



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

**Civil Appeal 291 of 2002**

**BALOZI HOUSING CO-  
OPERATIVE SOCIETY  
LIMITED .....  
APPELLANT**

**AND**

**SAMUEL WAIGANJO  
THUO T/A WAIGANJO &  
ASSOCIATES ..  
RESPONDENT**

*(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi,*

*Milimani Commercial Courts (Commissioner of Assize*

*Mr. Philip Ransley) dated 12<sup>th</sup> November, 2001*

**in**

**H.C.C.C. NO. 161 OF 2001)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

By a plaint dated and filed on 1<sup>st</sup> February, 2000 in the superior court, the respondent (plaintiff in the superior court) claimed, among other things, the sum of Kshs.31,006,822.45 in respect of professional services rendered by him to the appellant as a quantity surveyor relating to a proposed building development on L. R. No. 12422/16 B Muthaiga (“the suit land”).

The appellant (defendant in the superior court) denied the claim. In a defence dated and filed on 10<sup>th</sup> March, 2000 the appellant claimed that the respondent had not carried out his obligations in accordance with the terms of his employment, and counter-claimed by way of general damages, an unspecified sum of money, for breach of contract.

Then, on 5<sup>th</sup> February, 2001, the respondent filed an application for summary judgment under **Order 35 Rule 1** of the Civil Procedure Rules. The grounds stated on the face of that application were as follows:

- “1. The Defendant was at the commencement of this suit truly and justly indebted to the Plaintiff in the sums claimed in the plaint.***
- 2. The said claim is on account of professional fees for services rendered by the Plaintiff at the Defendant’s request and/or instructions.***
- 3. The Plaintiff pursuant to the instructions carried out his duties thereunder and rendered a fee-note upto and including the point at which he raised the fee-note.***
- 4. The defence does not raise any triable issues and is a mere sham meant to delay the Plaintiff from getting his fees.”***

That application was heard by the superior court (Ransley, Commissioner of Assize as he then was) on 14<sup>th</sup> June, 2001, and in a Ruling given on 12<sup>th</sup> September, 2001, the superior court granted the appellant **conditional leave to defend**, and ordered it to deposit Kshs.20 million in a joint account in favour of the two advocates within 21 days of the date of the ruling.

It is that ruling that is the subject of this appeal. The appellant is essentially aggrieved by the “condition” that requires it to deposit Kshs.20 million which it considers onerous. The appellant has presented 16 grounds of appeal as follows:

- “1. The learned commissioner erred in law and in fact in failing to consider and make a finding whether the many material facts raised in the defence, counter claim and the replying affidavits constituted triable issues that would have entitled the appellant to unconditional leave to defence (sic).***
- 2. The learned commissioner erred in fact when he found that the appellant’s defence did not take issue with the respondent’s method of computing his fee note.***
- 3. The learned commissioner misdirected himself in fact and in law in that having observed in his ruling that the appellant had contended that the fee note was excessive, that it did not represent the work done and that the parties should have the same assessed by an independent quantity surveyor failed to hold that these constituted triable issues.***
- 4. The learned commissioner erred in fact and in law in holding that the defendant did not raise issue with the quality of the work done and/or the method of charging and calculation of the respondent’s fee note when these matters were clearly raised in the defence, the counter claim and the affidavits of Sylvester Mutharia and Menelik Makonnen.***
- 5. The learned commissioner misdirected himself in law in that having observed in his ruling that paragraph 3 of the defence alleges that the respondent was negligent in his duties as particularized he deduced that the appellant was alleging that he owes nothing to the respondent but failed to address himself to whether or not his observations aforesaid raised triable issues.***
- 6. The learned commissioner misdirected himself in law in that having recognized the existence of a valid counter claim in the appellant’s defence he failed to consider and address himself to the trite law that this entitled the appellant to unconditional leave to defend.***
- 7. The learned commissioner misdirected himself in fact when he found that in the minutes of 27<sup>th</sup> May, 1997 annexed as ‘SMM2’ to the replying affidavit of Sylvester Mutharia it was minuted the preliminary estimated cost for the whole project as Kshs.745,768,000/- and he failed to observe that in those minutes the figure of Kshs.754,768,000/= was found to be way above the appellant’s expectations.***
- 8. The learned commissioner misdirected himself in fact and in law in that having observed in his ruling that the respondent had forwarded a fee estimate of Kshs.31,661,298.70 based on a project cost of Kshs.756,598,510/= he also observed in the same paragraph that the target cost of the whole project***

was set at Kshs.450,000,000/= and that the project consultants were urged to ensure that this estimate was met, he failed to address himself as to whether these contradictory observations raised triable issues.

9. *The learned commissioner misdirected himself in law in that having observed in his ruling that questions have been raised by the appellant on the project cost figure on which such fees should be calculated, he failed to consider the merits of these questions and whether or not these questions raised triable issues particularly in view of the fact that the project cost figure determines the amount of fees payable to the respondent and thus is at the heart of the respondent's claim.*

10. *The learned commissioner erred in fact when he concluded that the calculation of the respondent's fees was not challenged in the defence and misdirected himself in law when he found that there was substance in the averments of Sylvester Mutharia in paragraph 10 of his replying affidavit that the estimated fees which were for the whole project were only slightly higher percentage wise than the final fee note when the whole project had aborted yet failed to recognize that this was a triable issue that would entitle the appellant to unconditional leave to defend.*

11. *The learned commissioner erred in law in failing to consider and to address himself to trite law and legal authority presented before him by the appellant on the following points:*

*(a) A defendant may take advantage of Order XXXV Rule 2 (11) to show either by affidavit or oral evidence or otherwise that he should have leave to defend.*

*(b) If a counterclaim appears to be bona fide then unconditional leave to defend should be given.*

*(c) Where there are circumstances that require to be closely investigated or that the defendant reasonably requires to interrogate or cross-examine the plaintiff unconditional leave to defend should be given.*

*(d) Where the claim is of a highly complicated or technical nature, which could only be understood if such evidence were given, unconditional leave to defend should be given.*

*(e) Where there is reasonable ground for an inquiry or account in order to ascertain the amount recoverable unconditional leave to defend should be given.*

*(f) Unconditional leave to defend must be given unless it is clear that there is no real substantial question to be tried.*

*(g) A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition.*

12. *The learned commissioner erred in law when he found that where work was terminated prior to final completion, the respondent if he is entitled to charge fees should adopt the method of payment set out in schedule 4 condition B10 of the Architects and Quantity Surveyors Act.*

13. *The learned commissioner misdirected himself in law and in fact when having (albeit incorrectly) found that where work was terminated prior to final completion, the respondent, if he is entitled to charge fees, should adopt the method of payment set out in schedule 4 condition B 10 of the Architects and Quantity Surveyors Act, he failed to address himself as to whether the method of charging adopted by the respondent was the correct and applicable one and, whether, this was a triable issue that would entitle the appellant to unconditional leave to defend.*

14. *The learned commissioner misdirected himself in law in that having made the following observations he failed to address himself to the merits of these contradictory positions and whether these contradictory positions raised triable issues:-*

- *That the appellant has questioned the method of charging*
- *That the method of charging was stated in the letter of appointment to be negotiated; and*
- *That the respondent decided to charge under the Architects and Quantity Surveyors Act.*

**15. *The learned commissioner erred in law in that having found that he was not totally satisfied that the charges raised by the respondent are in accordance with the agreed method of charging, he failed to hold this to be a triable issue and grant to the appellant unconditional leave to defend.***

**16. *The learned commissioner erred in law and in fact in that having found that he could not say what was the correct amount of payment that should be made to the respondent, he failed to consider trite law that where there is a reasonable ground for an inquiry or account in order to ascertain the amount recoverable, unconditional leave to defendant should be given.***

In his submissions before this Court, Mr Waweru Gatonye, learned counsel for the appellant, argued that the record before the superior court showed that there were several triable issues before that court and that those issues would have entitled the appellant to unconditional leave to defend. For example, Mr Gatonye argued, the respondent's fees were to be "negotiated" by the parties, yet the fee-note was based on the Architects and Quantity Surveyors Act (Cap 525). Even then, the respondent purported to charge "fees on fees", as the revised estimate of Kshs.756,598,510/= on the project, on which the fee was based, **already** included 11% provision for professional fees.

Mr Gatonye further argued that the fee-note of Kshs.31,006,822.45 was based on the assumption that the project went ahead to full completion, yet the project never took off. According to counsel, the method of calculating the respondent's fee was a major triable issue, as was his alleged negligence – the subject of counter-claim before the superior court.

Mr S M Mwenesi, learned counsel for the respondent, submitted that the superior court was right in granting conditional leave to defend as it questioned the *bona fides* of the respondent's defence, which Mr Mwenesi said was a "sham". According to counsel, there was no dispute about the fact that the respondent had been appointed as the appellant's quantity surveyor, and that he was entitled to fees for professional work done.

The superior court correctly observed the law when it stated that summary judgment will be given only in clear cases, and where there are no triable issues. However, the law is equally clear that where there is a single triable issue, the defendant is entitled to his day in court. Here is what Madan, JA (as he then was) said in ***Gupta vs Continental Builders Ltd (1978) KLR 83***:

***"The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend". (emphasis added).***

In ***Giciem Construction Company vs Amalgamated Trades & Services (1983) KLR 156***, a case that was cited to us by both the learned counsel, this Court observed as follows:

***"The proper principles to be considered in a case such as the present were set out in the locus classicus in East Africa on this subject, namely *Zola vs Ralli Brothers (1969) EA p 691*, in which Sir Charles Newbold said at p 694:***

***'Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim the plaintiff is not entitled to summary judgment. The mere right of the defendant to be indemnified by, or to have a claim over or against a third party in respect of the defendant's liability to the plaintiff by way of counterclaim, a sum of***

**money which does not directly reduce the liability of the defendant to the plaintiff, does not entitle the defendant to prevent the plaintiff from obtaining a summary judgment. Normally a defendant who wished to resist the entry of summary judgment should place evidence by way of affidavit before the judgment showing some reasonable ground of defence.”**

The Court also said in the *Giciem case (supra)* that:

**“In considering applications under order XXXV the courts should grant leave to defend if there genuinely exists triable issues even if the court is skeptical about the success or merits of the proposed defence, and where the court has doubts as to the bona fides of the application it ought to impose an appropriate condition when granting leave to defend.” (emphasis added).**

It is the above statement that appears to have guided the superior court in granting “unconditional” leave to defend. However, we have not been able to discern any “mala fides” on the part of the appellant in raising its defence before the superior court.

Having perused carefully the pleadings on record, the ruling by the superior court, and having heard argument, we are of the view that the learned Commissioner of Assize (as he then was) erred in imposing a “condition” to defend, which condition, we agree with the appellant’s counsel is unfair and onerous.

The superior court did indeed find that the defence raised triable issues that require a full hearing. However it then went ahead and imposed a condition. Here is what the learned Commissioner of Assize said in the concluding two paragraphs of his ruling:

**“However, I am not totally satisfied that the charges raised by the Plaintiff are in accordance with an agreed method of charging. I am of the view that the Plaintiff is entitled to some payment but I cannot say that what is asked for is the correct amount.**

**I think this is a case where conditional leave to defend should be given. I propose that the Defendant be and is hereby given conditional leave to defend on depositing with the Advocates of the parties in an interest earning account with a reputable bank a sum of Kshs.20 million within 21 days from today. Failing which the Plaintiff will have judgment as prayed”.**

That was clearly wrong. We are of the view that as far as is possible the courts should encourage the resolution of disputes by hearing both sides on merit, without undue regard to technicalities. The courts should not easily strike out pleadings, unless there is a good reason to do so. We reiterate the principle outlined by this Court in *Trust Bank Ltd vs Amalo (2003) I E A 350* as follows:

**“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges CJ (Tanzania) in the case of *Essanji and another vs Solanki (1968) EA at 224:***

**‘The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.’**

**That accords with the policy of the law as can be gleaned from Order IX, rule 1 of Civil Procedure Rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”**

Accordingly, and for the reasons stated, we find that this appeal has merit; we allow the same and order that the respondent’s notice of motion dated 1<sup>st</sup> February, 2001 in the superior court seeking summary judgment be dismissed; that the order made on 12<sup>th</sup> September, 2001 requiring the appellant to deposit Kshs.20 million is hereby set aside. The costs of the notice of motion in the superior court, and

the costs of the appeal are awarded to the appellant.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July, 2009.**

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**