REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 437 OF 2003

CALTEX OIL KENYA LIMITED.....PLAINTIFF

VERSUS -

CRESCENT CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 17th December 2012. The plaintiff prays for judgment against the defendant in the sum of Kshs 4,062,165.97 together with interest and costs. The plaintiff also seeks Kshs 1,088,700 being audit fees paid to two firms, Deloitte and Touche, and PKF Kenya.

2. The motion is predicated on a deposition made by Stephen Okinda on 17th December 2012. He states that on 6th February 2007, the parties entered into a written consent. The consent provided that the firm of Deloitte and Touche do establish the indebtedness of the parties to each other. The plaintiff's original claim in this suit is for Kshs 26,749,366.52 while the defendant counter claims Kshs 50,387,158.77. In a report dated 3rd July 2007 the defendant was found liable for Kshs 23,405,647.27. The defendant disputed it but admitted owing Kshs 19,343,481.30. Judgment was entered for the admitted sum. The parties then entered into a further consent on 19th May 2011 instructing PKF Kenya to determine the disputed sum. The plaintiff contends that the latter report found that the defendant owes it Kshs 4,062,165.97. The plaintiff submitted that the auditors found no sums to be due under the counterclaim. Under paragraph (k) of the letter of consent, the plaintiff now seeks to recover its half share of the audit fees of Kshs 588,700 and the earlier costs of Kshs 500,000 paid to Deloitte and Touche. It is the plaintiff's case that there is no defence to the action and that this is a suitable case for summary judgment.

3. The motion is contested. First, there is filed a preliminary objection dated 21st January 2013. The objection taken is that since there is a statement of defence on record, summary judgment cannot issue in view of Order 36 rule 1 of the Civil Procedure Rules 2010. Secondly, the defendant has filed grounds of opposition of even date. They raise an additional ground that the audit report forming the basis of the motion is contested and should be produced at the trial as evidence. Thirdly, there is a replying affidavit sworn by Mark Kezegule on 18th February 2013. Its pith is that the audit report was not tendered by consent of the parties and amounts only to an expert report. The report itself is attacked for glossing over the defendant's counterclaim. It is also contended that since the plaintiff has not won the suit, its claim for costs is putting the cart before the horse. In a synopsis, the defendant's case is that the motion lacks merit and should be dismissed.

4. I have heard the rival submissions. Order 36 rule 1 (1) provides that in all suits where the plaintiff makes a liquidated claim, with or without interest, and the defendant has entered an appearance but not filed a defence, the plaintiff may apply for summary judgment. The burden then shifts to the defendant at rule 2 to show by affidavit or oral evidence that he should be granted leave to defend the suit. The present suit was filed before the Civil Procedure Rules 2010 came into effect. The preliminary objection is thus well taken as there is a defence on record. That defence is by way of counterclaim and as further re-amended on 30th December 2004. The amount counterclaimed is Kshs 50,387,158.77 plus interest and costs from 1st January 2007 till payment in full.

5. It is then important to examine the principles that would govern entry of summary judgment in this case. If a defendant demonstrates there is a triable issue, the court has no recourse but to grant unconditional leave to defend. See the decision in *Osondo Vs Barclays Bank International Limited* [1981] KLR 30. The same principle is espoused by the Court of Appeal in *Momanyi Vs Hatimy* [2003] 2 E.A. 600. Again, the purpose of summary judgment is to expedite determination of cases but is an inappropriate procedure where the court is being invited to decide "difficult questions of law which call for detailed argument and mature considerations" and which would best be left to evidence at the trial. See *American Cyanamid Co. Vs Ethicon Limited* [1975] 1 ALL ER 504, [1975] AC 396.

6. This general principle can be again gleaned from the old case of *Churanjilal & Co Vs Adam* [1950] 17 E.A.C.A 92 where Sir Graham Paul V-P said of summary judgment application:

> *" .. It is desirable and important that the time of creditors and of courts should not be wasted by the investigation of bogus defences. That is one important matter but it is a matter of adjectival law only, embodied in Rules of Court, and cannot be allowed to prevail over the fundamental principle of justice that a defendant who has a stateable and arguable defence must be given the opportunity to state it and argue it before the court. All the defendant has to show is that there is a definite triable issue of fact or law"*

7. When I juxtapose those principles against the facts, I find further as follows. Both Parties acknowledged in the consent orders of 6th February 2007 and 19th May 2011 that the primary dispute relates to accounts. The defendant has admitted, and judgment has been entered, for Kshs 19,343,481.30. The present motion is for recovery of the disputed sum of Kshs 4,062,165.97. What is the plaintiff's basis for it? The foundation is a reconciliation account report dated 19th June 2012 prepared by PKF Kenya. It reaches the conclusion that the defendant owes the plaintiff the above sum. The defendant contests the report. I have then examined the consent by the parties dated 19th May 2011. Paragraphs (i), (j) and (k) of the consent are relevant and provided as follows:

> i) *After receiving all the pertinent documents, clarification and submissions as presented by the parties the auditor shall take the dispute into consideration and prepare a report to be submitted to the High Court detailing inter alia the following:*
>
> *a) The auditor's finding on the claim made by the plaintiff.*
>
> *b) The auditor's finding on the claim made by the Defendant.*
>
> *c) The auditor's finding on the party who is in debt including a finding on the debt due.*
>
> *d) The report shall be submitted to the Court and both parties on or before the 2nd August 2011.*
>
> *j) The case is to be mentioned in Court on 22nd June 2011 to confirm compliance with c) and d) above and to take a date for further mention.*
>
> *k) Both parties shall pay the auditor's fees and expenses equally. The share of fees shall be recoverable in the suit by the winning party from the losing party.*

8. Clearly, there was no express consent that the audit report would be binding on the parties and the court: It was merely an expert report to be submitted to court on or before 2nd August 2011. The Court is not bound to accept it. See *Huntley Vs Simmons* [2010] EWCA civ 54, *Armstrong Vs First York* [2005] EWCA civ 277, *Fuller Vs Strum* [2002] 2 ALL ER 87. This I find to be in consonance with the express provisions of section 49 of the Evidence Act. While both parties were to share the costs, those costs are recoverable by the party who prevails in the final judgment. Doubt is further removed by the letter of the auditors to the Deputy Registrar of the Court dated 19th June 2012. It says the report contains their *"recommendations ….. based on our understanding, review and analysis of the claims as presented by both parties"*. True, the auditors have arrived at the conclusion that the defendant owes the plaintiff Kshs 4,062,165.97. But in the absence of an admission by the defendant, the finding cannot be a firm basis for judgment. The report should be presented in evidence and tested by cross-examination.

9. In our adversarial system of justice even the weak and vanquished must have their day at the throne of justice. The plaintiff may genuinely feel that the defendant is clutching on straws. The court however must maintain a delicate balance and hold both parties at equal arms length. Those are the clear dictates of article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. It is the overriding objective of the court. On the face of it, the plaintiff has not won the suit and I must agree with the defendant that the claim for half share of the costs is on a quicksand and premature. I have also made reference to the reamended defence and counterclaim. It is for a substantial sum. The defendant states that the auditors have ignored or glossed over its counterclaim of Kshs 50,387,158.77. The basis for the findings of liability in the audit report and whether the defendant is entitled to aspects of its counterclaim on the disputed debt is not idle: it is a triable issue. The plaintiff's learned counsel Anne Mbugua, had submitted that the entry of judgment would not prejudice the trial of the counterclaim as the suit remains alive. My answer is that the plaintiff's claim and the defendant's counterclaim are independent suits joined at the hip. As they are intertwined, the liabilities of both parties in contested matters are best dealt with together at the suit. It would be to turn logic on its head to grant the plaintiff the costs it urges when the final result is not assured. Allowing the motion would thus lead to a miscarriage of justice. That is anathema to article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act. In short, I am not persuaded that the defence and counterclaim set up are a mere sham.

10. From the facts I have highlighted, there are contested matters of evidence in this case that call for detailed argument and mature considerations as stated in *American Cyanamid* case above. See also *Nails & Steel Products Limited Vs Baricho East Enterprises Limited* HCCC No 281 of 2010 (High Court, Nairobi, unreported), *Esther Wamaitha Njihia Vs Safaricom Limited* HCCC No 62 of 2011 (Nairobi, High Court, unreported), *Total Uganda Limited Vs Thummin Trading Company* HCCC No 779 of 2010 (High Court, Nairobi, unreported), *Mirage Lite Limited Vs Safaricom Limited* Nairobi, High Court case 596 of 2009 [2012] e KLR.

10. Granted all of those circumstances, I find that the defence and counterclaim are not hopeless or a sham or a strategy contrived to delay the plaintiff's case. Having reached that conclusion, the court has no other recourse except to grant the defendant unconditional leave to defend. I grant that leave. In the result, I order that the plaintiff's notice of motion dated 17th December 2012 be and is hereby dismissed with costs to the defendant.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 7th day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Minishi for Mr. Saende for the Defendant.