REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

COMMERCIAL CIVIL CASE 161 OF 2012

ORIENTAL CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

-VERSUS-

RIFT VALLEY WATER SERVICES BOARD.....DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 4th May 2012brought by the Plaintiff under Order 2 Rule 15(1) of the Civil Procedure Rules and Section 1A of the Civil Procedure Act. The application seeks orders of this court for the Defendant's Defence filed in this matter on 20th April 2012 to be struck out and judgment entered for the Plaintiff as prayed in the Plaint.

2. The application is based on grounds set out in the face of the application and is further supported by the affidavit of SuryakantChaturbhai Patel, a director of the Plaintiff, sworn on 4th May 2012.

3. The Applicant's case is that the Defence filed in this matter discloses no reasonable defence in law and that its pendency in the suit may prejudice and delay the fair trial of the Plaintiffs suit. The Applicant further claims that the Defence is an abuse of the court process, is a sham and is composed of bare denials.

4. Through the supporting affidavit, the Applicant reiterates that paragraphs 4 and 5 of the Defence are mere denials and do not controvert the Plaintiff's claim. Paragraph 8 of the Defence in which the Defendnat seeks to raise a preliminary objection does not also apply as while Clause 24 of the Contract provides for dispute resolution mechanism between the Defendant's Project Manager and the Plaintiff, the Clause does not apply in respect of default by the Defendant relating to payment of certified contract sums.The Defendant's whole defence therefore lacks merit and is intended to delay expeditious payment of the sums due to the Plaintiff.

5. The application is opposed by the Defendant/Respondent through a notice of preliminary objection and a replying affidavit. The preliminary objection contests this court's jurisdiction to deal with the claim on the grounds that the contract between the parties provides for arbitration. The replying affidavit avers that the Plaintiff's claim arising in the contract in question has been fully paid and adds in rather unsavory

language that the whole suit in this matter is a scheme by the Plaintiff to fleece a public body.

6. At the *inter partes* hearing of the application, the Defendant failed to attend court and the matter proceeded *ex parte.* Counsel for the Plaintiff Mr. Wanjama made oral submissions in support of the application. In the submissions, Mr. Wanjama told the court that the Plaintiff's claim as constituted in paragraph 5 of the Plaint was comprised in two unpaid bills which were fully within the Defendant's knowledge. He referred the court to a form annexed at page 28 of the Plaintiff's bundle of documents titled "Form for the Handing Over of Surplus Fittings from Contract 3" and which contained an approval stamp for the claim set out in paragraph 5(i) of the Plaint. He further told the court that the Defendant's own supplementary list of documents exhibited the same interim payment certificate at page 4 of the documents. He further referred the court to an approved "Interim Payment Certificate" annexed 41 of the bundle which he stated related to the claim at paragraph 5(ii) of the Plaint. He submitted that both the Defence and the Replying affidavit had failed to controvert this evidence and merely made baseless claims that the Plaintiff was out to rip off the Defendant. He therefore urged the court to strike out the Defence and enter judgment in favour of the Plaintiff.

7. I have carefully considered the application, the pleadings, affidavit evidence filed for and against the application as well as the submissions by counsel for the Applicant.

1. Order 2 Rule 15 (1) of the Civil Procedure Rulesallows this court to order to be struck out any pleading on the grounds that it discloses no cause of action or defence; is scandalous, frivolous and vexatious; it may prejudice, embarrass or delay fair trial of the action; or if it is otherwise an abuse of the court process.

2. The above grounds have been tested in our courts and are fairly well-settled. Without delving into the whole array of authorities that have addressed these grounds, I find the holding in **DT Dobie & Company (Kenya) Limited vs. Muchina [1982] K.L.R 1** providing sufficient parameters within which the present application should be determined. These parameters were set out by the court in that holding as follows:

"no suit ought to be summarily dismissed unless it appears so hopeless that that it plainly and obviously discloses no cause reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows some semblace of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward".

8. In the application before me, I have had occasion to study in detail the pleadings filed by the parties. The Plaint filed on 19th March 2012 clearly sets out a case for two unpaid bills aggregating the sum of Kshs. 7,882,793.00 which bills the Plaintiff avers remain due, owing and unpaid. The supporting affidavit and the Plaintiff's list of documents provide the requisite supporting evidence of the claim as comprised in the two bills. This evidence not only confirms that the bills relate to works whose implementation was accomplished as supported by documents but that the bills themselves were approved by the Project Manager overseeing the project on behalf of the Defendant. Counsel for the Plaintiff painstakingly took the court through the said supporting documentation and pointed out the payment approvals.

9. On the other hand, the Defence filed by the Defendant answers the claim by first concurring with the Plaint that the contract was executed to the full satisfaction of the Defendant then alleging that the claim for Kshs. 7,882,793.00 was "misconceived and an outburst of recklessness" as the Defendant had duly paid the full contract sum. The Defence in very characteristic affinity to verbosity goes on to contend that the claims at paragraph 5 of the Plaint are "fallacious, ambitious and strange" as the Defendant is not aware of the claim. This stance is replicated in the replying affidavit.

10. In my analysis, and saving the pronounced largesse and pomp in the language used to dismiss the Plaintiff's claim, the Defence completely fails to controvert the Plaintiff's claim on its merits. The list of documents filed by the Defendant similarly fails to show that the sums claimed were paid or that the claims in their entirety do not lie. The only point of defence that is merited is the preliminary objection claiming that the court has no jurisdiction to entertain the suit in view of an arbitration clause in the

applicable contract between the parties. I wish to address this point of law as below.

11. Section 6 of the Arbitration Act, provides:

"a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than the time when that party enters appearance or otherwise acknowledges the claim (emphasis added) against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration".

12. From the wording of Section 6 of the Arbitration Act aforesaid, it is explicit that an application for stay of proceedings to allow referral of a dispute to arbitration can only be made within the time allowed to a party to enter appearance or otherwise acknowledge the claim.

13. In the present matter, the Plaint was filed on 19th March 2012. Summons to enter appearance were issued on 20th March 2012. The Defendant filed a Memorandum of Appearance on 4th April 2012 and filed its Defence on 20th April 2012. By entering appearance and filing defence, the Defendant effectively removed itself from the jurisdiction of the Arbitration Act and submitted fully to the jurisdiction of this court. The preliminary objection therefore fails on this ground.

14. In the result, and paraphrasing the threshold set out in the **Muchina case** (supra), the Defence in this matter plainly and obviously discloses no cause reasonable cause of action and is so weak as to be beyond redemption. While therefore it is now tritely settled that the court's jurisdiction to strike out pleadings should be exercised in very exceptional cases (See ***Muhuni& Another vs. Patel & Another [1990]KLR)*** and while courts should aim at sustaining rather than terminating suits (Per ***Madan JA in D.T. Dobie Vs. Muchina, supra)***, the application before me presents a strong case for the exercise of this exceptional jurisdiction as I see no plausible basis for the 2nd Defendant to continue being trudged along by the real litigants in the matter when eventually no claim would be sustainable as against it.

15. For these reasons, I am inclined to grant, as I hereby do, the Plaintiff's Notice of Motion dated 4th May 2012 and to enter judgment for the Plaintiff against the Defendant as prayed in the Plaint.

16. I further award costs of the application and the suit to the Plaintiff.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12th DAY JULY 2012.

J.M. MUTAVA

JUDGE