

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 402 OF 2018

NEW INTERNATIONAL CONSULTANCY COMPANY

LIMITED (suing by a Power of Attorney NO. P/A 65175/1 OF

APEXVISION LIMITED.....1ST PLAINTIFF

APEXVISION LIMITED.....2ND PLAINTIFF

-VERSUS-

TELKOM KENYA.....1ST DEFENDANT

SUNDARARAMA PATTABIRAMAN.....2ND DEFENDANT

RULING

1. This ruling in respect to the application dated 22nd January 2020 wherein the applicant seeks the following orders: -

1. Spent

2. The Honourable court be pleased to vary, review and/or amend the Ruling and/or order issued on 14th November, 2019, to correct the erroneous figure of Kshs 223,000.00/= (Kenya shillings Two Hundred and Twenty Three Million), whenever it appears and described as the debt admitted by the defendants/respondents to read the correct sum of Kshs 323,466,970.20/=(Kenya Shillings Three Hundred and Twenty Three Million Four Hundred and Sixty Six Thousand Nine Hundred and Seventy and Twenty Cents), and the contested balance sum be amended/corrected from the one stated of Kshs 407,000.000/= (Kenya Shillings Four Hundred and Seven Million) to the correct sum of Kshs 423,615,349.80/=(Kenya Shillings Four Hundred and Twenty Three Million Six Hundred and Fifteen Thousand Three Hundred and Forty Nine Eighty Cents).

3. Further, and in the alternative and/or in addition hereof, the honourable court do give any further directions concerning the extent of the arbitrator's jurisdiction, on any part of the plaintiffs' claim including the portion of the claim concerning accrued interest for the period of default, pre-suit and thereafter, either for the admitted sum and/or in addition thereto of the whole claim and/or the contested part of the claim.

4. The Honourable court be pleased to provide for the costs of the admitted portion of the claim, whose judgment has been entered and/or upheld as against the defendants/respondents, by awarding the costs and interests thereon in any event to the plaintiff.

5. The costs of this application be provided for.

2. The application is supported by the affidavit of the applicant's Director of Commercial Operations **Mr. Kiogora Murithi Muriuki** and is premised on the grounds inter alia, that the

court's decision/ruling of 14th November 2019 contains errors on some of the figures which reflects sum of Kshs 223 million instead of the correct sum of Kshs 323,466,970.20. The applicant also states that the court did not award costs to the applicant despite entering judgment in its favour for the admitted sum of Kshs 323,466,970.20 that was misstated as Kshs 223,000,000/=.

3. The respondents opposed the application through the Grounds of Opposition dated 18th February 2020 wherein they list the following grounds: -

1. There is no error apparent on the face of the record with respect to the admitted sum noted by the court in paragraph 29 of Nelson Mogaka's affidavit sworn on 20th November 2018 the first defendant admitted that the sum to be paid to the plaintiff as at that date is Kshs 223,446,970.00.

2. The plaintiff cannot purport to assert a claim with respect to sums that had already been paid prior to the commencement of the proceedings herein.

3. The sum admitted by the first defendant was settled in full. Nothing bars the plaintiff from proceedings to arbitration and agitating its claim for such claims as it asserts.

4. This court has no jurisdiction to give further directions concerning the extent of the arbitrator's jurisdiction with respect to the plaintiff's intended claim. An arbitral tribunal is mandated to determine its own jurisdiction and matters relating to the jurisdiction of the arbitral tribunal should be raised before the arbitral tribunal for determination.

5. There was no error in the court's determination that costs of the application shall abide the outcome of the arbitration. If the plaintiff is aggrieved by the court's order in this regard, the recourse lies in appealing this part of the decision.

6. There is no sufficient or other reason to warrant a review of the ruling of 14th November 2019.

4. Parties canvassed the application by way of written submissions which I have considered.

5. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

Review.

6. Order 45 Rule (1) of the Civil Procedure Rules (CPR) and Section 80(a) of the Civil Procedure Act (CPA) stipulate as follows: -

“[Order 45, rule 1.] Application for review of decree or order. 1.

(1) Any person considering himself aggrieved—

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

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of 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 when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the

ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

80. Review 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.”

7. In the present case the applicant argues that the respondent admitted owing the applicant the sum of Kshs 323,466,970.20 in which case, the ruling on judgment admission of 14th November 2019 should have been for the sum of Kshs. 323,466,970.20 and not Kshs 223,000,000 as was stated in the impugned ruling. In advancing this argument, the applicant drew the court’s attention to the defendant’s replying affidavit of 20th November 2018 wherein the deponent states as follows at paragraph 27 thereof: -

I verily believe that the amount owed to Apexvision Limited as at 31st October 2018 is as set out in the table below: -

Date	Invoice No.	Amount	WHT	WH-VAT	Net payable
20-Dec-17	2017122904	158,999,999.40 (100,000,000)	(3,933,522.90)	(3,277,935.75)	51,788,54
7-May-18	2018050701	53,000,000.00	(1,092,645.25)	(1,311,174.30)	50,596,18
7-May-18	2018050702	53,000,000.00	(1,092,645.25)	(1,311,174.30)	50,596,18
7-May-18	2018050703	53,000,000.00	(1,092,645.25)	(1,311,174.30)	50,596,18
7-May-18	2018050704	53,000,000.00	(1,092,645.25)	(1,311,174.30)	50,596,18
7-May-18	2018050705	53,000,000.00	(1,092,645.25)	(1,311,174.30)	50,596,18
8-Feb-16	20160208001	350,000.00	(1,740.00)		348,2
8-Feb-16	20160208006	17,800,000.01	-		17,800,00
8-Feb-16	20160208004	574,008.60	(24,741.71)		549,266.8
TOTAL			(9,396,749.15)	(9,833,806.95)	323,466,9

8. According to the applicant, the actual admitted sum was Kshs 323,466.970.20 and not Kshs 223,000.00.

9. I have perused the defendant’s replying affidavit dated 20th November 2018 and I note that while it is true that the defendants stated, at paragraph 27 thereof, that the amount due to the plaintiff as at 31st October 2018 was Kshs 323,466,970.20, the defendants went further to state that they subsequently paid kshs 100,000,000 on 20th November 2018 and that the outstanding amount was therefore 223,446,970.20 which they proposed to pay by instalments. This admission is captured at paragraphs 28 and 29 of the said replying affidavit as follows.

“28. I am aware that on 20th November 2018 the 1st defendant paid the amount of Kshs

100,000,000/= to Apexvision Limited. The proof of this payment is at page 20 of the exhibit.

29. The 1st defendant intends to pay the remaining outstanding amount of Kshs 22,446,970.20 in separate instalments.”

10. From the foregoing averments by the defendant’s deponent, it is clear that the actual admitted amount is Kshs 223,446,970.20 and not kshs 323,466,970.20 as has been suggested by the applicant. I am therefore not persuaded that there was any error or misstatement, by the court, on the amount of debt that was admitted by the defendants and I am therefore not satisfied that the prayer for review of the amount on account of an error apparent on the face of the record is merited. **Arbitrator’s jurisdiction.**

11. On the issue of the arbitrator’s jurisdiction, I find that this court already stated, in the impugned ruling, that the same arises from the parties’ own agreement wherein at Clause 24 thereof, the parties agreed that they will refer any dispute arising between them to an arbitrator. In light of the clear provisions of the parties’ agreement, I find that it is not within the purview of this court to define the extent of the arbitrator’s jurisdiction as the parties are free to lodge any complaint that they may have over the subject agreement, to the arbitrator. I find that the subject of the arbitrator’s jurisdiction ought to be raised before the arbitral tribunal which is mandated to determine its own jurisdiction.

Costs on the admitted sum.

12. Turning to the prayer for costs and interests on the admitted portion of the claim, I find that there was an oversight on the part of the court, in failing to provide for costs and interests on the admitted part of the claim Section 27 of the Civil Procedure Act stipulates as follows: -

“27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

13. Having regard to the above cited cases and Section of the Civil Procedure Act, I find that the applicant has made out a case for the review of the impugned/ruling so as to provide for costs and interest. In this regard, I award the applicant the costs of this case and interest on the admitted sum of kshs 223,466,970.20 at court rates from the date of filing the suit till payment in full.

14. I also award the costs of this application to the applicant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

n the presence of

Mr. C. N. Kihara for plaintiff/applicant

Mr. Ondieki for defendant/respondent

Court Assistant: Sylvia