



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 2461 OF 1992
GITHUNGURI & ANOTHER T/A
GITHUNGURI & COLLINS ARCHITECTSAPPLICANT
VERSUS
KENYA RAILWAYS CORPORATION..... DEFENDANT

JUDGMENT

This is an application for summary judgment expressed to be brought under order 35 Civil Procedure Rules. The plaintiff is a firm of architects. It has made a liquidated demand for monies they say is the balance of sums due to them from the defendant for services rendered to them in a building contract. The contract document had an arbitration clause respecting all disputes arising under the contract. The plaintiffs were paid in part for services they rendered and brought this action for the balance.

The defendant appeared and have filed a written statement of defence denying liability. In the application before me they have raised the issue of the jurisdiction to entertain both the suit and the application relying on the arbitration clause.

S 6(1) of the Arbitration Act, cap 49 Laws of Kenya, provides, in pertinent part, as follows:

“If a party to an arbitration agreement ... commences any legal proceedings in any Court against any other party to the agreement ... in respect of a matter agreed to be offered:-

(a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings ...”

Mr Kituku for the defendant submitted that a party may rely on the above subsection even after delivering pleadings. With due respect to him, the subsection is clear, and in any case the authorities are clear on the issue, that once a party sued delivers a pleading or takes a step in the proceedings he denies himself the right to rely on the arbitration clause. In *Pitchers Ltd vs Plaza (Queensway) Ltd* [1940] 1 All ER 151 it was held the defendants in the case had taken a step in the proceedings in that case and were therefore precluded from relying on the arbitration clause. In that case the defendants had not delivered any pleadings but filed an affidavit to oppose an application filed in the suit. The affidavit deposed, *inter alia*, that the defendant had a defence to the plaintiff's claim. That was held to be a step taken in the proceedings as precluded the defendant from relying on the arbitration clause.

In our case the defendant not only has filed a written statement of defence, but also filed a replying affidavit in opposition of the application for summary judgment. It is precluded from relying on the arbitration clause. This Court has, therefore, the jurisdiction to handle this case.

I now turn to the merits of the application. The claim is liquidated. It is for Kshs 1,880,295.30. It is alleged to be the balance of fees for professional services rendered at the defendant's request. The defendant has filed a written statement of defence making a general denial. It offends o VI rule 9(3) Civil Procedure Rules.

But under o 35 rule 2 Civil Procedure Rules, a defendant may show by affidavit or otherwise that he should have leave to defend the suit. The defendant corporation has filed a replying affidavit dated 19th October, 1993. It raises three issues. The first one is one of jurisdiction which I have already dealt with. The second one concerns the provision of the Architects and Quantity Surveyors Act, under which the plaintiff is supposed to charge its fees. It has been contended on its behalf that it is supposed to be charged under the 4th schedule clause B 9(d). The plaintiff/applicant contends it is clause B 9(a) which applies. The third issue is the contention by the defendant that the plaintiff was supposed to but has not transferred to it all original drawings and documents concerning the subject project which are in the possession of the latter.

Are the foregoing the issues envisaged by o 35 rule 2 Civil Procedure Rules? OXIV rule 1(4) Civil Procedure Rules defines what an issue is.

“Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.”

This is a definition of an issue in general terms. However, a triable issue, must, to my mind, mean an issue which would require the adduction of evidence to resolve it. The issues raised above are not in that category. I have already dealt with the issue of jurisdiction.

With regard to the mode of charging fees the parties by agreement, and it was conceded as much herein, stipulated that the 4th Schedule of the Architects and Quantity Surveyors Act, chapter 525 Laws of Kenya, would apply. The dispute between the parties is whether calculations shall be made under clause B 9(a) or B 9(d). It is unthinkable why a dispute should arise. The two clauses are clearly complimentary. Paragraph B 9(a) stipulates the manner of charging while work is in progress. A fee note would not be raised under that clause unless some work would have been done over the costs thereof assessed. In general terms estimates would be used. That is the import of that paragraph. Payments are based on certificates.

Clause B 9(d) requires actual construction costs. It would appear to me that an architect may charge his fees under paragraph (a) and if he thinks no additional payments are due to him may forego a final calculation of his fees under paragraph (d). The two paragraphs are not alternative modes of calculations of fees chargeable.

What is the plaintiff's claim? It is not based on a final account. It is based on fees calculated on the basis of paragraph (a), above. The correctness of the figure has not been challenged. Consequently, the plaintiff having chosen to base his fees on paragraph (a) above, he will not later submit a claim based on a final account worked under paragraph (d). He will be precluded by dint of o II rule 1 Civil Procedure Rules.

In the above circumstance I do not see any triable issue disclosed to go to trial. Consequently I find for the plaintiff and enter summary judgment for Shs 1,880,295.30 pleaded in the plaint together with interest and costs. Costs of the summary judgment application to the plaintiff / applicant.

Orders accordingly.

Dated and delivered at Nairobi this 30th day of November, 1993

S.E.O. BOSIRE

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JUDGE