



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 103 of 2006

CONTE DESIGN.....PLAINTIFF/APPLICANT

VERSUS

KENYA SUGAR RESEARCH FOUNDATION....1ST DEFENDANT/RESPONDENT

KENYA SUGAR BOARD.....2ND DEFENDANT/RESPONDENT

RULING

The Applicant Conte Design has moved this court by way of a notice of motion under order XXXV Rule 1(I)(a) and order XII rule 6 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, for orders that;

- i) The defences filed by both defendants be struck out.
- ii) Judgement be and is hereby entered for the plaintiff against the defendants jointly and severally in the sum of Kshs.32,863,428.15.
- iii) The Defendants be condemned to pay costs.

The application is brought on the grounds that the applicant seeks judgement for a liquidated demand, the 1st Respondent admits the Applicant's claim, and that the defences filed by both Respondents do not raise triable issues and the same are a total sham.

In a supporting affidavit sworn by Seth A. Changilwa a partner in the Applicant's firm, it is deponed that on the 24th January 2002 the Applicant entered into a contract with the 1st Respondent (Kenya Sugar Research Foundation), for the Applicant to provide building professional consultancy services. Pursuant to the agreement the Applicant provided the services and raised two interim fee notes and later a combined fee note for Kshs.32,863,428.15. On or about 22nd August, 2005, a meeting was held between the Applicant, 1st Respondent and Kenya Sugar Board, (The 2nd Respondent), and it was agreed that the outstanding amount be paid by the 2nd Respondent. However, no payment has been made.

The 1st Respondent has objected to the application through an affidavit sworn by its Chief Executive George Enock Okwach, who maintained that the 1st Respondent appointed the Applicant as lead Architect consultant for building works on 28th January 2002, and that it was an express term of the agreement that the Applicant was not to undertake any project works unless instructed by the 1st

Respondent in writing, and that no instructions were given by the 1st Respondent for commencement of any project works. It was further maintained that in respect of the interim fee note No.1, the Applicant has already been paid by the 2nd Respondent.

A replying affidavit and grounds of opposition filed by the 2nd Respondent were struck out as same were filed in contravention of order 50 rule 16(1) of the Civil Procedure Rules.

Mr. Khalwale who appeared for the Applicant submitted that the annexures to the supporting affidavit showed that there was an agreement spelling out the scope of the work and that the work was done and fee note submitted. He maintained that the Applicant's case was plain and obvious and that the letter from the 1st Respondent which indicated that an agreement had been reached that the 2nd Respondent would be responsible for the payment was a clear admission of the Applicant's claim as were paragraphs 5,6 and 10 of the replying affidavit. Mr. Khalwale relied on the following authorities in support of his submissions.

• *Equatorial Commerce Bank Limited vs Microhouse Net Limited. Milimani HCCC NO. 186 OF 2005.*

• *Fidelity Commercial Bank Limited vs Holiday Investments (K) Limited and two others. Milimani HCCC 971 of 2002.*

• *National Bank of Kenya*

ed vs Kenya Times Media Trust Scheme HCCC Milimani 529 OF 2003.

Mr. Mogaka who appeared for the 1st Respondent was of a different view. He submitted that summary procedure could only be adopted in a plain and obvious case. That in this case there were triable issues raised as no instructions were given to the applicant for commencement of any project and that this goes to the root of the case. The case was not therefore appropriate for summary judgement. Mr. Mogaka felt justified in his view by the cases cited by Mr. Khalwale as well as *Civil appeal No.124 of 1996, East African Packaging Industries Limited Zoeb Alibhai* in respect of which he referred the court to the following passage by G. S. Pall J.A.

“The summary procedure under order XXXV can only be adopted when it can be clearly seen that the defendant's defence is unsustainable. It is meant to be applied in plain and obvious cases when the court is satisfied beyond per adventure that the defence is sham or not maintainable in law and no legitimate amendment can save it. Also once a bona fide issue has been identified, the court should refrain from resolving it on affidavit evidence”.

In this case both the Respondents have filed defences to the Applicant's claim, the 1st Respondent basically admits having appointed the Applicant as lead architect but maintains that the work was only to be undertaken on the 1st Respondent's instructions and that no such instructions were given. This is supported by Annexure “SAC1” to the Applicant's affidavit in support of the application wherein at page 3 it is stated: **“The consultant is advised therefore not to undertake work unless instructed. Any invoices on projects not authorised by KESREF shall not be honoured”** I am satisfied that there is a triable issue as to whether appropriate instructions were given by the 1st Respondent in respect of the work for which payment is being claimed.

With regard to the 2nd Respondent, it claims to be a stranger to the allegations being made by the Applicant. The 2nd Respondent was not a signatory to the agreement exhibited as “SAC1” there is therefore an issue as to whether there is a privity of contract between the Applicant and the 2nd Respondent, and whether 2nd Respondent is liable to the Applicant.

It was submitted that there was an admission of the Applicant's claim based on a letter exhibited as

annexure 'SAC-6'. First and foremost, this letter is written by the Chief Executive of the 1st Respondent and cannot be an admission by the 2nd Respondent. Secondly although the agreement talks of an agreement reached with KARI and the 2nd Respondent, the details of this agreement are not revealed and it cannot therefore be inferred that they are an admission of this specific claim.

Mr. Khalwale submitted that paragraph 5, 6 and 10 of the replying affidavit sworn by George Enoch Okwach were an admission of the Applicant's claim. I am not so persuaded. In my considered view, these paragraph cannot be read in isolation for while they are an admission that 1st Respondent appointed the Applicant as lead architectural consultant for Building works, that admission is qualified by paragraphs 7, 8 and 9 of the same affidavit wherein it is deponed that the work was to be for selected projects identified for commencement by 1st Respondent and was only to be undertaken on specific instructions and that no such instructions were given. Moreover, Paragraph 10 which alleges that the fee note was in respect of work already done and paid for by 2nd Respondent cannot by any standards be an admission of the claim by either 1st Respondent or 2nd Respondent.

I find that that there is no clear admission or acknowledgement of the Applicant's claim upon which a judgment on admission can be based. To the contrary it is evident that there are triable issues and that this is not an appropriate case for summary judgement. Accordingly I dismiss the notice of motion dated 18th January, 2007 and do order that the Applicant's suit shall proceed to full trial.

Dated signed and delivered this 30th day of March, 2007.

H. M. OKWENGU

JUDGE