



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO 1230 OF 1997**

**LALJI BHIMJI SANGHAM BUILDERS**

**& CONTRACTORS.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL.....DEFENDANT**

**RULING**

The plaintiff's suit is grounded on an agreement in writing dated 20th January, 1987 with the defendant. By the said agreement the plaintiff undertook to execute and complete the construction of the defendants Estate known as "Umoja PhaseII" Nairobi at the cost of Kshs. 211,750,000/-.

Clause 60(5) of the said agreement provided that the Engineer at intervals of not less than 4 weeks was obliged to issue certificates stating the; sums due to the plaintiff from the defendant and on presentation of the said certificates to the defendant, the plaintiff would be entitled to payment of the sum reflected in the certificate within 45 days of certification by the engineer.

On 24th October, 1991 the Engineer issued a certificate No. 17 for kshs. 14,890,364/50. The plaintiff presented the same to the defendant for payment. Only Kshs. 7,500,000/- was paid. The balance of Kshs. 7,390,364/50 was not paid.

Another certificate was issued on 10th January, 1996 (No 18) for Kshs. 290,019,006/15. The same was presented for payment. The defendant has not complied.

The said agreement also provided for the payment of interest at the rate of 1% above the prevailing Commercial Prime Bank rate in Kenya upon all overdue payments from the date on which the same should have been made.

The plaintiff's claim as at the time of filing the suit against the defendant was kshs. 48,398,487/30 made up of principal sums in the said two certificates (Nos 17 and 18) plus interest under the agreement.

The defendant filed a defence in which the plaintiff's claim was denied.

There is now before me an application by way of Notice of Motion under Order 35 Rule 1 and order 6 Rule 13(1) (b) and C of the Civil Procedure Rules and supported by an affidavit of Lalji Bhinyi Saughani, for orders that the defendant's defence be struck out and judgment be entered for the plaintiff as prayed in the plaint.

The defendant did not file any grounds of opposition or a replying affidavit to the application that

notwithstanding, believing that I have the discretion to grant audience to counsel under Order 50 Rule 16(2), I allowed the counsel for the defendant to address the court.

The learned counsel for the defendant raised a preliminary point to the effect that the application is incompetent as it offends the provisions of order 50 Rule 3 of the Civil Procedure Rules. I rejected the preliminary point and reserved the reasons therefor to be included in this ruling.

The procedure for motions and other applications under order 50 of the Civil Procedure Rules is applicable where the rules have not otherwise provided. (See O.50 R.1) Order 35 Rule 2 has provided for the mode of an application for summary judgment. It shall be made by motion supported by an affidavit either of the plaintiff or some other person who can swear positively to the facts verifying the cause of action and any amount claimed. The plaintiff's application has complied to the letter with the said provision. The provision ousts the application of order 50 and in particular rule 3 thereof. For these reasons the application is competently before the court.

The learned counsel for the plaintiff has cited Gupta -vs- Continental Builder ltd 91978) KLR 83 and C. A. No. 5 of 1997 - Nairobi Golf Hotels (Kenya) Limited - vs Lalji Bhimji Sanghani Builders and contractors.

The plaintiffs claim against the defendant is a liquidated sum. This is a sum that is based on documentary evidence and has been arrived at by mathematical precision. The plaintiff having applied for summary judgment the onus now falls on the defendant to demonstrate it should have leave to defend the suit. The defendant has filed a defence. Leave to defend may not be granted if it is clear from the material placed before the court that the defence filed does not raise prima facie triable issues or that it is a shame. - see Nairobi Golf Hotels (K) Ltd case.

The agreement has been annexed and so are the two certificates. The Engineer was the agent of the defendant. The defendant has not disowned the Engineer or the certificates annexed. The terms of the agreement were unequivocal and unambiguous. Addressing the issue of a certificate, the court of Appeal in the Nairobi Golf Hotels case said:

***“Since it was issued within the jurisdiction conferred by the contract upon the architect and in the absence of fraud or collision, the appellant cannot resist payment.”***

The defendant has not alleged any fraud or collision. I see no defence on merit that raised any triable issues to confer the benefit of unconditional leave to defend the suit.

Accordingly, the defendants defence is hereby struck out. I proceed to enter judgment for the plaintiff against the defendant as prayed in the plaint. The plaintiff shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of March, 1998.

**A. MBOGHOLI MSAGHA**

**JUDGE**