to the following holding by the Court of Appeal in the authority of **Moi University V Vishva Builders Limited-Civil Appeal No. 296 of 2004** (unreported):

***“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend...In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”***

11. On its part, the interested party in its submissions supports the argument by the respondent that the first Motion relates to a non-existent property (Plot LR No. Sigona/422-Kikuyu) and that the development referenced took place in the property known as Title No. Sigona/1707, which property the interested party has claimed a charge interest over.

12. The interested party is therefore of the view that the applicant is not entitled to the orders being sought in the first application.

13. In respect to the second application, the applicant contends that this court issued orders on 7<sup>th</sup> August, 2019 and yet the respondent and interested party chose to disregard the orders made, instead choosing to use crooked means to enrich themselves financially by advertising the property in question for sale.

14. The applicant is of the view that court orders ought to be respected and complied with, and cited various authorities to that effect, such as the case of **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** where it was held that court orders are meant to be complied with, failing which any inexcusable act of disobedience must be brought to account.

15. In its submissions dated 19<sup>th</sup> June, 2020 in retort to the above, the respondent has argued that given the quasi-criminal nature of contempt proceedings, the standard of proof would be that above a balance of probabilities but below that in criminal cases which is beyond a reasonable doubt. The respondent called upon this court to consider the case of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** in which the High Court stated thus:

***“Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases.”***

16. The respondent has further argued that the applicant ought to have satisfied this court that not only did the respondent defy the court orders but that such defiance was deliberate. According to the respondent, the applicant has not shown that the respondent in any manner published or contributed to the advertisement in question.

17. Furthermore, it is the contention of the respondent that even so, there is no basis for holding its managing director personally liable for any actions of the respondent unless and until the corporate veil is lifted, which has not been done in the present instance.

18. Going by the record, it is unclear whether the interested party filed written submissions on the second application, in the absence of a copy of the same availed for this court's reference.

19. I have considered the grounds laid out on the face of the two (2) Motions, the facts deponed in the respective affidavits supporting and opposing each Motion, and the competing submissions and authorities cited.

20. A brief background of the matter is that the applicant and respondent entered into an agreement on 14<sup>th</sup> October, 2013 for the construction of maisonettes in Sigona in Kikuyu area. It was agreed that the applicant would construct the maisonettes for the respondent and that upon completion, the respondent would pay to the sums agreed upon and claimed for the construction.

21. According to the applicant, it eventually completed the project but the respondent failed to make payment for the works done, leading to an outstanding debt in the sum of Kshs.29,964,789.60 which the plaintiff now seeks in his plaint together with interest for breach of contract, a permanent injunction plus costs of the suit and interest thereon.

22. I will primarily deal with the *first application*. In his supporting affidavit, Engineer Peter Macharia stated that the applicant undertook the project and upon completion, issued applications for payment periodically and pursuant to the agreement entered into between the parties.

23. In reply, James Wainaina Munywe stated that at no point did there exist any contractual arrangement between the parties in respect to the property in Sigona known as Plot LR No. 422-Kikuyu and that the respondent denies being indebted to the applicant in the sums sought in its plaint.

24. The above position taken by the respondent was reaffirmed in the affidavit of Joseph Lule for the interested party.

25. In rejoinder, Engineer Peter Macharia restated his earlier averments that a construction contract existed between the parties.

26. It is noted that the only substantive order which was sought in the first application is for summary judgment; the injunctive and inhibition orders were only sought at the interim stage hence I am unable to consider them at this point.

27. The guiding principles in determining an application for summary judgment were succinctly stated by the Court of Appeal in the case of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania [2014] eKLR** where it held thus:

***“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.”***

28. With the Court of Appeal further reasoning that:

***“In DHANJAL INVESTMENTS LTD V SHABAHA INVESTMENTS LTD Civil Appeal No. 232 of 1997, the Court had earlier stated as follows regarding summary judgment:***

***“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant v Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd v Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions...”***

29. From the foregoing, it is clear that where a defendant puts forth a defence which raises triable issues, he or she ought to be allowed to defend his or her case on merit.

30. The record shows that the defendant herein entered appearance in the suit and filed its statement of defence to deny the existence of the property known as Plot LR No. 422-Kikuyu and to further deny its indebtedness to the applicant in the sums pleaded in the plaint. In my view, these are triable issues which ought to proceed to trial for adjudication. Might I add that at this juncture, it is not this court's duty to delve into the merits of the case.

31. In the premises, I am convinced that the circumstances of the suit are not suitable for the entry of summary judgment. Consequently, I am unable to grant the substantive orders sought in that application.

32. This brings me to the *second application* touching on contempt of court proceedings. Before I proceed further, I wish to mention that the applicant through its submissions urged this court to substitute the name of Mr. Michael Mugambi as the interested party's managing director with that of Mr. Robert Kibaara, Chief Executive Officer (CEO) of the interested party on the orders sought in the aforementioned application, on grounds of an error on the part of the applicant. In the absence of any opposition from the parties, this court will allow the substitution to apply accordingly.

33. In his affidavit, Engineer Peter Macharia stated that on 7<sup>th</sup> August, 2017 this court issued interim injunctive orders against the respondent in respect to the property in Sigona known as Plot LR No. 422-Kikuyu and that the same was served upon the respondent.

34. The deponent stated that subsequently, he came across an advertisement in one of the social media platforms that the aforementioned property had been advertised for sale by the interested party and that since the interested party and the respondent have a financial agreement in respect to the property, they should both be held liable for contempt of the orders of this court.

35. The provisions of **Section 5** of the **Judicature Act** constitute the substantive law granting superior courts the power to punish for contempt.

36. The intention behind the legal principle of contempt of court is to ensure an adherence to court orders and consequently, the maintenance of the rule of law and dignity surrounding the courts as well as to create repercussions for failure to comply. Such position was acknowledged in the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR** cited by the applicant, where reference was made to the analysis by the Court of Appeal in the unreported case of **Gulabchand Popatlal Shah & Another-Civil Application No. 39 Of 1990** thus:

*“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”*

37. The guiding principles in determining whether there has been contempt of court orders were discussed in the case of **Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others [2017] eKLR** and are as follows:

- a) That the order was clear, unambiguous and binding on the defendant.*
- b) That the defendant had knowledge of or proper service of the terms of the order.*
- c) That the defendant acted in breach of the terms of the order.*
- d) That the defendant's conduct was deliberate.*

38. On the first principle, I established from the record that on 7<sup>th</sup> August, 2019 this court ordered that there be a temporary injunction restraining the respondent whether by itself or through persons acting on its behalf, from dealing or in any manner disposing of the property known as Plot LR No. Sigona/422-Kikuyu. It is apparent that the order was clear and unambiguous.

39. Concerning the second principle above, the applicant availed a copy of the order annexed to the second application as “EPM 1,” bearing the official stamps for both the respondent's advocate and the interested party. It is thus clear that both parties were properly served with the order.

40. In respect to the third principle, I looked at a copy of the advertisement annexed to the second application as “EPM 2” and I note that the same does not bear any date or details of its publisher/source. Moreover, there are no additional details to enable this court ascertain that the maisonettes indicated in the advertisement are one and the same as the ones constructed on the property known as Plot LR No. Sigona/422-Kikuyu.

41. It is clear from the foregoing that there is no ground on which this court can find that either the respondent or the interested party or both were in breach of the order issued by this court on 7<sup>th</sup> August, 2019. I am satisfied that my position here also answers the fourth principle since the applicant has not brought any credible evidence linking the respondent and/or interested party and the advertisement in question.

42. I am of the view that the applicant has not brought any credible evidence to convince this court on the need to lift the corporate veil for the respondent so as to hold its director personally liable for any acts/omissions.

43. In the premises and upon considering the quasi-criminal nature of contempt of court proceedings, I find that the applicant has not satisfied this court to the required standard of proof on the institution of contempt of court proceedings against the respondent and interested party.

44. Consequently, the Motion dated 4<sup>th</sup> March, 2019 is hereby dismissed with costs to the respondent and the interested party, whereas the Motion dated 29<sup>th</sup> May, 2020 is dismissed with costs to the respondent and interested party.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17<sup>th</sup> day of July, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent

..... for the Interested Party