



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.521 OF 2004

KABUITO CONTRACTORS LIMITED.....PLAINTIFFS

VERSUS

KARURI CIVIL ENGINEERING (K) LIMITED.....DEFENDANT

R U L I N G

The plaintiff has brought an application, which is brought under Order XXXV Rule I of the Civil Procedure Rules. The application seeks for judgment to be entered in favour of the plaintiff as prayed in the plaint. The application is based on the ground that the defendant's defence is a mere denial, a sham, frivolous and does not raise any triable issue.

It is accepted by both parties that the defendant by various local purchase orders, ordered for a total of 816 tons of asphalt concrete mix from the plaintiff.

The plaintiff by its present claim has sued the defendant for the sum of kshs 2, 749, 600/- being the balance outstanding from the defendant to the plaintiff in respect of the said asphalt concrete mix.

The defendant in its defence although denies that the plaintiff supplied the asphalt concrete mix, further avers that the supply of the said concrete mix was in exchange of a contract with Eldoret Municipal Council to the plaintiff.

The plaintiff's supporting affidavit to the application-annexed copies of defendant's local purchase orders, plaintiffs delivery notes and invoices in respect of the goods delivered. The affidavit also annexed defendant's correspondence and notes which sought indulgence to allow the defendant time to settle the debt.

The defendant in response to the plaintiff's application denies indebtedness to the plaintiff on the grounds; firstly that the defendant did not order the concrete mix represented by delivery notes 02630, 02631, 02632 and 02633. These delivery notes; and I might add delivery note No. 02629, were in response to the local purchase order No. 4759. I confirm that I perused "AP L" and I was unable to trace the local purchase order No. 4759. This alone lends credence to the defendant's allegation that it had not ordered the concrete mix represented by that local purchase order.

Secondly the defendant denies indebtedness on the basis that delivery notes 02630 and 02631 were not signed for by its authorized agent of the defendant. That the authorized agent of the defendant is Mr. Njoro Solomon. I find that the defendant contention herein before to be unattainable. I so find

because the said Mr. Njoroge Solomon did not swear an affidavit to deny that the signature appearing on the aforesaid delivery notes was not his signature. Further the deponent of the affidavit in reply fails to state who had informed him that the signature is not one of Njoroge Solomon and if that information is first hand information the deponent fails to so state.

Thirdly the defendant denies the authenticity of various delivery notes but fails to state what aspect of those delivery notes is not authentic. The defendant through the deponent of the replying affidavit states that it had previously complained of the lack of authenticity of those delivery notes but fails to state whether that complaint was in writing or oral. One would expect such complaint to be in writing; accordingly for that contention to raise a triable issue against the plaintiff's claim it would be necessary for concrete evidence to be shown relating to the lack of authenticity of the delivery notes and prove to be produced of that complaint.

Fourthly the defendant contends that the parties entered into an oral agreement whereby the defendant was to forfeit its contract with Eldoret Municipal Council in favour of the plaintiff. The defendant failed to prove his contention with documents such as an assignment of contract and accordingly I am of the view that that allegation does not raise a triable issue to the plaintiff's claim.

The plaintiff by documents annexed to the application has sufficiently proved the defendant's indebtedness, save that it failed to annex the local purchase Order No. 4759 representing the value of kshs 180, 000/-.

The object of Order XXXV of the Civil Procedure Rules is to enable the plaintiff with a liquidated claim, in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial; **(Zola – v –Ralli brothers (1969) E.A. 691)**

In this regard I find that the plaintiff is entitled to have judgment entered into its favour as prayed less the value of the local purchase order No. 4759.

I do not accept the plaintiff's counsels argument that the defendant was not entitled to raise new issues in replying affidavit, which were not raised in a defence in response to the application for summary judgment. In the case of **GICIEM CONSTRUCTION COMPANY – V – AMALGAMATED TRADERS & SERVICES (1983) KLR 156** held that: -

“A party who opposes an application for summary judgment ought to place evidence by way of an affidavit showing some reasonable ground of defence in accordance with order XXXV Rule 2 of the Civil Procedure Rules.”

In view of the aforesaid the orders of this court are: -

- (1) That judgment is entered in favour of the plaintiff for kshs 2, 569, 600 plus costs and interest**
- (2) That the balance of the plaintiff's claim of kshs 180, 000 should go to trial;**
- (3) That costs of the application dated 2nd November 2004 are awarded to the plaintiff.**

Dated and delivered at Nairobi this 3rd day of May 2005.

MARY KASANGO

JUDGE



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