REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 479 OF 2014

POWERLINK LIMITED……..….....PLAINTIFF

VERSUS

SEYANI BROTHERS & COMPANY (K) LIMITED.....….DEFENDANT

RULING NO. 2

1. The defendant**, SEYANI BROTHERS & COMPANY LIMITED,** has asked the court to review its Ruling and orders which were made on 27th May 2015.

2. The application is founded upon the following grounds:

> ***"a) That by a ruling delivered on 27th May 2015 the Honourable Court found that the contract between the Plaintiff and the Defendant was separate from that between the Defendant and the Employer.***
>
> ***b) That it is clear from the contract agreement tendered by the plaintiff that the contract entered between the Plaintiff and the Defendant was indicated to be supplemental to the contract agreement between the Defendant and the Employer.***
>
> ***c) That the Honourable Court inadvertently did not consider the import and the meaning of the said terms of the agreement between the Plaintiff and the Defendant.***
>
> ***d) That had the Honourable Court considered the said clauses, it would have arrived at a different finding other than the one made on 27th May 2015.***
>
> ***e) That there are sufficient grounds to enable the court exercise the discretion and review its ruling and set aside the orders?.***

3. When canvassing the application the Defendant drew the attention of the court to clause 1.02, which stated that the contract was supplemental to the agreement between the Employer and the Contractor.

4. The Defendant also drew the attention of the court to clause 1.11 and clause 23.1. As far as the Defendant was concerned, the court had, inadvertently, failed to consider the implications of those clauses.

5. Finally, the Defendant noted that;

> ***"Under Order 45 Rule 1 of the Civil Procedure Rules, this Honourable Court has power to review its decision if there is a discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the person seeking review or could not be procured by such persons at the time when the decree was passed or the order made or on account of mistake or error apparent on the file of the record or for any other sufficient reason?.***

6. It was the Defendant's contention that the reasons set out in its application and in the supporting affidavit constituted sufficient reason to warrant a review.

7. There is no doubt that the contract between the parties has always been within the knowledge of the Defendant. Therefore, all the clauses within the said contract were within the knowledge of the Defendant.

8. The Defendant cannot, therefore, have discovered any new and important evidence from the contract which it has always had.

9. As regards the court's alleged failure to given consideration to clause 1.11, the court notes that when the parties were canvassing the earlier application, *(dated 21st January 2015)*, they did not make reference to that clause. Therefore, there was no basis upon which the court could give consideration to something which none of the parties asked it to consider.

10. Clause 23.1 of the sub-contract was addressed by the parties. And the court did, in its Ruling dated 27th May 2015, delve into its understanding of that clause.

11. It is thus factually inaccurate to suggest that the court had inadvertently failed to give consideration to the implications of that clause.

12. The Defendant may hold the view that the court's determination of the issue was erroneous. If that be the position, the Defendant is perfectly entitled to its said view. But that view cannot be the foundation for either a review or for the Defendant to canvass the issue afresh.

13.When a court pronounces its decision on an issue and a party to the case was aggrieved because he felt that the decision was not justified, the party is welcome to lodge an appeal.

14. In the case of **POP-IN (KENYA) LIMITED & 3 OTHERS Vs HABIB BANK AG ZURICH, CIVIL APPEAL No. 80 of 1988,** the Court of Appeal quoted with approval, the following words from **HOYSTEAD & OTHERS Vs TAXATION COMMISINER [1925] ALL.E.R 56,** at page 62;

> ***"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal results either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted?.***

15. Although the said court made reference to the bringing of fresh litigation, I hold the considered view that the principle is equally applicable to applications filed within the same case.

16. In this case, the Defendant is faulting the court for failing to take into consideration the consequences or the implications of certain clauses which are in the contract. That meant that, as far as the Defendant was concerned, the court had erred. It is for that reason that the Defendant would want the court to have a fresh look at the contract, with a view to substituting the order of dismissal of the application dated 21st January 2015, with an order allowing the said application.

17. Whether or not the Defendant used kind words, *(by suggesting that the error was only due to inadvertence)*, the truth is that the Defendant has launched an attack on the decision in issue.

18. In the case of **EDWARD KING ONYANYA Vs CHINA JUANGSU INTERNATIONAL TECHNICAL CO-OPERATION, Hccc No. 1227 of 1996,** Visram J. *(as he then was)* expressed himself thus;

> ***"What he did was to attack the Ruling sought to be reviewed and that is not something within the purview of his application. By attacking the decision of the Judge, the plaintiff sought a different conclusion from the one reached by the Judge, and that was tantamount to an appeal on which this court cannot sit on its own decision?.***

19. And in the case of **NATIONAL BANK of KENYA LIMITED Vs NDUNGU NJAU, (NRB) CIVIL APPEAL No. 211 of 1996,** the Court of Appeal said;

> ***"In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review?.***

20. On the basis of that authority, I find no merit in the application for review.

21. If I arrived at an erroneous decision because I failed to give appropriate consideration to some clause or clauses in the contract, that would entitle the Defendant to an appeal. It cannot be the basis for review.

22. Accordingly, the application for review is dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **21st day** of **January** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mathenge for Bundotich for the Plaintiff

Akhulia for the Defendant

Kahura for Ngeno for Interested Party.

Collins Odhiambo – Court clerk.