



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 345 OF 2004**

**CHINA JIANGSU INTERNATIONAL ECONOMIC**

**TECHNICAL CO-OPERATION CORPORATION.....PLAINTIFF**

**VERSUS**

**FINTEL LIMITED..... 1<sup>ST</sup> DEFENDANT**

**HILLARY MAINA THEGEYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 1<sup>st</sup> December 2019 and filed on the same day by the plaintiff (applicant) seeking the following orders:

- i. That the orders made on 13<sup>th</sup> February 2019 be and are hereby reviewed or set aside.*
- ii. That the suit herein be and is hereby reinstated for hearing on merit.*
- iii. That an order be and is hereby issued for hearing of this suit on priority basis.*
- iv. That the costs of this application be in the cause.*

2. The application is supported by the grounds stated on its face which are replicated in the depositions made in the supporting affidavit sworn by one *Cheng Chong*, the applicant's Manager.

In the grounds premising the motion and in the supporting affidavit, the applicant gave a chronology of the events that led to the hearing and disposal of the defendants' preliminary objection on 2<sup>nd</sup> October 2019.

3. The applicant contended that given the court's ruling on 13<sup>th</sup> February 2019, it was left with only one month to prosecute its suit and after securing a hearing date on 4<sup>th</sup> November 2019, hearing did not proceed despite availability of its witness since the defendants sought and were granted an adjournment.

4. The applicant implored me to find that it was not to blame for failing to prosecute its case within the time limited by this court and that failure to do so was occasioned by circumstances beyond its control. The applicant stated that it was ready and willing to prosecute the suit within a reasonable time and that it should be given an opportunity to do so.

5. In addition, the applicant invited the court to note that if the application was dismissed, it will suffer irreparable loss and damage while if it was allowed, the respondents do not stand to suffer any prejudice.

6. In resisting the motion, the respondents filed grounds of objection dated 27<sup>th</sup> January 2020 and an affidavit sworn by their counsel *Mr. Kimani Githongo*. A look at the grounds of objection and the replying affidavit show that the respondents' attack on the motion rests on the claim that the application was not supported by a proper affidavit as the supporting affidavit was sworn by the applicant's manager who in their view is not recognized in law as an authorized agent of a company; that the applicant has not demonstrated that it was entitled to orders of review sought as it had not met the preconditions for review set out under *Order 45* of the *Civil Procedure Rules*.

7. When the application came up for hearing on 7<sup>th</sup> July 2020, by consent of learned counsel appearing for both parties, namely *Mr. Karuga* for the applicant and *Mr. Kimani Githongo* for the respondents, the court directed that the application be canvassed by way of written

submissions. The submissions were to be filed on or before 28<sup>th</sup> July 2020. However, on 28<sup>th</sup> July 2020, only the applicant had filed its written submissions and though the respondents were granted further time to file their submissions, they had not done so by the time of preparing this ruling.

8. I have considered the application, the affidavits sworn in support and in opposition to the motion; the grounds of objection filed by the respondents and the written submissions filed by the applicant. I have also read the court record.

9. Before addressing the merits or otherwise of the application, I wish to deal with the preliminary point raised by the respondents regarding the affidavit sworn in support of the application. By implication, the respondents challenged the competence of the affidavit arguing that the deponent was not a director of the applicant and was not in law its recognized agent. The respondents did not however cite any law in support of their proposition nor did they refer this court to any authority.

10. *Order 9 of the Civil Procedure Rules* provides for persons who the law recognizes as agents of parties to a suit who can take any action authorized by the law on behalf of parties to a suit. They include advocates and donees of powers of attorney and in relation to corporate bodies, *Order 9 (2) (c)* provides that any officer of a corporation duly authorized under the corporate seal qualifies to be a recognized agent of a company.

11. In this case, the deponent swore that he is a manager of the applicant and that he had been duly authorized by the applicant to swear the supporting affidavit on its behalf. In the absence of any evidence to the contrary, I find that the deponent swore the supporting affidavit as the applicant's recognized agent. It is thus my finding that the affidavit is competent and was properly sworn in support of the motion.

12. Turning now to the merits of the application, the law governing review of court orders is set out in *Section 80 of the Civil Procedure Act (the Act)* and *Order 45 of the Civil Procedure Rules*. *Section 80* gives the court power or jurisdiction to review its own orders while *Order 45 of the Rules* limits or defines the scope within which that power should be exercised. *Section 80* provides as follows:

***“Any person who considers himself aggrieved—***

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

***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

13. *Order 45 (1) (i)* of the *Rules* stipulates that a party seeking a review of court orders must satisfy the following conditions:

- i. That he has discovered 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 the decree was passed or order made;
- ii. That there was some mistake or error apparent on the face of the record;
- iii. That there exists other sufficient reason(s) to warrant the review sought;
- iv. That the application was made without unreasonable delay.

14. Starting with the latter requirement, the time limited for prosecution of the applicant's suit in the ruling dated 13<sup>th</sup> February 2019 expired on 13<sup>th</sup> November 2019. The application was filed on 1<sup>st</sup> December 2019 slightly over two weeks later. In the circumstances, I am satisfied that the application was filed within a reasonable time.

15. Having considered the grounds premising the motion, I find that the applicant's main contention is that failure to prosecute its suit within the time limited by the court was not deliberate but was occasioned by circumstances beyond its control. The applicant asserted that the delay was caused by the courts delay in disposing off the defendants' preliminary objection; that if the application was not allowed, its constitutional right to a fair trial enshrined under *Article 50 (1)* of the *Constitution* will be violated causing it grave injustice.

16. The applicant's claim that the preliminary objection was determined on 2<sup>nd</sup> October 2019 leaving it with insufficient time to prosecute the suit is supported by the proceedings in the court record.

17. Given the foregoing, it is clear to me that the suit was not prosecuted within the time limited by the court not because of the applicant's indolence or lack of diligence but because of circumstances beyond its control. This in my view constitutes sufficient cause to justify grant of the orders of review as sought. In any event, the respondents have not claimed that if the application was allowed, they are likely to suffer any prejudice. It is thus my finding that the application is merited and it is hereby allowed with the result that the orders issued by this court on 13<sup>th</sup> February 2019 are hereby set aside. The plaintiff's suit is consequently reinstated for hearing on its merits.

18. Given the age of this case, it is hereby directed that a hearing date be fixed in the registry on a priority basis.

19. On costs, the order that best commends itself to me is that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of October, 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Njoroge holding brief for Mr. Karuga for the applicant

No appearance for the respondents

Ms Ubah: Court Assistant