



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 33 OF 2016**

**GIBBS AFRICA LTD.....PLAINTFF /APPLICANT**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff has filed a Notice of Motion dated 28/07/2017 seeking for the striking of the Defendant's defence and that judgement be entered for the Plaintiff as prayed in the Plaint. The Plaintiff also seeks for costs to be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's Principal Architect Mark Gitahi sworn on even date and is further supported by the grounds on the face of the Application and which raise the following germane issues:-

i. That the defence filed does not raise any reasonable defence known in law as it only contains blanket denials and does not disclose a prima facie triable issue and is therefore a sham defence.

ii. That the pleadings filed by the Applicant clearly show that the Respondent is well and truly indebted to the Applicant in the liquidated claim.

iii. That the Respondent has sought to deny the existence of a contract between the parties yet the contract is well documented in the plaintiff's list of documents herewith marked as exhibits "MGIA" "MGIB" and "MGIC"

iv. That the Applicant duly performed the contract which was duly confirmed by the Respondent vide annexures "MG2A," "MG2B" and "MG2C".

v. That pursuant to contract the Respondent made some part payments of Kshs.20,190,000.00 leaving a balance of KShs.31,366,658.65 now being claimed in the plaint.

vi. That the Respondents defence is nothing but a ploy to delay payment to the Applicant.

vii. That the claim by the Respondent in the defence that work was not done satisfactorily is really false since the Respondent vide its letters dated 30/06/2014 and 29/1/2015 acknowledge that the works done were indeed satisfactory as per its requirements. See annexures "MG5A" "MG5B" "MG5C".

viii. That from the annexed documents by the Applicant, it is quite clear that there is good and sufficient cause for the defence filed herein to be struck out and judgement entered for the plaintiff as prayed in the plaint.

3. The Application was opposed by the Respondent whose learned counsel filed grounds of opposition namely:-

**i. That the work done/performed by the Plaintiff did not meet the standard specification as agreed between the Plaintiff and Defendant.**

**ii. That if any work was performed, the same was paid for and the Applicant is not entitled to any further payment.**

**iii. That the work performed and the contract did not meet the required procurement procedures and requirements.**

4. The Application was canvassed by way of oral submissions. It was submitted by Kihara learned counsel for the Applicant that the contract entered into was performed satisfactorily as confirmed by the Respondent's Chief Officer one Mwikali Muthoka vide annexures "MG5A –

C". It was further submitted that the Part Development Plan (PDP) was duly certified by the Respondent's County Physical planning officer and subsequently approved by the cabinet secretary for Lands Hon. Charity Ngilu. It was further submitted that the Respondent had made some part payment and the balance is yet to be paid as demand notices had been sent in that regard. It was finally submitted that the Respondent is not serious with the current litigation and is only bent on delay of the final conclusion of the matter since the defence is a sham full of mere denials and which should be struck out and judgement be entered for the plaintiff.

Mr. Muoki learned Counsel for the Respondent sought to rely on the grounds of opposition filed on 12/3/2018. It was further submitted that the defence raises triable issues as the work was not done to the standards and as such the Applicant is not entitled to the money claimed. It was finally submitted that the contract entered into violated procurement procedures and hence the plaintiff cannot claim the benefit from such an illegality.

5. I have considered the Applicant's Application as well as the affidavit in support and annexures. I have also considered the Respondent's grounds of opposition as well as the oral submissions by the learned counsels herein. The issue for determination is whether the Defendant's defence raises triable issues.

6. The Defendant filed its defence dated 21/12/2016 and vide paragraph 4 – 11 the following issues were raised namely:-

- i. That the Defendant denies that any contract was performed as claimed in the plaint.
- ii. That if any contract was performed then the same did not meet the specifications required.
- iii. That the Defendant denies owing the plaintiff the monies claimed in the plaint or any at all.
- iv. That if any monies had been paid then there is no outstanding balance.
- vi. That the plaintiff's claim is statute barred and should be struck out.
- vii. That the plaintiff's claim is bad in law and violates all procurement procedures and should therefore be struck off.
- viii. That no demand and/or notice was served upon the Defendant.

7. Looking at the above seven issues raised by the Defendant, the same could have been really triable issues which would ordinarily require a determination thereon. However, the Plaintiff in its plaint and list of documents has presented the requisite evidence backing its claim against the Defendant. In fact the Plaintiff in the present Application has through the Affidavit in support annexed the requisite documents in support of its claim against the Defendant who has not filed a replying affidavit or other documents challenging those presented by the plaintiff. The requisite documents presented by the Plaintiff/Applicant are as follows:-

- i. Consultancy agreements between the Plaintiff and Defendant "MG1A", MG1B" and "MG1C".
- ii. Letters written by the Defendant's Chief Officer confirming that the Plaintiff performed its obligations as per the contract satisfactorily "MG2A," "MG2B" and "MG2C".
- iii. Evidence that the Defendant made part payment in the sum of Kshs.20,190,000/= leaving a balance of Kshs. 31,366,658/65 - "MG4"
- iv. A demand notice served upon the Defendant for payment of the balance – MG8"

8. From the documents availed by the Plaintiff/Applicant certain issues appear not in dispute bearing in mind that the Defendant failed to file a replying affidavit or furnish rival documents. The obvious deductions or conclusions are as follows:-

- a. That indeed there was a contract duly entered into between the defendant and the plaintiff which mainly involved consultancy work relating to the Defendant's desire to develop a new city on Plot Number LR 1491/R measuring 2200 acres which was to go by the name "**Konza City**".
- b. That the said contract was duly performed by the Plaintiff to the satisfaction of the Defendant. Indeed the local physical Development Plan – Machakos New Town (PDP) was duly prepared and certified by the Director of Physical planning as well as the cabinet secretary for Lands and Housing and Urban Development. The letters from the Defendant's Chief Officer dated 30/06/2014 and 29/1/2015 left no doubt that the works performed by the Plaintiff was satisfactory as per the Defendant's specifications. One of such letters dated 29/1/2015 went as follows:-

Gibb International

P.O. Box 30020 – 00100 GPO

NAIROBI

Dear Sir

**RE: CONSULTANCY SERVICES FOR MASTER PLANNING OF MACHAKOS NEW CITY SUBMISSIONS OF FINAL REPORTS.**

Reference is made to your letters dated 19/1/2015 and 26/1/2015 forwarding the final spatial plan hard and soft copy.

We acknowledge receipt and approve the same to be as per our requirements.

Yours faithfully

**MWIKALI MUTHOKA**

**CHIEF OFFICER**

c. That the Defendant still owes the Plaintiff a balance of Kshs.31,366,658/65 as claimed in the Plaint as per the annexure “MG4” and that a demand for the same had been made as per annexure “MG8”.

d. That the contract having been entered into on the 28/1/2014 and this suit being filed about two years thereafter, clearly shows that the Plaintiffs suit is not statute barred as alleged by the Defendant in its defence. In any case the limitation period for instituting suits arising from contract is six years. Obviously, the suit is not time barred as claimed by the Defendant.

e. The claim that the contract violated procurement laws has not been shown by the Defendant. Indeed the Defendant made some payments to the Plaintiff leaving the balance now due. It is noted that the Defendant in its defence has not raised any counterclaim for the part payment made to the Plaintiff if there had been an irregularity on procurement procedures. The defendant has not specifically pointed out the exact procurement procedure that is alleged to have been violated.

9. The striking out of pleadings is noted to be a draconian measure as it denies a party an opportunity of ventilating his or her grievances. In the case of **DT DOBIE & CO (K) LTD =VS= MUCHINA [1982] KLR1** it was held thus:-

**“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.”**

10. Again in the case of **GUPTO =VS= CONTINENTAL BUILDERS LTD [1976- 80] IKLR 809 MADANJA** stated:-

**“If a Defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the court to forthwith enter summary judgement for it as much as against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go for trial, just as a sham or bogus defence ought to be rejected peremptorily.”**

Indeed a triable issue raised in a defence requires it to be determined at trial even if a defence might not succeed in the end. However, it is my considered view that it is not necessary to entertain a defence which on the face value will not succeed in the end because the parties will have been greatly inconvenienced due to time and expense employed in the trial. It is fair and just to deny such kind of a defence whose triable issues are not likely to see the light of day. A trial should not be ordered just for the sake of it. Looking at the Defendant’s defence *vis a vis* the documents availed by the Plaintiff, I am satisfied that the said defence would not succeed in the end. The said defence is merely a sham and ought not to be entertained as its only purpose is to delay the fair and just conclusion of this matter. I find that the circumstances herein warrant an order for striking out the Defendant’s defence. The documents availed by the Plaintiff left no doubt that the Defendant is truly indebted to the Plaintiff for the sums claimed in the plaint. Consequently, the Plaintiff’s notice of motion dated 28/07/2017 is allowed as prayed.

Orders accordingly.

**Dated and delivered at MACHAKOS this 16<sup>th</sup> day of October, 2018.**

**D. K. KEMEI**

**JUDGE**