



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 286 OF 2016

D. MANJI CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

FARMERS INDUSTRY LIMITED.....DEFENDANT

RULING

1. This case was instituted by **D. Manji Construction Limited**, the plaintiff, against **Farmers Industry Limited**. The plaintiff by its plaint seeks judgment against the defendant for **Ksh 47,404,775.62**, with interest, which amount the plaintiff pleads was due under a contract for building works. The defendant filed a defence and counter-claim to the plaintiff's claim, claiming that the plaintiff's work was sub-standard and that the plaintiff varied the scope of works to the detriment of the defendant. The defendant by its counter-claim seeks general damages and for recovery of money paid to the plaintiff which was over and above the contract price.

2. The parties claims were referred to court's annexed Mediation in April 2017. The matter was referred back to the court, in September 2017, by the mediator who stated that the mediation had failed because of the defendant's failure to participate in the mediation.

3. The court summoned the parties to attend court on 2nd October 2017 for the purpose of the defendant showing cause why its defence and counter-claim should not be struck out for failing to comply with mediation.

4. On attending court on 2nd October 2017 the learned advocate for the defendant, Mr. Mbabu, requested that the defendant be given another chance to comply with mediation. This is what that advocate informed the court:

“We apologise to the court.....if given another chance, we believe that it is possible for the matter to proceed to mediation.”

5. On the said advocate giving that undertaking the court referred this case back for mediation.

6. The mediator provided a certificate of non compliance dated 4th December 2017 which was in the following terms:

CERTIFICATE OF NON COMPLIANCE

I JAMES MURIMI GITHINJI the mediator, certify that this certificate of non-compliance is filed on account of:

1.The Defendant's Advocate called the Mediator on 13th December 2017, the date scheduled by consent of the parties for the Mediation Session informing him that his clients were not interested in the mediation and won't attend the scheduled session. The session was therefore called off.

The plaintiff's Directors and its advocates have attended all sessions.

DATED at NAIROBI this 14th day of December, 2017.

7. On receipt of the above certificate of non compliance the court ordered the defendant to show cause why its pleadings should not be struck out for that no compliance with mediation.

8. The defendant showed cause through the affidavit of Florence Wairimu Mbugua, its managing director (M.D). In that affidavit the M.D stated that it was due to her ill health that she was unable to attend to the mediation sessions.

9. The court by its Ruling of 29th November 2019 found the defendant deliberately refused to attend mediation sessions and in accordance with Practice Directions No 9 on Mediation the court struck out the defendant's pleadings.

10. The defendant filed a Notice of Motion application dated 10th December 2018 which is the subject of this Ruling. The defendant seeks an order that the order issued on 29th November 2018 and the consequential orders of that day be reviewed, set aside, cancelled and/or varied.

ANALYSIS

11. I have considered the parties affidavits and submission on the application.

12. The mediator filed a certificate of non compliance twice and in both of those certificates faulted the defendant for failing to attend mediation. The defendant by the application before court is premised on the grounds that the defendant's M.D. was suffering from ill health which prevented the defendant from being represented at mediation and on the ground that the defendant's advocate was not served with notice of mediation that was to take place on 13th December, 2017.

13. Having considered the depositions made by the defendant's M.D. I reiterate that this court is of the view that the defendant deliberately failed to attend mediation sessions when required. The medical evidence presented before court did not indicate that the said M.D. was incapable of attending mediation. Not all. All those medical reports show, if indeed true, is that the M.D. was diagnosed with hypertension and osteoarthritis. Even if the medical reports are to be believed the court was not informed who else runs the defendant's company. There must be managers who run that company and who could have been mandated to attend mediation.

14. I entertain doubt about the said health condition of the defendant's M.D. because the defendant's learned advocate informed the court on 2nd October 2017 that the M.D. was well. This is what that advocate informed the court:

“We apologise. My client is now well. If given another chance we believe that it is possible for the matter to proceed to mediation.”

15. We now know that even though the defendant was given another chance to comply with mediation there was no compliance the second time around.

16. In my view considering the evidence presented by the defendant by its application there is no basis for review of the orders of 29th November 2018. The defendant has not presented any new evidence which would lead to such a review.

17. The defendant by the affidavit of its M.D. pleaded time and again that it be given a chance to defend this suit. Having considered that plea I will, in this exceptional circumstance, permit the defendant to defend this action. This I will do despite my finding that the defendant wrongly failed to comply with mediation when given an opportunity. The court will only vacate its order of 29th November 2018 on stringent conditions which the defendant must observe.

CONCLUSION

18. In exercise of this court's discretion I grant the following orders:

a. The order striking out the defendant's pleadings made on 29th November 2018 is set aside on the following conditions:

i. That the defendant does within 7 days file its witness statements and documents;

ii. The defendant does file within 7 days its list of issues for determination in this case.

iii. The defendant shall be ready to proceed with this case at the date the court will fix at the reading of this Ruling.

b. If the defendant does not comply with conditions (i) to (iii) above the defendant's pleadings will be deemed as struck out with costs to the plaintiff.

c. The plaintiff is ordered to file its list of issues for determination in this case within 14 days from today's date.

d. A date for the full hearing of this case will be fixed today.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE APPLICANT

..... FOR THE RESPONDENT