



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CIVIL APPEAL NO. 107 OF 2017**

**BETWEEN**

**LIANARD HOLDINGS LIMITED ..... APPELLANT**

**AND**

**KARTAR SINGH DHUPAR & CO. LTD. .... RESPONDENT**

*(An appeal against the ruling of the High Court of Kenya at Nairobi (Nzioka, J.) dated 24<sup>th</sup> February, 2017 in H.C.C.C. No. 250 of 2015.)*

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**JUDGMENT OF THE COURT**

1. By a building contract dated 2<sup>nd</sup> May, 2012 the respondent was engaged as a contractor to extensively develop the appellant's (employer) parcel described as L.R No. 24605/4 situated at Mavoko for a consideration of Kshs.1,300,000,000. The terms and conditions governing the parties' relationship were set out in the contract.
2. Of relevance to this appeal was that the commencement date of the project works which was 1<sup>st</sup> June, 2012 while the completion date was scheduled as 15<sup>th</sup> May, 2014. The respondent was to periodically make applications for payment of work done by furnishing the quantity surveyor, Getso Consultants Limited with details of the work done, materials on site and amount it considered itself entitled to. The quantity surveyor was required upon receipt of the application to verify the amount claimed, prepare an interim valuation of the work so far done and materials on site and forward the same to the project architect, Blink Studio Limited. The architect would then issue an interim payment certificate within seven days of the amount so verified. It is the amounts under such interim certificates that the respondent was required to pay within 14 days after presentation of the certificates. Delay in making payments under the interim certificate would attract simple interest on the unpaid amount until payment in full. The appellant was also required to retain 10% of the total value of the sums certified in the payment certificates and deposit the same in a joint interest earning account. The interest therein was to be paid to the respondent.
3. Pursuant to the aforementioned terms the architect issued an interim certificate number 1 (first interim certificate) on 13<sup>th</sup> August, 2012 indicating the sum payable to the respondent as Kshs.37,918,142.52. It is not in dispute that the appellant partly paid the said sum in instalments aggregating to Kshs.20,000,000. According to the respondent, the appellant indicated it was looking for financing to settle the balance. On the strength of the appellant's assurance, the respondent continued with the construction works. Thereafter, the quantity surveyor made a second interim valuation amounting to Kshs.16,310,725.36. For unknown reasons the architect refused to issue an interim certificate for the said amount.
4. Despite the respondent carrying out its obligations under the contract the appellant failed to settle the amounts owing under the first interim certificate and second interim valuation. When it became apparent that the appellant was unable to get financing to pay the outstanding amount the respondent had no choice but to suspend the construction in accordance with the contract. Ultimately, the respondent filed suit seeking payment of what it deemed as being entitled to under the contract.
5. In its defence the appellant imputed that the contract sum for the project had been grossly exaggerated by the respondent in collusion with the quantity surveyor. It averred that the respondent executed the works assigned to it in such a reckless and sub-standard manner occasioning loss to the appellant. With regard to the first interim certificate the appellant admitted that it had made part payment thereof of Kshs.20,000,000. However, the respondent was not entitled to the balance thereof due to the sub-standard work. As far as the appellant was concerned, the second interim valuation was irregularly issued and the architect rightfully declined to issue an interim certificate in respect of the same.
6. Subsequently, the respondent filed a notice of motion seeking summary judgment for the sum of:-

- a) Kshs.34,228,867.88 being the outstanding amount under the first interim certificate and the second interim valuation.
- b) Kshs.12,534,702 being the accrued interest on the outstanding amount under the first interim certificate as at 10<sup>th</sup> May, 2015.
- c) Kshs.3,467,556 being the accrued interest on the outstanding amount under the second interim valuation as at 10<sup>th</sup> May, 2015.
- d) Kshs.6,025,429.75 being the retention sum held by the appellant as per the contract.
- e) Kshs.3,301,000 being accrued interest on the retention sum.

The application was premised on the ground that there was no dispute regarding the outstanding amounts under the first interim certificate and second interim valuation. Moreover, the appellant had made an unequivocal admission to settle the undisputed sums but failed to do so.

7. The appellant resisted the application by an affidavit sworn by its director, Bernard Onkundi Otundo, in which it endeavoured to show that its defence raised several triable issues. The learned Judge (Nzioka, J.) found otherwise and by a ruling dated 24<sup>th</sup> February, 2017 entered summary judgment in favour of the respondent in the following terms: -

**(a) Judgment is entered in favour of the plaintiff/applicant in terms of the prayer under paragraph 21 of the plaint in the sum of Kshs.17,918,142.52 plus interest at 17% until payment in full. The sum awarded is based on a total amount of Kshs.37,918,142.52, in respect to certificate number 1 less Kshs.20,000,000 paid leaving the sum of Kshs.17,918,142.52.**

**(b) Interest claimed on the above sum under (a) in the sum Kshs.12,534,702 was calculated at a rate of 20%. The interest payable on the sum ordered above should be recalculated at 17% from the date when payment was due until payment in full.**

**(c) Judgement in respect of the retention sum under paragraph 40 in the sum of Kshs.4,213,126.95 based on certificate number 1.**

8. It is that decision that has instigated the appeal now before us wherein the appellant complains that the learned Judge erred in law and fact by:-

- (i) **Entering summary judgment in the manner she did.**
- (ii) **Failing to appreciate that the appellant's defence raised triable issue hence it was entitled to defend the claim against it.**
- (iii) **Finding that the respondent's claim was liquidated debt.**

9. Mr. Masese, learned counsel for the appellant, submitted that principles governing entry of summary judgment are settled. Towards that end, he made reference to this Court's decision in ***Industrial & Commercial Development Corporation vs. Daber Enterprises Limited [2000] 1 EA 75***. He went on to argue that the essence of summary judgment is to save a court's judicial time from investigating what he termed as sham and bogus defences. Nevertheless, where a defence demonstrates a triable issue such a matter ought to be allowed to go to trial. In that regard counsel relied on the case of ***Kundanlal Restaurant vs. Dershi [195] EACA 77***.

10. Mr. Masese faulted the learned Judge for not applying the aforementioned principles in the matter at hand. He contended that the amount claimed under the first interim certificate was disputed by the appellant. In particular, the amount claimed in the said certificate was Kshs.37,918,142.52 contrary to the express terms of the contract that the minimum amount with respect to an interim certificate issued thereunder should be Kshs.40,000,000. In addition, the amounts thereunder included insurance cover and performance bonds taken by the respondent for the entire duration of the contract yet the respondent suspended the construction works two months after commencement of the contract.

11. He argued that the applicable rate of interest on outstanding payments under the contract was crystal clear; it was to be determined by the prevailing interest rates charged by N.I.C Bank during the relevant period. The said bank's interest rate varied between 14% and 17%. Consequently, the applicable interest in this case could only be properly ascertained through a trial. As such, the learned Judge erred in finding that the applicable rate was 17% without evidence to support the same.

12. Mr. Masese urged that the learned Judge also erred in entering summary judgment for the retention sum of Kshs.4,213,126.96 because as per the contract such sum could only be paid upon the issuance of a final certificate of practical completion which had not been issued. Citing the case of ***Sand vs. Kenya Co-operative Creameries [1992] LLR 314*** he submitted that the learned Judge erroneously converted the application for summary judgment to an application for judgment on admission which was not sought by the respondent. In any event, the appellant had not made any admission on the amount owing. Challenging the learned Judge's finding that the respondent's claim was for liquidated sum he argued that the respondent's claim was for special damages for breach of contract which required to be specifically proved in a trial. It is on those grounds that we were urged to allow the appeal.

13. In opposing the appeal, Mr. Billing, learned counsel for the respondent, submitted that the learned Judge properly entered summary judgment in favour of the respondent. Buttressing that line of argument, he claimed the appellant had failed to demonstrate any dispute pertaining to the amount under the first interim certificate. The appellant unequivocally admitted owing the amount under the said certificate. The alleged dispute on the amount thereunder was being raised for the first time before this Court.

14. We have considered the record, submission by counsel and the law. The appeal herein challenges the exercise of the learned Judge's discretion in entering summary judgment against the appellant. Accordingly, we are conscious that we can only interfere with such discretion

if we are satisfied that the learned Judge misdirected herself in some matter and as a result has arrived at a wrong decision. See this Court's decision in Magunga General Stores vs. Pepco Distributors Limited [1987]2 KAR 89.

15. Case law has crystallized the parameters within which a relief of summary judgment can either be granted or withheld. It is trite that the basis of an application for summary judgment is that the defendant has no defence to the claim. See Banque Indosuez vs. D.J. Lowe & Company Limited [2006] eKLR. As rightly observed by this Court in Delphis Bank Limited vs Caneland Limited [2014] eKLR such discretionary power of entering summary judgment ought to be applied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process of the court.

16. In Zacharius Mweri Baya vs. Mohamed Sheikh Abubakar [2010] eKLR this Court restating the guiding principles for allowing an application for summary judgment under the then Order 35 of the former Civil Procedure Rules which is similar to Order 36 of the current Civil Procedure Rules expressed:

***“Indeed the stream of authority from numerous decisions of this Court on applications under Order 35 favours the general principle that all that a defendant has to show is that there is a triable issue of fact or law. Leave will then normally be given unconditionally except where a Judge considers that there is ground for believing that the defence is a sham in which case he may exercise his discretion to impose terms and conditions in lieu of rejecting the entire defence.”***

The learned Judge, in our view, appreciated the foregoing principles.

17. With regard to the amount owing under the first interim certificate we concur with the following findings of the learned Judge:-

***“The undisputed fact is that the defendant (appellant herein) made partial payment on the plaintiff's claim under certificate number 1...***

***The respondent's argument that the amount claimed under the certificate number 1 includes a claim for materials on site, an amount that was to pay for insurance of the works and the taking out of a performance bond that was to run through the entire contract period. Sic. I find this argument unfounded, as the defendant made partial payments thereof with full knowledge of these alleged issues... It is clear that the sum due under that certificate was acknowledged by that partial payment as stated above and in the absence of any reasonable, convincing and adequate explanation to dispute the balance the respondent is estopped from denying it. This position is supported by the letter dated 22<sup>nd</sup> July, 2013 from the project managers, Messrs First Rate Projects Ltd, written to the plaintiff and copied to the Project Architect and the Project Quantity Surveyors among others stating:***

***‘The client is in the process to clear certificate number 1 of Kshs.37,918,142.52...’***

***I therefore find that the claim under certificate number 1 does not seem to raise any issues in dispute for trial. I grant judgment thereon for the balance of the sum of money outstanding on the same.”***

18. Contrary to the appellant's contention that the amount indicated in the said certificate was less than the prescribed minimum amount of Kshs.40,000,000 under the contract, it is clear from the certificate itself which is on record that the gross valuation thereunder was for a sum Kshs.42,131,269.47. A deduction of 10% of the said amount as the retention sum totalling to Kshs.4,213,126.95 is what brought the amount payable to Kshs.37,918,142.52.

19. However, unlike the learned Judge, we find that the applicable interest rate on the outstanding payment under the certificate was an issue between the parties which could not be properly ascertained without the benefit of evidence being led in regard to the same. We say so because on the one hand, the respondent claimed that the applicable interest rate was 20% while on the other hand, the appellant claimed it varied between 14% and 17%.

20. We cannot fault the learned Judge for entering summary judgment for the retention sum of Kshs.4,213,126.95 which was clearly set out in the first interim certificate.

21. We also find that there was nothing wrong with the learned Judge entering summary judgment for the aforementioned ascertained liquidated claims which were severable from the rest of the respondent's claims. In Trust Bank Limited and Michael Muhindi vs. Investec Bank Limited- Civil Appeal No 258 and 315 of 1999 (unreported) this Court said:

***“There is authority, to wit, Gupta v Continental Builders Limited [1978] KLR 83, that in mixed claims where one of those is liquidated, then the Court has jurisdiction, upon application to enter summary judgment only on that part of the claim which is liquidated. But, in our view, that is only possible where the liquidated claim is severable from the other claims and can be dealt with separately without doing any violence to the other claims.”***

22. In the end, we uphold the decision in respect of the claim save for the interest rate for the unpaid amount under the first interim certificate, we see no reason to interfere with the learned Judge's discretion in this case. For avoidance of doubt, we set aside the summary judgment entered in respect of the interest rate of 17% on the outstanding amount under the first interim certificate and direct that the learned Judge determine the same after hearing both the parties. We hereby direct each party to bear its costs.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of January, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**