



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HCCC NO 92 OF 2012**

**GOLBO CONSTRUCTION CO LTD.....PLAINTIFF**

**V E R S U S**

**NATIONAL WATER CONSERVATION**

**& PIPELINE CORPORATION.....DEFENDANT**

**R U L I N G**

1. The Plaintiff's claim is for payment of KShs. 5,343,232/00 for work done for the Defendant. Its case is that the parties entered into an agreement for construction of some water pans, and that whereas the Plaintiff constructed the water pans to the satisfaction of the Defendant, only piecemeal payments were made leaving a balance of Particulars are contained in the **plaint dated 31st January, 2012**.
2. The Defendant filed a **statement of defence dated 12th April, 2012**. It admitted being a party to the contract but denied that construction was undertaken as per the terms of the contract. The Defendant also pleaded that following a fire incident that occurred on 24th September 2009 at its offices and subsequent destruction of its records, it commissioned a forensic audit analysis by experts which revealed that the Plaintiff may not have undertaken the construction works. It denied that the Plaintiff was entitled to any of the reliefs sought in the plaint.
3. The Defendant also specifically denied that a letter which is part of the Plaintiff's documents and which is construed to mean admission on its part indicated that the alleged finalised works had not been undertaken, and was therefore not a confirmation that the terms of the contract had been satisfied. No counterclaim was pleaded.
4. The Plaintiff subsequently filed **notice of motion dated 18<sup>th</sup> December, 2012** seeking the main order that the defence dated 12th April, 2010 be struck out and judgement be entered for the Plaintiff. The application is brought under **Order 2, rule 15(1) (b), (c) & (d)** of the **Civil Procedure Rules, 2010** (the **Rules**). There is a supporting affidavit sworn by a director of the Plaintiff, one **Adan Intalo Ali**, in which he asserts -
  - i. That the memorandum of appearance and defence were filed out of time, the Defendant having been served with summons to enter appearance on 12<sup>th</sup> March 2012, and entering appearance on 29<sup>th</sup> March 2012 and filing defence on 19<sup>th</sup> April 2012.

- ii. That the defence consists of general denials and does not raise any triable issues.
- iii. That the claim is liquidated and supported by documents issued by the Defendant to the Plaintiff.
- iv. That the Defendant admitted in writing to owing the Plaintiff money, made part-payment and undertook to settle the balance within a specified date.

5. The Defendant has opposed the application by **replying affidavit sworn on 10<sup>th</sup> May 2013** by one **Eng Petronilla Apiyo Ogut**, the Managing Director of the Defendant. The affidavit repeats in detail the Defendant's case as pleaded in its statement of defence. Grounds of opposition emerging therefrom include –

- (i) That after the Defendant entered appearance and filed defence the Plaintiff failed to pursue the matter for a long time without offering any explanation.
- (ii) That numerous issues for trial are disclosed by the pleadings and it should not be struck out.
- (iii) That the letter sent by the Defendant sought additional information from the Plaintiff in order to determine the amount payable but no response was received from the Plaintiff.
- (iv) That the Plaintiff has not furnished the Defendant with a completion of works certificate indicating that they met the terms of the contract.

**Did the Defendant enter appearance and file defence out of time?**

6. Order 7, rule 1 of the Rules states –

**“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”**

The Defendant entered appearance on 29<sup>th</sup> March 2012 and subsequently on 19<sup>th</sup> April 2012 it filed defence. It thus took approximately 17 days to file memorandum of appearance and one month and fourteen days to file defence. Timelines set under Order 7 rule 1 were therefore not adhered to.

7. Such memorandum of appearance could only be filed with leave of the court. The court would have been called upon to enlarge the period for filing a memorandum of appearance. As regards the defence, to the extent that the memorandum of appearance was not filed within the prescribed time, the statement of defence filed subsequently could not be properly filed without leave of court.

**Does the defence raise any triable issues or is it a sham which may prejudice, embarrass or delay the fair trial of the action?**

8. The guiding principle in applications to strike out pleadings is that the court ought to act cautiously and allow such application only in clear and obvious cases. The court will consider the facts of the case without embarking upon a trial of the same. The court will not be concerned with the merits of the impugned pleading at this stage; that is a function of the trial court. The court must indeed refrain from expressing any opinions upon the merits of the facts pleaded as this may prejudice the fair trial of the action, should it go to trial. If only one triable issue is disclosed, that is enough to permit the suit to proceed to trial. See **D. T. Dobie & Company (K) Ltd –vs- Muchina [1982] KLR 1.**

9. Looking at the defence filed herein, it is evident that it is not filed in compliance with Order 7, rule 5 of the rules, which provides -

**“The defence and counterclaim filed under rules 1 and 2 shall be accompanied by:-**

- (a) an affidavit under Order 4, rule 1(2) where there is a counterclaim;**
- (b) a list of witnesses to be called at the trial;**
- (c) written statements signed by witnesses except expert witnesses; and**
- (d) copies of documents to be relied on at the trial.”**

**10.** These conditions were not satisfied, as there was no list of witnesses, witness statements or copies of documents that the Defendant would rely on at the trial. Even the *KPMG* forensic audit report the Defendant refers to is not exhibited.

**11.** Even though the court is enjoined under **section 1A** of the **Civil Procedure Act** and **Article 159** of the **Constitution of Kenya, 2010** to do justice without undue regard to technicalities of procedure, the rules of procedure are intended to provide a level playing field for all parties as these rules would be known to the parties.

**12.** It is also evident that the Defendant admitted its indebtedness to the Plaintiff. The defence does not raise any triable issue at all. I am also satisfied that to allow the defence to stand would in this case prejudice, embarrass and delay the fair trial of the action as it was filed in contravention of order 7 Rule 5 of the rules and thus constituted an abuse of the process of the court.

**13.** In the circumstances, the application is allowed with costs to the Plaintiff. The defence is hereby struck out and judgment entered for the Plaintiff for the sum of KShs. 5,443,232/00 with costs and interest at court rates. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 9<sup>th</sup> DAY OF JULY 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 9<sup>TH</sup> DAY OF JULY 2014**