



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 19/2016**

**ANCHOR LIMITED.....PLAINTIFF**

**VERSUS**

**SPORTS KENYA.....DEFENDANT**

**RULING**

1. On 18/10/2016 the Plaintiff took out a Plaint and Summons suing the Defendant for a breach of contract over a contract to install, test and commission four twenty five meter monopole flood lights for Moi Stadium in Kisumu. The Plaintiff alleges that it did all the work required under the contract but was paid only part of the contractual sum due. The suit claims the sum of Kshs. 15,470,880/= plus interests.

2. The Defendant filed its Statement of Defence on 17/11/2016. It admitted entering into the contract with the Plaintiff but denied being indebted to the Plaintiff in the sum claimed or at all. In essence, the Defence claims that if any monies are owed to the Plaintiff, then it is owed by a third party and not the Defendant. The Defence gives notice of the intention of the Defendant to take out Third Party Notice against the alleged third party who it claimed owes the monies. That third party is the County Government of Kisumu.

3. In its Statement of Defence, the Defendant also raised the issue of jurisdiction. It claimed that under the contract signed by the parties, this Court has no jurisdiction to entertain the suit.

4. The Plaintiff responded by filing the Notice of Motion Application dated 19/01/2017 and filed on 23/01/2017. It is expressed to be brought under Order 40 Rule 2 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act. It seeks, in the main, for orders that “the Defence filed herein on 17th November, 2016 be struck out and judgment be entered as prayed in the Plaint.” It also asks for costs.

5. On its face, the Application raised the following grounds:

- a. The Defence is “a mere sham and a general denial and only meant to delay trial of this action.”
- b. The Defendant “has admitted the contracts for supply of the contracted items.”
- c. “The assertion that the amount due is owed by a Third Party is meant to prejudice, embarrass and delay the fair trial of this case.”
- d. That the Defendant has filed “no verifying affidavit with the defence which is a mandatory document envisaged under Order 7 Rule 5 of the Civil Procedure Rules.”
- e. That it is in the interests of justice to grant the orders sought.

6. The gist of the Application is that the Defendant has raised no serious defence that raises any triable issues. In his oral submissions, Mr. Ireri argued that if the Court looks at the pleadings filed in totality, it

will come to the conclusion that the Defence is a mere sham only meant to delay the fair trial of the dispute. The fact that the Defendant did not file the mandatory Verifying Affidavit, Mr. Ireri believes, is a tell-tale sign that the Defence is a sham. In any event, Mr. Ireri argued, the failure to file a Verifying Affidavit itself is enough to have the Defence struck out.

7. In opposition, the Defendant raised four grounds:

- a. First, the Defendant argued that the Application is fatally defective because it was filed under the wrong provisions of the law. The Defendant's counsel, Mr. Thuo, argued that when a party files a suit under the wrong provisions of the law, the Court has no choice but to dismiss the Application.
- b. Second, the Defendant argued that it is only fair that the Third Party be given an opportunity to put in their papers to defend the suit and explain their position.
- c. Third, on the issue of verifying affidavit, the Defendant's counsel argued that the Defendant has no counter-claim so there was no need for them to file a Verifying Affidavit.
- d. Lastly, the Defendant's counsel argued that the Court had no jurisdiction for two different reasons. In the first place, Mr. Thuo argued, the contract was signed in Nairobi and both parties have their offices in Nairobi. Hence, the appropriate place to file the suit would have been Nairobi and not Kiambu. In the second place, Mr. Thuo argued that the contract has a dispute resolution mechanism where the parties contractually agreed to pursue out of court settlement before filing suit.

8. I will begin by quickly addressing the first objection by the Defendant to wit that the Application is expressed to have been brought under the wrong provisions of the law and that, ergo, it must be dismissed.

9. I will simply state that our jurisprudence and decisional law no longer countenances this kind of technical and formalist justice. If it must be repeated the admonition that Courts can no longer deploy technicalities as the basis for their decisions comes from the Constitution: Article 159(2)(d). That Sub-article provides as follows:

**“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-**

- (a) justice shall be done to all, irrespective of status;**
- (b) justice shall not be delayed;**
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
- (d) justice shall be administered without undue regard to procedural technicalities.”**

10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwangi, in **Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR** and another one supplied by the Learned Hon. Justice C.W Githua in **James Muriithi Ngotho & 4 Others V Judicial Service Commission (2012) eKLR**: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwangi defined a technicality thus:

Combining the meanings of these words, **“procedural technicalities”** may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.

11. I can think of no better example of a technicality than citing a wrong provision of the law being used as a basis to dismiss a suit or application. I need not say more about this argument by the Defendant.

12. Then, the Defendant insists that the Third Party needs to be given an opportunity to defend the suit. I

would easily dismiss this ground of objection as well. There is no privity of contract between the Plaintiff and the Third Party and no suit has been preferred against the Third Party. If it turns out that there is no reasonable defence raised in the suit by the Plaintiff, the fact that the Defendant has a claim against some third party would not save the Defence from being struck out.

13. Next, the Defendant says that a Verifying Affidavit is not mandatory if a party has not filed a counter-claim. With respect, this is not the position in law or practice. However, I would not strike out a Statement of Defence merely on account of lack of a verifying affidavit unless a Defendant persists in its refusal to file one after being directed to do so by a Court.

14. I would also not dismiss the entire suit as urged by the Defendant on account that it is filed in the “wrong” court. It is true that the contract was entered into in Nairobi and the parties’ offices are in Nairobi County. Going by the ordinary rules of place of suing, the appropriate place of suing would be Nairobi’s Milimani Law Courts.

15. However, I would note that the High Court of Kenya has geographical jurisdiction throughout Kenya. Indeed, there is only one High Court of Kenya with different administrative stations at different Counties in the Republic. It is therefore a misunderstanding to say that a suit filed at Kiambu High Court where the principles of *forum non conveniens* suggest should have been filed at the High Court of Kenya at Milimani is fatally defective because the High Court of Kenya at Kiambu lacks jurisdiction. At the very worst, such a suit may be transferred to the High Court at Milimani.

16. In this case, it is important to note that the Defendant is headquartered in Kasarani which is closer to Kiambu High Court than Milimani. It is doubtful, therefore, that the principles of *forum non conveniens* would apply to militate the transfer of the suit to the High Court at Milimani.

17. However, in its last salvo, the Defendant raises its most substantial point: the Contract has a Dispute Resolution Clause. Clause 1.14 of the Contract between the parties is entitled “Resolution of Disputes” and provides as follows:

The Procuring Entity’s (sic) [Defendant] and the Contractor [Plaintiff] shall make every effort to resolve amicably by direct informal negotiations any disagreement or dispute arising between them under or in connection with the contract.

If, after thirty (30) days from the commencement of such informal negotiations both parties have been unable to resolve amicably a contract dispute either party may require that the dispute be referred for resolution to the formal mechanisms specified in the SCC [Special Conditions of Contract.]

18. Our courts will not take jurisdiction and determine a dispute if the parties had *ex ante* resolved on how their disputes would be resolved. Where such a mechanism is provided by the parties in a contract, the Courts would respect the contractual provision by the parties and require them to first use that mechanism. There are, of course, certain exceptions to this general salutary principle.

19. The Court of Appeal has, in **Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others [2015] eKLR**, provided a felicitous rational and basis for this general principle established in our decisional law:

*It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*

20. Many decisions of the High Court and the Court of Appeal are to the same effect. In this regard, a contractual dispute resolution mechanism is treated in the same way as a dispute resolution mechanism provided in a statute: a party is required to either demonstrate that they fall within a certain exception to the general principle or that it has exhausted the mechanism provided in the dispute resolution provisions of the contract or statute. Some of the cases that have established this principle include: **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR**; **R vs Ministry of Interior and Coordination of National Government & Others ex parte ZTE Corporation (Judicial Review Case No. 441 of 2013)**; **R vs Chief Registrar of the Judiciary & Others ex parte Riley Services**; **R v Public Procurement Administrative Review Board & Another Ex Parte Avante International Technology Inc. [2013] eKLR**; **R v National Housing Corporation Ex Parte Ernie Campbell & Company [2016] eKLR**.

21. The High Court announced in the **In the Matter of the Mui Coal Basin Local Community [2015] eKLR**, the rationale for this principle thus:

*The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system. The dispute resolution mechanism provided under the Public Procurement and Disposal Act represents the first category of dispute resolution mechanism created under a statute envisaged by the Constitution while the procedures by the Commission on the Administration of Justice established under Article 59(4) of the Constitution would represent the latter category.*

22. Applying this doctrine to the situation at hand, the question would be whether, given Clause 1.14 of the Contract, the Plaintiff can demonstrate that either it comes within an exception to the principle or that it has exhausted the dispute resolution mechanism in the contract. The Defendant states that it has not. The Plaintiff, on the other hand, has neither pleaded nor demonstrated that it has satisfied either conditions.

23. It is important to think about the question in the context of what the Court is being asked to do: to strike out the Defence. The powers of the Court to strike out a pleading are special powers which ought to be exercised only in clear circumstances where the pleading is hopeless. **Halsbury’s Laws of England, 3rd Edition Volume 30** at page 38 states that:

**The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases, and where a question of general importance or serious question of law would arise on the pleadings, the court will not strike the pleadings unless it is clear and obvious that the action will not lie.**

24. A string of judicial precedents from our courts have equally established that courts should be very cautious before striking out pleadings, and that the measure should only be adopted in the most hopeless of cases. Madan JA stated in the oft quoted case between **DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR 1** that

**The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of court.**

**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and**

**obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.**

25. While applying Justice Madan’s sentiments in DT Dobie, Court of Appeal Judges Omolo, O’Kubasu and Onyango-Otieno added in **Coast Projects Ltd v M R Shah Construction (K) Ltd (2004) 2 KLR 119** that

**Summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure which can only be applicable in plain, clear and obvious cases.**

26. The question I must answer then is whether the Appellant’s defence was of such a hopeless kind that it warrants summary dismissal. For a Statement of Defence to warrant striking out, a Court must satisfy itself that it raises no genuine issues of material or triable fact. A genuine issue of material or triable fact is one which is supported by evidence such that the Court could reasonably return a verdict for the Defendant. Hence, in applying the standard for summary judgment, the Court is required to review all the evidence in the light most favourable to the Defendant. At this stage, the Court should avoid weighing evidence or resolving the truth or falsity of disputed facts; its inquiry should be limited solely to a determination of whether genuine issues of material or triable fact exist. It is true that the “mere existence of a scintilla of evidence” favoring the Defendant will not prevent the Court from striking out the pleading or entering summary judgment. See **Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 669 (7th Cir.2000)**. However, once the Defendant has set forth specific facts showing that there is a genuine issue for trial, an Applicant becomes disentitled to the relief of striking out the Statement of Defence. **Id.** Differently put, an Applicant for summary judgment or striking out of a Statement of Defence must discharge the heavy burden of clearly demonstrating the absence of any genuine issue as to the existence of each material fact which under applicable principles of substantive law would be required to support a judgment in its favour. See **United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970)**.

27. With this legal test in mind, it is readily obvious that the question whether the Plaintiff was obligated to use the Dispute Resolution Mechanism in its contract with the Defendant, and whether it exhausted that mechanism before coming to Court is a triable issue.

28. The conclusion, then, is inevitable. Looked at in a light most favourable to the Defendant, and applying the correct legal standard for striking out pleadings, this is not an appropriate case for striking out the Statement of Defence. The Defendant may need to amend its pleadings at some point but the threshold for striking out has not been reached.

29. Consequently, the Plaintiff’s Application dated 19/01/2017 and filed in Court on 23/01/2017 is dismissed with costs.

30. Orders accordingly.

**Dated and delivered at Kiambu this 20th Day of July, 2017.**

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**JOEL NGUGI**

**JUDGE**