



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 286 OF 2016

D. MANJI CONSTRUCTION LIMITED.....APPLICANT

VERSUS

FARMERS INDUSTRY LIMITED.....DEFENDANT

RULING

1. The defendant, **Farmers Industry Limited**, filed Notice of Motion dated **18th March 2020**. The defendant seeks review of this court's Ruling dated 12th March 2020 (the impugned Ruling). That Ruling was in respect to the defendant's application seeking leave of the court to amend its defence and counter claim.

2. The defendant's application for review (of the impugned Ruling) is premised on the ground that the court dismissed its application to amend the defence because the court found that the defendant had failed to file witness statements, documents and issues as ordered on 29th November 2018. The defendant has by the present application stated that contrary to the court's impugned Ruling the defendant's managing director, **Florence Wairimu Mbugua** filed witness statement made on 12th November 2019 and; the defendant filed bundle of documents and list of issues on that same date. In the defendant's view the court in finding that it had not complied was an oversight because it had indeed complied. That since that oversight is what influenced the impugned Ruling the court should review that impugned Ruling.

3. The application is opposed by the plaintiff D. Manji Construction Limited through the affidavit of James Nyiha, its learned advocate. The deponent stated that the defendant's application was bad in law because it was premised on the wrong interpretation of the impugned Ruling. The deponent stated further that the dismissal of the defendant's application, by the impugned Ruling, was on the sole reason that the defendant had excessively and inexcusably delayed in filing the application to seek to amend defence and file a counter claim. Accordingly, the plaintiff stated that there was no error apparent on the face of the record in the impugned Ruling.

ANALYSIS

4. Review application are considered as provided under Order 45 Rule 1(1) of the Civil Procedure Rules. That Rule provides:

“Any person considering himself aggrieved

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.

5. How that Rule is applied was discussed in the case **Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where the court stated:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review

that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

6. The defendant has brought its application on the ground that there is an apparent error on the face of the impugned Ruling. I have perused the defendant’s application and I confirm that I have sighted the defendant’s witness statement, list of issues and bundle of documents. They seem to have been filed on 13th November 2019. Those documents are however not physically in the court file of this matter. But that notwithstanding it is clear that this court’s Ruling of 12th March 2020 was not only on the ground that the defendant had not filed those documents as previously ordered. Part of the impugned Ruling of 12th March 2020 is reproduced hereunder to attest that.

“10. By the proposed amendment the defendant seeks to pray that it overpaid the defendant Ksh. 23,834,537.60 and for Ksh. 26,000,000.00 as damages for the alleged delay in completion of the construction.

11. The defendant did not adequately explain why it delayed since 2016 to 2020 to seek leave to amend its defence. More importantly the defendant did not explain why since 6th November 2019, when the Ruling was delivered, it failed to seek leave but instead waited until January 2020.

12. In my view the leave sought is not merited. It is not merited because the defendant cannot tell this court that it took three years to determine that it overpaid the defendant or that the defendant delayed in completion of the contract. Mind you in the defence already on record the defendant did not allege any over payment or delay incompletion of the contract. I form the opinion that the amendment sought is for nuances (sic) [nuisance] value and for the intent of delaying the hearing of this case fixed for hearing on 18th March 2020. Because of that finding and because it was not timeously filed and perhaps more importantly because the defendant has failed to abide by the order of 6th November 2019 the Notice of Motion dated 13 January 2020 is hereby dismissed with costs to the plaintiff.”

7. The court from the above, it will be recognized, did not dismiss the defendant’s application only on the ground that the defendant did not file its document. No. The court dismissed the application because the defendant failed to explain the delay from 2016 to 2020 to seek an amendment of the defence, failed to explain the delay from November 2019 to seek leave to amend and; the court dismissed the application because the court formed the view the application was filed for nuisance value to interfere with the hearing of the suit that had been fixed for 18th March 2020.

8. It follows even though the defendant has shown it had filed its witness statement and documents that alone does not satisfy the short comings recognized in the impugned Ruling. There is therefore no basis to review that impugned Ruling.

CONCLUSION

9. The Notice of Motion application dated 18th March 2020 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Applicant:

For the defendant:

ORDER

This decision is hereby virtually delivered this 18th day of June, 2020.

MARY KASANGO

JUDGE