



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE 294 OF 2015

ENVIRONMENTAL SOLUTIONS LTD.....PLAINTIFF/APPLICANT

VERSUS

MAASAI MARA UNIVERSITY.....DEFENDANT/RESPONDENT

RULING

This is a ruling on Notice of Motion dated 6th April 2017 and filed on the 20th April 2017. It is brought under Section 3A of the Civil Procedure Act CAP 21, Order 2 Rule 15 and Order 51 of the Civil Procedure Rules 2010.

It seeks the following orders:-

1. Spent
2. To strike out this suit.
3. costs for this application and the entire suit be provided for

Grounds on the face of the application are as set out

1. That vide the plaint dated 16th June 2015, the Plaintiff is praying for judgment to be entered in favor for Kenya Shillings Seventy Six Million, Three Hundred and Eighty Thousand (Kshs. 76,380,000.00) general damages, interest and costs of the suit for the alleged breach of contract allegedly entered into by itself and Maasai Mara University the defendant herein.
2. That on the 3rd day of December 2014 the parties knowingly and without coercion entered into a contract for the provision of Environmental Impact Assessment/ Environmental Audit services for new and existing structures within Maasai Mara University for the sum of **Kenya Shillings Three Hundred and Thirty Seven Thousand (Kshs. 337,000.00)** only for the entire contract.
3. That after the completion of the specified task, the Plaintiff in an attempt to defraud the university purported to issue the defendant with an alleged invoice of **Kenya Shillings Seventy Six Million Three Hundred and Eighty Thousand (Kshs. 76,380,000)**.
4. That there was no reasonable cause of action for breach of contract based on the alleged financial proposal as the same was certainly not the contract that was executed by the parties herein and was not part of the contract dated 3rd December 2014 either impliedly or expressly in the terms of reference or under the Special Conditions of the contract.
5. That the proposal remained but a proposal and did not bind either of the parties.

The application is supported by affidavit of Prof. Simon. K Seno, the Deputy Vice-Chancellor of Maasai Mara University the defendant herein. He averred that the impact assessment by the Plaintiff was done as promised but in an attempt to defraud the university an alleged invoice of **Kenya Shillings Seventy Six Million Three Hundred and Eighty Thousand (Kshs. 76,380,000)** was forwarded to them.

He averred that according to the contract dated 3rd December 2014 under **Clause 1.8** provides that: ***“prices charged by the contractor for services performed under the contract shall not with the exception of any adjustments authorized by SCC, vary from prices quoted by the procuring entity vide its letter of award. No variation in or modification to the terms of the contract shall be made except by written amendments signed by the parties.”***

He further averred that **Section 47 (a) & (b) of the Public Procurement and Disposal Act No.3 of 2005** provides that variation of contract price and /or quantity of works can only be effective if first approved by the Tender Committee of Public body and that at no time did this committee sit and decide to vary the contract price of the said contract dated 3rd December 2014 and therefore any purported variation of the contract price is null and void.

In response the Plaintiff filed a replying affidavit sworn by Mutua Patrick Nzoka dated 20th September 2017 and filed on 21st September 2017. Mutua Patrick Nzoka averred that the relief of striking out the suit sought by the defendant is too drastic an action. He averred that the defendant is guilty of fraud as the copy of the contract annexed in support of the application has been unilaterally and /or illegally altered to favor the defendant and the Plaintiff did not consent to the said alteration and thus the suit is in no way frivolous, vexatious, scandalous or an abuse of the Court process.

He averred that **Clause 1.1 (b)** of the General Conditions of the contract defines the contract price to mean **“the professional fees payable to the tenderer under the contract as per the pricing schedule for the full and proper performance of its contractual obligations”**

The Plaintiff filed written submissions.

The Plaintiff in submission restated the ground on the face of the application and the averments. Counsel also stated that it is noteworthy that an interlocutory judgement has already been entered against the defendant for failure to file a defence and the current application is an attempt to salvage the defence; that failure to file defence for more than 2 1/2 years despite changing advocates is inexcusable.

Counsel for the Plaintiff submitted that Courts have previously frowned upon application such as this.in the case of **D.T Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another (1980) eKLR** Justice Madan held that Courts ought to sustain suits rather than terminate them.

Counsel also cited the case of **Nancy Mwangi T/A Worthin Marketers vs. Airtel Networks (K) Limited (formerly Celtel Kenya Limited) & 2 others (2014) eKLR** where the Court rightly held as follows;

“Case law and practice require the Court in determining an application under Order 2 Rule 15(1) (a) of the Civil Procedure Rules 2010 to only look at the pleadings without probing for any evidence to see if the plaint is real demurer, hopeless and without a semblance of a cause of action which perhaps may be emboldened by amendment, or the application for striking out the pleading involves prolonged and serious arguments which require a serious discussion, the Court should ,as a rule, lean towards sustaining rather than dismissing or striking out the pleading”

What I consider to be in issue is whether the defendant has demonstrated that the Plaintiff has no reasonable cause to warrant going into full hearing of this suit.

The Plaintiff has alleged that the contract attached to the application has been amended to suit the defendant whereas the defendant alleges that the Plaintiff is relying on financial proposal which not binding on the parties. Both parties have annexed a contract dated 3rd December 2014.The contract indicate the contract sum as **Kenya Shillings Three Hundred and Thirty Seven Thousand (Kshs. 337,000.00)** for tender of EIA/EA consultancy. The Plaintiff has based its claim on the financial proposal. The issue as to whether the contract has been amended to support the defendants claim can be determined in a full hearing.

From the foregoing I find that there is need for the parties to be given an opportunity to adduce evidence to assist the Court in arriving at a just and fair determination. I therefore decline strike the suit. Cost of the application to the Plaintiff.

Dated and Delivered at Nairobi this 11th day of April, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....**COURT ASSISTANT**

.....**COUNSEL FOR PLAINTIFF/APPL.**

.....**COUNSEL FOR DEFENDANT/RESP.**