**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**
**AT NAIROBI**

**CIVIL APPEAL NO. 5 OF 1997**

**NAIROBI GOLF HOTELS (KENYA) LIMITED ..... APPELLANT**

**VERSUS**

**LALJI BHIMJI SANGHANI BUILDERS AND CONTRACTORS ..... RESPONDENTS**

(Being an Appeal from the Ruling of the High Court of
Kenya at Nairobi (Hon. Mr. Justice Bosire) dated the
27th day of November, 1996
in
H.C.C.C. NO. 1900 OF 1995)
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**JUDGMENT OF THE COURT**

This is an appeal from the decision of the superior court (Bosire, J. as he then was) in Nairobi High Court Civil Case No. 1900 of 1995 given on November 27, 1996, by which the learned Judge entered summary judgment against Nairobi Golf Hotels (Kenya) Limited (the appellant), in a suit instituted by Lalji Bhimji Sanghani Builders and Contractors (the respondents) against the appellant for a liquidated demand of Shs. 5,784,782/=, costs and interest thereon.

Litigation between the parties arose as follows. By a standard building contract dated June 15, 1989, made between the respondents and the appellant, the respondents undertook to execute and complete the main construction work, painting and decoration for the appellant's prestigious hotel building known as "Windsor Golf and Country Club" here in Nairobi for the agreed consideration of Shs. 53,407,417/20. The contract itself is not in dispute. However, it is averred by the respondents in paragraph 4 of their plaint dated June 15, 1995, that under the terms of the contract, and in particular Clause 30 thereof, the architect at intervals of not less than 4 weeks was obliged to issue certificates stating the amount due to the respondents from the appellant and on presentation thereof the respondents were entitled to payment within 14 days of the presentation. On October 27, 1994, the architect issued a final certificate Number 30 for Shs. 5,784,782/= but on presentation the appellant declined payment.

The appellant filed a written statement of defence and a counter-claim. It admitted the existence of the contract but maintained, inter alia, that the architect acted ultra vires under the agreement by issuing what purported to be a final certificate when he should not have done so until he had complied with the formalities of Clause 15(4) of the contract by which it is mandatory upon the architect to have issued in the first instance a Certificate of Making Good Defects, if any.

After the defence and counter-claim was filed the respondents moved the superior court by motion on notice for summary judgment against the appellant for the entire sum claimed in the plaint under Order XXXV rules 1 and 2 of the Civil Procedure Rules. The affidavits in support of the motion and in reply thereto were more or less a rehash of the averments in both the plaint and the written statement of defence. When the motion came for hearing on October 18, 1995, the parties by consent chose to file written submissions. In a reserved ruling the learned judge held that the respondents had no part in the preparation of the final certificate and whether or not it was validly or properly issued was a matter between the appellant, as the employer, and the architect. So the breaches complained of by the appellant regarding the final certificate were breaches, if breaches they were, not by the contractor but by the architect who was under the contract the agent of the appellant. The learned judge held that no prima facie triable issues had been raised as would entitle the appellant to have leave to defend the suit and consequently gave summary judgment as prayed in the plaint.

The appellant has raised 8 grounds of appeal in its memorandum of appeal but when the appeal was called to hearing Mr. Muigai, learned counsel for the appellant, informed us that he would argue one ground only that is that the learned judge should have held that the written statement of defence did raise triable issues and ought to have given the appellant unconditional leave to defend. In the course of his submissions he also urged that it was a misdirection on the part of the learned judge to embark on a trial of the suit by affidavit only, disregarding the complexity of the matter before him.

It is trite law that in an application for summary judgment under Order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty in the main is limited to showing, prima facie, the existence of bona fide triable issues or that he has an arguable case. On the other hand, it follows, a plaintiff who is able to show that a defence raised by a defendant in an action falling within the purview of Order XXXV, is shadowy or a sham is entitled to summary judgment. This court so held in the case of Continental Butchery Ltd vs Samson Musila Nthiwa, Civil Appeal No. 35 of 1977 (CA) in which Madan JA (as he then was) stated the principle thus:

> "with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under the summary procedure provided by O.35 subject to there being no triable issue which would entitle a defendant to leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham."

The learned Judge of Appeal was restating the words of Lord Halsbury in the English case of Jacob vs Booths Distillery Co. 85 LTR at Page 262, in which he said:

> "There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay, which only added to the expense and where it was not in aid of justice that such things should continue O.XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

The learned judge observed correctly that the respondents who had a liquidated claim could apply for summary judgment. Having done so, the onus fell upon the appellant to demonstrate it should have leave to defend the suit. It could do so by affidavit evidence, oral evidence or even a written statement of defence or otherwise. In cases where a defence has been filed leave to defend the suit may not be granted if it is clear from the material placed before the court that the defence so filed does not raise prima facie triable issues or that it is a sham defence. The learned judge properly appreciated the principles of law enunciated in Camille vs Merali [1966] E.A. 411 and Gupta vs Continental Builders Ltd. [1978] KLR 83.

Determination of this appeal principally centres on the role of the architect and the function of the final certificate under this building contract. Conditions 1 and 2 confer on the architect a power to issue

certificates. The principal purpose of certificates is to secure payment to the contractor of sums properly due to him under the contract or to 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 Edn. Vol.4 (2) para. 427 it is stated:

"427. 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 instance the architect is clearly the agent of the appellant. He was, therefore, bound to conduct the business of his principal, the appellant herein, according to the terms of the contract and if he acted otherwise and if any loss be sustained, the architect must make it good to his principal. It is apparent therefore that the suit instituted against the respondents is ill-advised.

The effect of a final certificate in a contract for works of construction will naturally depend on the terms of each contract. In this case the architect under Clause 30 has power to certify the final balance due and once he has done so he will be functus officio, unless the final certificate is impugned under sub-clause (7) thereof. Since it was issued within the jurisdiction conferred by the contract upon the architect, and in the absence of fraud or collusion, the appellant cannot resist payment.

The defence put forward by the appellant did not raise any triable issues and in the circumstances the appellant was not entitled to unconditional leave to defend. We have no doubt that in entering summary judgment against the appellant the learned judge acted properly and cannot be faulted. This appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 15th day of July, 1997.

R.O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR