



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HCC. NO. 305 OF 2017

SMEC INTERNATIONAL PTY LTD.....PLAINTIFF

VS

MINISTRY OF WATER, ENVIRONMENT

AND NATURAL RESOURCES.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. This Ruling is in answer to the Notice of Motion dated 5th July 2018 for the following orders:-

1. *Spent.*
2. THAT this Honourable Court be pleased to review its Ruling and orders made on the 4th May, 2018.
3. THAT this Honourable Court be pleased to hear and determine the application by the Defendants/Applicants dated 29th March, 2018 seeking leave to amend their Statement of Defence.
4. THAT cost of the application be in the cause.

2. The Ruling sought to be reviewed was a short one following the Court attendance of 3rd May 2018 by Counsel for the Plaintiff in the absence of Counsel for the Defendants. It was a ruling in respect to a Notice of Motion dated 16th November 2017. In that Ruling I stated:-

“The Notice of motion dated 16th November 2017 is not opposed. In that Motion the Plaintiff has provided proof of the following:-

- (i) The contract of 31st May 2010 under which the Plaintiff was contracted to provide consultancy services by the 1st Defendant.*
- (ii) An invoice of 7th June 2012 raised after completion of the work.*
- (iii) Various requests for payment.*

All these has not been disputed and I have to find that the debt is due and there can be no defence to it. For that reason I allow the Notice of motion dated 16th November 2017 as prayed”.

3. At the hearing of the application dated 16th November 2017, Opiyo appearing for the Plaintiff informed this Court that the application was unopposed. One of the reasons sought for the Review is that in determining the matter the Court did not consider the Replying Affidavit of Kanini Nthiga filed on 29th March 2018.

4. The Plaintiff's answer to this is that the said Replying Affidavit was not in the Court record as at 4th May 2018 when the Court delivered its Ruling. It is said that the Replying Affidavit was in fact served on the Plaintiff's Counsel on 27th August 2018 way after the Ruling.

5. This Court has considered all material placed before it and the rival submissions filed herein.

6. While the Court did not see the Replying Affidavit on the day the application was argued and when it wrote its short Ruling, there is no allegation by the Plaintiff that the Replying Affidavit which has a Court stamp of 11th April, 2018 was not actually filed by the Defendant or was introduced into the record after the Ruling or otherwise lacks bonafides. What the Plaintiff says is that the Replying Affidavit had not been served on its Counsel nor was it on the Court record.

7. I think that in fairness and notwithstanding doubts that the Replying Affidavit was on record, this Court holds that because one of the reasons for allowing the application was that it was undefended, there is merit in the argument that the application of 16th November 2017 needs to be reconsidered on the basis of the Replying Affidavit. These are circumstances within the ambit for Review. See order 45 Rule 1 of the Civil Procedure Rule which provides:-

“(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”.

Striking out of a Defence is always a draconian order and this Court is willing to give the Defendants the benefit of doubt that they had indeed opposed the Application.

8. In leaning towards allowing the application I note that it was brought without undue delay being filed about 60 days after the Court's Ruling.

9. This Court reviews the Ruling of 4th May 2018 and hereby sets it aside. The application of 16th November 2017 shall be set down for hearing afresh.

Dated, Signed and Delivered in Court at Nairobi this 5th day of April, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Muma for Opiyo for Plaintiff

Nthiga for Defendants

Nixon – Court Assistant