



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 418 OF 2015

MASOSA CONSTRUCTION LIMITED.....PLAINTIFF

=VERSUS=

SBI INTERNATIONAL HOLDINGS AG (KENYA).....1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....3RD DEFENDANT

RULING

1. The dispute in this action relates to the contractual relationships between the parties in the project known as the Northern Corridor Transport Improvement Project (NCTIP). SBI INTERNATIONAL HOLDING AG (Kenya) (hereinafter SBI) was the main contractor of NCTIP. The plaintiff MASOSA CONSTRUCTION LIMITED (hereinafter Masosa) has sued SBI as the 1st defendant, KENYA NATIONAL HIGHWAYS AUTHORITY (hereinafter KeNHA) as the 2nd defendant and NATIONAL BANK OF KENYA LIMITED (hereinafter NBK) the 3rd defendant.

2. Before court is a notice of motion application dated 14th January 2020 filed by SBI. By that application SBI seeks two prayers, that SBI be removed from these proceedings and for the suit against SBI to be struck out and be dismissed. The application is opposed by Masosa. The application is brought under the provisions of Order 1 Rule 10 (2) and Order 2 Rule 15 (1) (d) of the Civil Procedure Rules (hereinafter the Rules).

3. SBI by the present application seeks that it be removed from this case and that the case against it be struck out or dismissed on the ground that it is an abuse of the court process. The court of appeal in the case **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another**[1980] eKLR had occasion to consider an application for dismissal of a suit for disclosing no reasonable cause of action and for being an abuse of court process where it stated:

"We are asked to set it (action)aside, partly on the ground that it discloses no reasonable cause of action. I will not decide the case upon that ground, although I think it is most difficult to see what is the reasonable cause of action upon the pleadings as they stand" per Denman, J. in Kellaway v. Bury (1892) 66 L.T. 599 at pp. 600 and 601.

Upon appeal:-

"That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."

per Lindley L.J. ibi, p. 602.

"It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."

Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the

court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think it's exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219.

"The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court." per Danckwerts, L.J. in Nagle v. Fielden (1966) 2 Q.B.D. 633 at p. 646."

ANALYSIS AND DETERMINATION

4. Masosa has by its plaint pleaded it was invited by Abdul Mullick Associates Limited, the project Manager of NCTIP, to submit a tender for the construction and completion of proposed Mlolongo Public School which was part of NCTIP. The project manager informed Masosa that its tender had been accepted by KeNHA for the amount of Ksh 137,986,292.30. Masosa pleaded in this case that the said award led to the conclusion of the contract between it and SBI as the main contractor. Masosa pleaded that KeNHA was the employer in that foretasted contract. Masosa further pleaded as against SBI as follows:

(22) The Plaintiff states that the 1st Defendant as the Main Contractor was under obligation to perform the following roles under the contract; supervision of the works; hosting of internal site meetings; attendance of site meetings; project communication with the subcontractor, liaising with consultants and the Employer on behalf of the sub-contractor; timely payment of interim valuations; and attendance to the subcontractors.

.....

(26) The Plaintiff avers that the delays in payment of sums under the Project were occasioned by among others the 1st Defendant's as the main contractor refusal and or neglect to pay it in time.

.....

(27) The plaintiff avers that on 26th October 2010 the Project Manager informed the 2nd Defendant that the 1st Defendant had refused to sign Interim Payment Certificate No. 34B for the sum of Kshs 23,767,041.60.

...

(72) Further, over the pre-contract and the construction period, the 1st and 2nd Defendants jointly and severally made serious breaches with regard to the administration of the contract and processing and honouring of interim payments causing the project to be mismanaged, maladministered and delayed.

....

86B. The Plaintiff also claims against the Defendants retention withheld at the 1st Defendant in the sum of Kshs 3,123,519.51 together with interest at the rate of 3% above the Central Bank of Kenya's average rate for base lending prevailing when the amount fell due.

5. SBI premised the application on the grounds that this claim does not disclose reasonable cause of action against it, that Masosa was nominated sub-contractor, that on recommendation of project manager SBI issued an irrevocable letter of undertaking allowing KeNHA to pay Masosa directly rather than through SBI, that by virtue of that irrevocable letter SBI removed itself from any contractual relationship with Masosa, that SBI was at all material times a disclosed agent of KeNHA and that SBI did not participate in any way in the selection of Masosa.

6. What needs to be borne in mind is that in applications such as the one before court the court is not required to determine the merits or otherwise of the plaintiff's case. It follows that this court will not decide the validity or otherwise of the contract between SBI and Masosa. The court is required to examine the pleadings then determine whether the case discloses reasonable cause of action or whether or not it is an abuse of the court process. The jurisdiction to dismiss an action on the ground that it is an abuse of the court process ought to be sparingly exercised and to be invoked only in exceptional cases: see D.T.Dobie v Muchina (supra). In this case it will be noted that there are specific pleadings directed at SBI. Further in its final prayer Masosa seeks the prayer for judgment for:

"Ksh 3,123,519.51 as per paragraph 86B above as against the 1st and 2nd defendants: (SBI and KeNHA respectfully)."

7. In this court's view SBI is a necessary party who ought to participate in the hearing and determination of this case. It is a necessary party as was stated by the court of appeal in when considering joinder of a party, in the case Civicon Limited v Kivuwatt Limited & 2 Others (2015) eKLR thus:

"This Court in Meme vs Republic (2004) KLR 637 considering an application for joinder held that joinder will be permissible:

(i) Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;

ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and

iii. Where the joinder will prevent a likely course of proliferated litigation.”

8. The retention of SBI in this action will result in the complete settlement of the questions before court and will act to prevent the court considering multiplicity of court action. It is for the above reason that I find that the Notice of Motion dated 14th January 2020 is without merit. It is dismissed with costs.

9. The court will now give a date for parties to comply with case management conference in readiness for trial of this case.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of OCTOBER 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 13th day of October, 2020.

MARY KASANGO

JUDGE