



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HIGH COURT CIVIL SUIT NO. 452 OF 2011**

**RAMASALT AGENCIES LIMITED :::::::::::::::::::::::::::::: PLAINTIFF**

**- VERSUS -**

**AIRTEL NETWORKS KENYA LIMITED :::::::::::::::::::::: DEFENDANT**

**R U L I N G**

1. The application before the court is Notice of Motion dated 18th February 2013 filed by the Defendant/Applicant on 27th February 2013. the application seeks as the main order that:-
  1. ***The consent order of 24th February 2012 be varied to allow the admission of the Report filed by the Defendant's auditors Messr Price Water House Coopers dated 7th August 2012.***
2. The application is premised on the following grounds namely:-
  1. ***That a by a consent recorded in the court on 24th February 2012, the parties agreed to appoint tax experts to renew the contract executed between that parties and the tax experts were directed to file their reports.***
  2. ***That the Defendant/Applicant appointed Philip Korir as its tax expert.***
  3. ***That however, Philip Korir has left his place of employment before filing the report.***
  4. ***That the Defendant/Applicant has subsequently filed a report prepared by its auditors Messr. Price Water House Coopers dated 7th August 2012.***
  5. ***That it is just and equitable that the consent order be varied to allow for the admission of the report prepared by the Defendant/Applicant's auditors and which is already on record to facilitate the further hearing of this matter.***
3. The application is supported by affidavit of **LINDA KAAI KIRIKO** dated **18th February 2013** and its annextures.
4. The application is opposed vide a replying affidavit of **HASSAN NOOR MAALIM** dated **11th April 2014**.
5. The brief history of the application is that on 24th February 2012, the parties entered the following consent in relation to the suit action:-
  1. ***That the Tax Expert appointed by the parties i.e. JOB OMONDI OKWORO and PHILIP KORIR are hereby appointed to renew the contract executed between the parties in this matter and to file a joint report on or before the 9th of March 2012 on the following terms of reference:-***
    - a. ***That to establish as between the parties who was liable to pay the excise duty and***

**value added tax totalling Kshs.38,880,279.94 that is claimed by the Defendant from the Plaintiff.**

- b. **That the tax experts be free to agree and engage a third tax expert should they fail to reach unanimous decision.**
2. **That the cost of the experts be shared equally between the parties.**
3. **That the matter be mentioned on 12th March 2012 for further directions by the court.**
6. The Defendant now seeks to amend the above consent on the ground that the Defendant's appointed tax expert Mr. Philip Korir did leave the employment of the Defendant before filing his tax report. The Defendant/Applicant nonetheless went ahead and filed a Tax Report prepared by its auditors Messr Price Water House Coopers dated 7th August 2012. The Defendant/Applicant now seeks the leave of the court to adopt the said report which is annexed to the supporting affidavit of Mr. Linda Kaai Kiriko.
7. The application is opposed by the Plaintiff/Respondent who has filed a replying affidavit herein by Mr. Hassan Noor Maalim on the grounds that the Defendants tax expert, Mr. Philip Korir was appointed due to his own personal expertise and not because he was employed by Price Water House Coopers Limited, and secondly that the filing of the Report was a time conscious exercise before the hearing of the matter on 28th March 2012. The Defendants instead filed the Report on 12th August 2012 even without the leave of the court. It would not be fair to have the Defendant's Report filed after the Plaintiff has been heard on his Report. It is also submitted by the Plaintiff that the Defendant has a contractual relationship with the Price Water House Coopers whose Report would be bias in favour of the Defendant. Lastly, it is submitted for the Plaintiff that variation of a consent order can only be allowed on the same terms and conditions a consent order would be set aside e.g. mistake, fraud etc, none which has been proved by the Defendant.
8. I have considered the application and the opposition to it. To determine the application. I raise the following issues for determination:-
  1. **Whether the said consent order can only be varied in the terms upon which a consent order can be set aside.**
  2. **Whether the grant of the application will cause prejudice to the Plaintiff/Respondent.**
  3. **Who should pay the costs of this application?**
9. To answer the first issue above, it is true that variation of any consent order can only be done upon the same principles being established that is, that there was mistake, fraud, misrepresentation or a contractual frustration or intervening circumstances which made it impossible or extremely difficult for the defaulting party to comply. That said, we must now go back to consider that consent which was recorded on 24th February 2012. The following traits of the consent are determinable.
  - **The consent does not give the background or even the professional qualifications of the appointees except that they are referred to as "tax experts".**
  - **The consent does not identify the said tax-experts by their employer.**
  - **The tax experts are given leeway to engage a third tax expert should they fail to reach unanimous decision.**
  - **The consent is in terms of procedure in the hearing and determination of the suit.**
  - **The consent does not on its face show that the said experts could never be replaced, although the job was given to them to do till completion.**
10. In my view, the consent referred to above was on procedure to be adopted in determining the suit. It was not a consent on substantive issue on the matter. Indeed, it amounted to a consent or agreement on who will provide witness for which party. In other words, it was a pre-trial procedure in much the same way that parties file witness statements, or give the names of their witnesses before trial, only to later on establish that the said witnesses are not available, and thereby apply to the court for the leave to file a fresh witness statement. This is what happened in this matter. Mr. Philip Korir, being the tax witness proposed by the Defendant/Applicant soon

became unavailable for that task, and so the Defendant has come back to court seeking the leave to substitute someone else for Mr. Korir. That sounds to be a reasonable request especially since this is a matter of pre-trial procedure. The consent does not go into the substance of the suit subject matter, and in any event, the tax expert opinion is not binding to this court. It is just a testimony of a witness which is merely persuasive.

11. But even if the consent was a substantive issue in the suit subject matter, and could be considered in the same way we consider consent judgements, it is still my position that the principles that apply in setting aside a consent judgement have been proved in this matter. Those include frustration of the consent making it impossible or difficult to perform. The other principle applicable here is an intervening circumstance which has made it difficult for the defaulting party to comply. Mr. Philip Korir can no longer be reached by the Defendant to perform the task contained in the consent. The Defendant has the right to seek the leave of this court to replace Mr. Korir as its witness.
12. The second issue is whether if the application is granted the Plaintiff/Respondent will suffer prejudice. In my view, that is not likely. The Plaintiff can still seek to recall its tax-expert if need be. The submission by Plaintiff/Respondent that Price Water House Coopers are in contractual relationship with the Defendant/Applicant and that its Report would favour the Defendant/Applicant is not convincing. Even the said Philip Korir was appointed by the Defendant and his Report could also be said to favour the Defendant, in much the same way as it can be said that the Plaintiff's expert JOB OMONDI OKWORO's Report would favour the Plaintiff. But all these misgivings are allayed by Clause (b) of the Consent which required the tax-experts to be free to agree, and to engage a third tax expert should they fail to reach a unanimous decision. Mr. Joash Ratemo, who prepared the Defendant Tax Report, dated 7th August 2012 would be a substitute for Mr. Philip Korir. The admission of that Report will not cause any prejudice to the Plaintiff. The Plaintiff will be allowed to recall any witnesses or even new ones, to respond to any aspect of the Defendant's Tax Report.
13. The other issue is who will pay the costs of this application. Under the said Consent the parties in this matter were to file a joint Report on or before the 9th March 2012. The Defendant has not explained the delay in filing the Report except to state that the said Mr. Philip Korir left its employment. It is not been stated when the said witness left the Defendant's employment. As if that failure to file the Report on time was not enough disobedience, the Defendant went ahead, without the leave of the court, to file the said Report in court. That is a litigant's impunity. It would be easier for me to reject the Defendant's application on these grounds of disobedience, and litigant impunity. It is only because I realise that the claim herein and the defence thereto hinge so much on the contents of the said tax reports, and also because the claim involves a huge sum of money, that I allow the Defendant's application. However, the Defendant/Respondent shall pay the costs of this application to the Plaintiff before any further proceedings take place in this matter except if the Plaintiff prefers to appeal this Ruling. I herewith assess those costs at Kshs.25,000/=.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30TH DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Kuria for Plaintiff

Githii for Defendant

Teresia – Court Clerk