



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 1 of 2004

CLEARSPAN CONSTRUCTION (A) LIMITEDPLAINTIFF

VERSUS

EAST AFRICAN GAS COMPANY LIMITEDDEFENDANT

R U L I N G

This is an application dated 17th July 2009 by the plaintiff under the provisions of Order VI Rule 13(1), (1), (b), (c) Order XXXV Rules 1 and 2 and Order XII Rule 6 of the Civil Procedure Rules. The plaintiff seeks the following orders against the Defendant:-

- 1. That the defence filed herein be struck out or alternatively,*
- 2. Summary judgment be entered for the plaintiff against the defendant in the sum claimed in the suit together with costs and interest.*
- 3. That in the further alternative judgment be entered as prayed in the plaint or for such sum as this court may deem appropriate at this stage.*
- 4. That the plaintiff do have costs of this application*
- 5. That the plaintiff do have the costs of the suit.*

The application is based on the grounds that:-

- 1. Certificates were issued by the defendant's duly appointed Engineers directing payments of Shs.66,580,802/- as being due and payable by the Defendant to the plaintiff. The Defendant was to further pay the sum of Kshs.5,000,000/- as a special additional payment to the plaintiff for commencing the work making a total of Shs.71,580,802.20.*
- 2. The Defendant admitted owing the sum and payment of a sum of Kshs.21,666,250/50 leaving a balance of Shs.49,914,562/-.*

3. *The defendants has admitted the sum of Shs.49,914,562/- as being due by it to the plaintiff but has made no payment to date despite making a proposal and a schedule of payment timelines to the plaintiff in writing.*

4. *The Defendant has made no attempt to pay the sum of Kshs.49,914,562/- at all despite its own Engineers certificate to such effect.*

5. *The Court has in an earlier ruling “contained” that the sum of Kshs.49,914,562/- is due and owing from the Defendant to the plaintiff (sic).*

6. *The Defence herein is unmeritorious and does not contain any arguable point to warrant the matter going for full trial.*

The application was supported by an affidavit sworn by one

Anthony Dickinson a Director of the plaintiff company on 17th July 2009.

The Defendant opposed the applicant and filed a Replying Affidavit sworn by one Prakash Bhundia on 7th September 2009. The Defendant also relied on its statement of Defence.

From the pleadings and the two rival affidavits in this application the contractual relationship for earthwork and related construction between the plaintiff and defendant is not disputed.

By a letter dated 12th October 1999 the Defendant awarded the plaintiff an Earthworks contract for their LPG Terminal Project at Mombasa. The contract price was Kshs.149,217,097/-.

The plaintiff mobilized and embarked on performance of the works. Payments were made to the plaintiff from time based on payment certificates issued by the Project Engineer.

It is the plaintiffs claim that pursuant to the said contract, it duly discharged its obligations under the said contract and presented to the Defendant duly approved certificates and claims for Kshs.38,161,605/- and Kshs.33,419,552/- respectively totaling to Kshs.71,580,802 for payment wherein the Defendant paid the sum of Kshs.21,666,250/- leaving an outstanding balance of Kshs.49,914,552/-. The plaintiff claimed that the said amount had accrued interest of Kshs.49,172,618/75 calculated at bank interest rate as from 1st September 2001.

The plaintiff claimed that the Defendant duly appointed an Engineer under the said contract and that the said Engineer and/or its agents, servants and employees has certified that the sums are due to the plaintiff but the Defendant has not fully paid the said sum to the plaintiff and the Defendant has instead suspended the said contract. The plaintiff contends that the Defendant was obliged to pay the plaintiff from time to time, the certificates as certified by the Engineer appointed by the Defendant.

The plaintiff in its plaint set out particulars in eight certificates valued at Shs.40,788,730/- which we duly paid. The plaintiff set out particulars of unpaid certificates and certified claims in the sum of Kshs.49,914,552/-.

The plaintiff in this application annexed a letter dated 21st August 2001 from the Defendant to the plaintiff in which it is alleged that the Defendant admitted owing the plaintiff's claim. The said letter reads as follows:-

“A. J. Dickinson

Managing Director

Clearspan Construction (A) Ltd

Ralli House

Nyerere Avenue

MOMBASA 21ST August 2000

Dear Sir

We are in receipt of your letters to CIS dated 10th August and 14th August, finalizing the quotation claim for Interim work. We now present our proposals for settlement.

A CLAIM/CERTIFICATE:

KSHS,66,580,802

We propose this to be paid by six equal instalments of Kshs.11,096,800/- commencing 31st August 2001.

B NEW WORKS – kshs.11,385,820

We propose

- i. 20% down payment**
- ii. Balance on completion of works or as per monthly certificate depending on how works proceed.**

We hope that by 30th November 2001 the full works programme will commence and we would wish to discuss with you an accelerated works programme and payments schedule.

Prakash Bhundia

Director”

On the same day 21st August 2000 the Engineer, CIS LPG Consultants had written to the plaintiff on the following terms:

“Clearspan Construction (A) Ltd,

3rd Floor, Ralli House

Nyerere Avenue

Mombasa

KENYA

ATTENTION Mr. Tony Dickinson

Dear Sir,

RE: LPG TERMINAL AT MOMBASA EARTHWORKER CONTRACT

We refer to the following:

- CCL letter ref. CCL/CIS/01.08/I re, dated 14th August 2001.
- CCL letter Ref.CCL/EAGC/OI.08/Ire, dated 3rd August 2001.

We wish to clarify the agreement with EAGC, which is as follows:-

Certified amounts Kshs.38,161,605.00

Agreed claims Kshs.28,419,197.00

TOTAL Kshs.66,580,802.00

We understand that a payment schedule for the above has been forwarded to you by EAGC.

In addition to the above, “a special additional payment” of Kshs.5,000,000/- will be made within the Earthworks contract when this contract is effectively resumed.

Regarding the Interim works, the total amount of Kshs.11,385,820/- is acceptable subject to the following two points:-

- 1. It is assumed that the covering of the manways will be done utilizing the original manway covers. If it is possible to use lighter temporary covers, a reduction in the amount of Kshs.336,275 will be appropriate.**
- 2. The amount of Kshs.3,800,000/- for the repairs to the roadway and protection of cut/embarkments at the tank is treated as a provisional sum.**

Please confirm your understanding and acceptance of the above.

Yours sincerely

For and on behalf of

C.I.S. SERVICES LIMITED

J. Sherry

Project Manager

c.c. Mr. P. Bhundia”

The plaintiff contends that this letter written by the defendant’s Engineer together with the former then written by the defendant and referred to immediately above amounted to admissions of the amount by the defendant. The plaintiff says that the defendant made 3 instalment payments and stopped paying when the balance due was Shs.44,914,552/-. The balance was additional to a sum of Kshs.5,000,000/- the defendant was to pay to the plaintiff as additional payment on earthworks contract.

The defendant in its reply stated that while some payments were made based on “a set of payment certificates” that the certificates thereafter had been objected to by the defendant. The defendants averred that all and every payment made were the amounts properly due and payable to the plaintiff. That all amounts over and above the amounts already paid by the defendant to the plaintiff are amounts contested and un-admitted. The defendant added that the plaintiff never accepted the offer suggested in the certificates of payment by the Engineer nor the offer suggested by the defendant.

The Defendant referred to its defence and submitted that in all the pleadings and the defence raised triable issues that should be subjected to a full hearing as the issues raised require evidence to prove then.

I have considered the plaintiffs application and supporting affidavit. I have considered the replying affidavit. I have considered the pleadings and submissions by counsel and authorities submitted.

I have carefully analysed the aforesaid two letters and all circumstances of the case. By its letter of 21st August, 2001 the Defendant referred to the correspondence between the Engineer and the plaintiff. They agreed that the letters finalized the quotation claim for interim work. The Defendant then said:-

“... We now present our proposals for settlement:-...”

These words in their usual and ordinary meaning meant that the defendants were offering mode of settlement of the claim. For it to make the offer of mode of settlement it means that they had accepted and/or agreed on the claim. And what was the amount or claim involved? They stated:

“.....

A CLAIM/CERTIFICATES:

66,580,802

We propose this is to be paid by six monthly instalments of Kshs.11,096,800 commencing 31 August 2001.

.....”

The words used were certain, simple and clear. They amount to an admission that the defendant had accepted the claims and certificates to the tune of Shs.66,580,802. They offer to pay this by 6 equal monthly instalments of Shs.11,096,800/-. The said figure of Shs.66,580,802 was not accidental or plucked from the air. It was the basis of a determination by the Engineer in his certificates issued and

agreed claims. It was contained in the letter of the Engineer dated 21st August 2001. That the two letters were of the same date are instructive. In fact, the Engineer refers to the fact that it knew that the offer of payment schedule had been forwarded to the plaintiff. They also confirmed that the sum of Shs.66,580,802 had been agreed by the defendant. This is sufficient proof that the admission was based on professional certification by the engineer.

I have carefully considered the applications, affidavits and the pleadings. I find no evidence that defendants had objected to or contested any of the certificates which were annexed to the affidavit.

The defendant had not before the suit filed questioned the role of the Engineer. At all material times the payments were made on basis of certificates issued by the Engineers. In the contract document the Engineer appointed by the defendant's contractor was J.F. D'Driscoll, Managing Director, C.I. Services Ltd of Ireland. His duties and authority was clearly specified. I do hold that at all material times, the Engineer while he owed duty of care to both parties and obligation to be fair and impartial, was an agent of the defendant the Employer. Clause 2.1 of the Conditions & Contract. I do find that the certificates were duly certified by the Engineer in terms of the contract. The allegation in the defence of collusion and conspiracy as between the plaintiff and Engineer were not particularized as required by law. It is mandatory to give particulars of allegations of fraud collusion or conspiracy in pleadings for it to be taken seriously. To throw in those terms or words are not sufficient to demonstrate that their defence raises triable issues.

I was referred to the case of **CASSAM –V- SACHANIA (1982) KLR 191** in which the Court of Appeal considered the principles to be applied in applications for judgment on admissions. I agree with and bound by observation of the Court that:-

“Summary determination are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of trial”

(See P. 197 Porter J.A.)

In my view the material facts are capable and have been adequately established and the law is capable of being argued without the benefit of a trial. This court was substantially convinced that the admission of the amounts owed was done on the basis of certificates issued by the defendant, the employer's own Engineer. In **NAIROBI GOLF HOTELS (KENYA) LIMITED –VS- LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS C.A. No. 5 of 1997** dealt with the role of an architect and the function of a final certificate in a building contract. The court said inter alia,:-

.... The principal purpose of certificate is to secure payment to the contractor of sums properly due to him under the constructor or to the express approval of work that has been done. What is the position and the function of the architect in contracts for works of constructions. In **Halsbury's Laws of England 4th Edition Vo. 4.(2) para 427** it is stated:-

“477 position of certifier: An architect or engineer exercising jurisdiction to certify under a contract must act impartially and independently. In addition he will owe a duty to the employer to carry out the certification procedure with reasonable care and skill and will be liable to him for any loss caused by his negligence. However, he is unlikely to be liable for loss caused to the contractor.

In this case the architect is clearly the agent of the appellant.

The effect of a final certificate in a contract for works of construction will naturally depend on the term of each contract.”

I do hold that the certification issued herein by the Engineer were done in the course of his duty under the contract and they were done so as an agent of the Employer the Defendant. They have not been

challenged or impugned under the contract or through any action in respect thereof.

In the case of **GUPTA –VS- CONTINENTAL BUILDERS LIMITED, (1976 – 80) KLR 809**, summary judgment was entered in similar circumstances and the court observed:-

“What emerges clearly after a careful examination of the pleadings documents and proceedings in this case that the contract or did work for the appellant and the corporation as its joint and several employer which was certified beyond dispute (at least to the value of Shs.119,000) by the Employer’s own quantity Surveyor and a certificate for it issued by its own architect. It would be a monstrous failure of justice if the contractor is kept out of its money. Justice demands therefore the law requires that the appellant should pay the sum of Kshs.119,000 with interest and costs to the contractor.”

I think that the facts of the present case are similar to those in **Gupta case** and I see no reasons for not reaching a similar decision in granting the relief sought by entering summary judgment on admissions. Apart from the correspondence, the Defendant by its act of paying part of the amount certified and agreed upon in sum of Kshs.66,580,802 in effect admitted the same by conduct.

As a result of payments the amount was reduced to Kshs.49,914,552/-. The defendant does not deny it paid the difference between Shs.66,580,552/- and Shs.49,914,552/-.

The plaintiff’s claim in the plaint was as follows:-

- (a) Shs.49,914,552/-
- (b) Accrued interest of Shs.49,172,618/75 as at 11th August 2004.
- (c) Interest at court rates on (a) and (b) from the date of filing suit until payment is full.
- (d) Costs

Upon consideration I hold that the plaintiff has proved that the defendant is justly and truly indebted to it in the sum of Kshs.49,914,552/- on basis of the admissions herein.

In the plaint, the interest rates before institution of the suit is said to be based on undisclosed prevailing bank rates. The amount claimed by the 11.08.09 was Kshs.49,172,618/75.

I do hold and find that there is no proof that the said interest rate was agreed or admitted and if so the agreed or admitted amount. This would be a matter for trial if pursued by the plaintiff.

However, it would appear that the said claim was in effect abandoned as the plaintiff only claims the principal sum admitted without interest before the suit was filed. (Paragraph 13 of the affidavit).

As a result I do hereby hold that the plaintiff has proved its claim of the aforesaid sum of Kshs.49,914,552/- on admissions of the debt by the defendant.

I do hereby grant prayer 2 of the Notice of Motion dated 17th July 2009 in the sum of Kshs.49,914,562/- with interest thereon from the date of filing the suit until payment in full at court rates. The defendant shall pay costs of the application and the suit to the plaintiff.

Orders accordingly.

Dated and delivered at Mombasa on this 3rd day of November 2009.

M. K. IBRAHIM

J U D G E

In the presence of:

Mr. Salim Ghalia for the plaintiff

Ms. Obura h/b for Katwa Kemboy Advocates for the Defendant.