



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 241 OF 2019

REELFORCE SYSTEMS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NAIROBI CITY COUNTY GOVERNMENT.....DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 24th January, 2020 brought by the plaintiff/applicant and supported by the grounds set out in its body and the facts stated in the affidavit of Sammy Moses Lusiola, in which the applicant sought for the orders hereunder:

i. THAT this Honourable Court be pleased to grant leave to the plaintiff to apply for judgment in default of appearance against the defendant for a liquidated sum of Kshs.27,500,700/ due and owing to the plaintiff.

ii. THAT costs be in the cause.

2. There was no response to the Motion or participation at the hearing of the same by the defendant, despite evidence of service.

3. On its part, the plaintiff/applicant opted to rely on the averments made in its Motion and did not make any arguments at the hearing thereof.

4. I have considered the grounds laid out on the face of the Motion and the facts deponed in the affidavit supporting the Motion.

5. A brief background of the matter is that sometime on or about the 14th day of February, 2017 the parties herein entered into a contractual agreement in which it was agreed that the plaintiff/applicant would offer consultancy services for the education sector to the defendant and that the defendant would pay to the plaintiff/applicant a sum of Kshs.27,500,700/.

6. According to the plaintiff/applicant, it offered the aforementioned services diligently and to completion but the defendant; being in breach of the contract; failed to settle the invoices issued for the sum of Kshs.27,500,700/which the plaintiff/applicant now seeks to be paid in his plaint together with general damages for breach of contract plus costs of the suit and interest thereon.

7. It is apparent that the plaintiff/applicant's application is premised on the provisions of **Order 10, Rule 8** of the **Civil Procedure Rules** which require a party seeking judgment in default of appearance or pleadings against the government to first seek and obtain leave of court.

8. The deponent herein stated in his affidavit that upon filing the suit vide the plaint dated 1st November, 2019 and subsequently taking out summons to enter appearance, the plaintiff/ applicant served the same upon the defendant on 22nd November, 2019.

9. The deponent further stated that the defendant has to date neither entered appearance nor settled the aforesaid outstanding sum owing to the plaintiff/applicant.

10. Upon perusal of the record, it is clear that summons to enter appearance were issued to the plaintiff/applicant on 7th November, 2019.

11. The plaintiff/applicant also availed a copy of the summons that indicates as having been served upon the defendant, annexed to the supporting affidavit and marked as "SM 6". Upon examining the same, I note that while the receiving stamp is illegible, it shows that the

summons were received on 22nd November, 2019 which supports the averments made by the deponent.

12. There is no indication from the record that the defendant filed a memorandum of appearance pursuant to the provisions of **Order 6, Rule 2** of the **Civil Procedure Rules** which envisages the filing of a memorandum of appearance as the mode of entering appearance upon service of summons.

13. The record shows that the notice of appointment of advocates dated 15th January, 2020 was filed on 17th January, 2020 by the firm of Njenga Maina & Co. Advocates acting for the defendant. This can be taken to mean that rather than filing a memorandum of appearance, the defendant appointed the abovementioned firm of advocates to represent it in the suit and the said advocates entered appearance on behalf of the defendant.

14. From the foregoing, I am of the view that the filing of a notice of appointment of advocates is a mere procedural technicality which would not have a fatal impact on the defendant's case. In the case of **Michael Jesse Mkok v Roland De Mello [2020] eKLR**, the court held inter alia that the decision by a defendant therein to enter appearance by filing a notice of appointment of advocates was not fatal to his case.

15. The provisions of **Article 159(2) (d)** of the **Constitution of Kenya, 2010**, call upon the courts to administer justice without undue regard to procedural technicalities.

16. In the premises, I am satisfied that the defendant can be deemed to have entered appearance by filing a noticed of appointment thereby countering the substantive order sought by the plaintiff /applicant.

17. In the end, the Motion dated 24th January, 2020 is hereby dismissed with no order on costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of July, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for

the

Defendant