IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 296 OF 2004

MOI UNIVERSITY …… APPELLANT

AND

VISHVA BULDERS LIMITED ……..…… RESPONDENT

(Being an appeal from the decision of the High Court of Kenya at Eldoret (Tunya, J) delivered on the 16th day of October, 2002 in Eldoret HCCC No. 51 of 1999 pursuant to the leave to lodge and serve the Notice of Appeal and Record of Appeal out of time granted on 10th November 2004 (Githinji, J.A)

In

H. C. C. Appln. No. 244 of 2004 (UR. 118 of 2004)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Omondi Tunya, J) delivered at Eldoret on 16th October, 2002, in which the learned Judge granted an application for summary judgment against the appellant herein. The matter arises out of a building contract.

The respondent herein (as the plaintiff in the superior court) filed a suit against the appellant (as the defendant in the superior court) seeking judgment for Shs.347,157,533.70/- plus interest and costs of the suit. The initial plaint was filed in the High Court of Kenya at Eldoret on 15th March 1999. The appellant filed a defence on 22nd November, 1999 in which the claim was denied and asked for the dismissal of the suit. Paragraph 9 of that defence stated:-

"Without prejudice to paragraphs 5, 6, 7 and 8 of the plaint, the defendant avers that this suit is prematurely before this Court as the contract between the plaintiff and the defendant provides for arbitration in case of any dispute between the parties before any recourse to Court action and the defendant shall apply at the earliest opportunity to have the matter referred to arbitration and the suit be struck out or stayed."

After filing of that defence there followed a series of amendments of pleadings ending with the Re-amended Plaint in which the sum claimed was reduced to Shs.185,305,011.30 plus interest. In its answer to the foregoing in the Re-amended Defence the appellant denied the claim and in that defence it was stated inter alia:-

"6A. The Defendant shall also aver that the Plaintiff has been paid on quantum meriut basis and that the present claim is baseless and ought to be struck out.

7. WITHOUT PREJUDICE to the foregoing, and in the alternative, the Defendant states that as per the contract between the Plaintiff and the Defendant, the Plaintiff is only entitled to the sum of Kshs.57,270,096.10 which sum has been duly paid less the amount retained as per the contract and the said retention sum is not yet due as the Plaintiff failed to complete its part of the contract by abandonment the contract was frustrated and finally the project abandoned in its initial stages and the final accounts have not been settled.

8. The Defendant without prejudice to the foregoing, denies that the Plaintiff is entitled to any interest on any sum and avers that the contract entered into between the Plaintiff and the Defendant did not provide for interest to be charged and paragraph 4 of the plaint is therefore denied in toto and proof thereof required.

9. Without prejudice to paragraphs 4A, 4B, 4C, 5, 6, 6A, 7 and 8 of the plaint, (sic) the Defendant avers that this suit is prematurely before this Court as the contract between the Plaintiff and the Defendant provides for arbitration in case of any dispute between the parties before any recourse to Court action and the Defendant shall apply at the earliest opportunity to have the matter referred to arbitration and the suit be struck out or stayed."

More than one year after the filing of the original plaint the respondent in an application dated 11th December, 2000 and stated to have been brought under "***section. 3A*** *of the Civil Procedure Act and under* ***O.XXXV R. 1 (1) & 2*** *of the Civil Procedure Rules*" sought summary judgment to be entered as prayed in the plaint or in the alternative a summary judgment against the appellant in the sum of Kshs.185,305,011.30, plus interest. The application was based on the grounds that:-

"(b) There is overwhelming documentary evidence that the Defendant is truly indebted to the Plaintiff as per the plaint

(c) The Defendant has acknowledged his indebtedness to the Plaintiff in writing

(d) The Plaintiff's claim is therefore a clear one."

That is the application that was placed before Omondi Tunya, J (as he then was) for determination. The learned Judge considered all that was placed before him by way of documents and legal submissions by counsel appearing for the parties, and in the end was satisfied that the respondent herein was entitled to summary judgment as prayed. In concluding his ruling which he delivered on 16th October, 2002 the learned Judge stated:-

"The upshot of my findings and ruling in this application is that the applicant has satisfied the provisions of O.XXXVRules 1 **and** 2 **of the Civil Procedure Rules. On its part, the respondent has not convinced this court that it has a prima facie bona fide defence which entitles it to defend the suit. I consequently grant prayer (a) in the motion with costs of this application to the applicant. It is so ordered."**

Being aggrieved by the foregoing the appellant, through its advocate, filed this appeal citing the following 8 grounds of appeal:-

"1. That the learned Judge erred in law and fact in holding that there were no triable issues in the case to go to full hearing contrary to the overwhelming evidence on record.

2. That the learned Judge erred in law and fact in taking into consideration extraneous issues and failing to consider issues raised both in the Amended amended defence and in Replying Affidavit of the Appellant.

3. That the learned Judge erred in improperly exercising his discretion thereby prejudicing the rights of the Appellant.

4. That the learned Judge erred in failing to take into account the peculiar circumstances of this case and the fact that the amount involved was colossal and for the sake of public interest the matter should have gone to full trial.

5. That the learned Judge erred in law and fact in holding that the Interim Certificates could not be revoked by the maker thereof without any evidence in that regard

6. That the learned Judge erred in failing to hold that the issues raised in the Appellant's Amended amended defence could only be properly adjudicated upon hearing oral evidence and not summarily.

7. That the learned Judge erred in using wrong and failing to apply correct, principles regarding summary judgment.

8. That the learned Judge erred in law and fact in arriving at a decision against the weight of the evidence on record and against the pleadings."

That is the appeal that was argued before us at Eldoret on 24th September, 2009 and then adjourned for further hearing in Nairobi on 17th November, 2009.

In his submissions, Mr. A. Nyairo, the learned counsel for the appellant, took us through the history of the relationship between the parties based on a letter of 28th June, 1990 in which the appellant contracted the respondent to construct a Faculty of Science Complex at a contract sum of Shs.476,371,024/- The contractor (the respondent herein) was authorized to commence the work immediately. An agreement was signed after the work had commenced.

It is to be pointed out that the learned Judge of the superior court granted the respondent's application for summary judgment on the ground that the appellant had no bona fide defence to the claim. It was Mr. Nyairo's submission that the appellant's defence raised triable issues. In a bid to satisfy this Court on that score Mr. Nyairo went into details of various issues which, in his view, were serious triable issues. For example, he pointed out that interim certificates were issued by DR (Departmental Representative or Architect) who had no authority to issue them. In his view, lack of authority by DR was a triable issue.

The second triable issue, according to Mr. Nyairo, was the fact that the certificates issued by DR expressed themselves as "*work done and materials on sight*" but that was not true as regards certificates Nos. 8 – 13. It was further submitted that it was mutually agreed by the parties that there would be no interest payable on delayed payments and yet this was ignored by the learned Judge.

Mr. Nyairo then referred us to the fact that the respondent in its application for summary judgment had relied on cancelled certificates which issue was raised in the Amended Defence but was ignored by the learned Judge .

To counter the foregoing submissions, Mr. J.K. Mitey, the learned counsel for the respondent, submitted that the statement of defence did not raise any triable issues fit for a trial. On the question of Departmental Representative, Mr. Mitey submitted that according to the contract documents the DR had jurisdiction to issue interim certificates. He further submitted that the architect had authority to determine liquidated and ascertained damages, and it is for that reason that certificates Nos. 8 – 13 were issued. He went on to submit that interim certificates create a debt upon which a contractor can seek summary judgment. On the issue of cancelled certificates, Mr. Mitey pointed out that there had been a purported cancellation of the certificates which was pursuant to a letter which had been written before the signing of the contract.

Finally Mr. Mitey submitted that the learned Judge carefully analyzed the matter before him and applied the law correctly.

We have considered the background to this matter, the submissions by counsel appearing for the parties and in the end the main issue to be decided is whether the learned Judge was entitled to enter summary judgment and whether the appellant's defence raised any triable issues. We have stated elsewhere in this judgment that the application before the superior court was an application for summary judgment under **Order XXXV rules 1** and **2** of the Civil Procedure Rules. We must consider whether what was placed before the learned Judge was a proper case for summary judgment. The learned Judge considered the interim certificates produced before him and considered them to be conclusive proof that the appellant owed the amount in question to the respondent . But we have now been taken through the agreement, the definition and jurisdiction of the DR (Departmental Representative) and it was argued that the DR had no jurisdiction to issue the certificates. But there was a counter-argument that the DR had the authority to issue these certificates. There was then the issue of certificates nos. 8 – 13 which were at one time cancelled. It was not clear as to whether the cancelled certificates were reinstated or not and if so whether these were authorized. Then there was the issue of interest charged for delayed payments. There appear to have been an agreement that no interest would be charged for delayed payments. In Building Contract Law (1st Edition) by John Murdoch and Will Hughes at p. 151 it is stated:-

"However, an employer who claims that work has been overvalued in an interim certificate appears to be in a stronger position, he can resist a claim for summary judgment by raising sufficient doubts about the certificate in the court's mind, or by bringing evidence to support any other right of set off."

The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one trial issue would be sufficient – see **H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89**. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in **Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75** at P. 76 Duffus P. said:-

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "a triable issue***" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

And finally in **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** at p. 365 this Court said:-

*"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under **Order XXXV rule 1** and **2**. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of **Continental Butchery Limited vs. Samson Musila Ndura**, Civil Appeal No. 35 of 1997 where this Court stated:*

With a view to eliminate delay 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 from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant 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.

*That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of **Dhanjal Investments Limited vs. Shabana Investments Limited**, Civil Appeal No. 1232 of 1997*

(unreported) where it stated:

The law on summary judgment procedure has been settled for many years now . It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited [1952] 19 EA 77, **and followed in the Court of Appeal for Eastern Africa in the case of Souza Fiqueredo & Co. vs. Moorings Hotel [1959] EA 425, that if the defendant shows a *bona fide* triable issue he must be allowed to defend without conditions."**

In view of the foregoing we are satisfied that the appellant's defence in the superior court raises triable issues which should go for adjudication. Accordingly the appeal is allowed, the decision and decree of the superior court set aside and we order that the suit be remitted for trial in the superior court. The appellant will have the costs of this appeal and the costs of the application for summary judgment in the superior court.

Dated and delivered at ELDORET this 18th day of February, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.